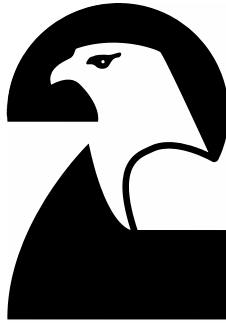


**CENTER FOR THE STUDY OF FIREARMS & PUBLIC POLICY**  
A PROJECT OF  
**SECOND AMENDMENT FOUNDATION**



**IN DEFENSE OF  
THE RIGHT TO  
KEEP AND BEAR ARMS**

The Center for the Study of Firearms and Public Policy was established in 1988 by the Second Amendment Foundation. Its primary purpose was to publish *The Journal on Firearms and Public Policy*. The goal of this project was to expand the audience who had access to legal, economic, historical and other scholarly research about the Second Amendment. This year's publication is the 25th *Journal on Firearms and Public Policy*.

Dr. Edward F. Leddy, who was one of the prime movers behind the *Journal* served as editor for the first four issues. In 1993, Julianne Versnel assumed the role of editor for one year before becoming its Publisher. David B. Kopel, J.D. became its editor in 1994. In 2011, Dr. Gary Mauser became the editor.

It has been the Second Amendment Foundation's privilege to distribute over 100,000 print copies of the *Journal on Firearms and Public Policy* as well as offer significant access to them electronically over the years. The authors who have so generously provided the *Journal on Firearms and Public Policy* with their work are listed with their articles in the following pages. All *Journals* are available on [www.saf.org](http://www.saf.org) as PDFs.

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# Journal on Firearms and Public Policy

## Volume 25

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.

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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](mailto:jhv@saf.org).

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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](http://www.saf.org) for more research materials.



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# OF ARMS, FREEDOM, AND CAPITALISM: WHAT PIERS MORGAN DOES NOT KNOW

Charles A. Breiterman<sup>1</sup>

“Producers who delegate security to others, to specialists of government and war, become politically and militarily emasculated.” - Ibn Khaldun (1332-1406)

Among the causal factors that have been recognized in the emergence of representative government and capitalism in England are: (1) the nobility successfully limited the power of the monarchy beginning with the Magna Carta in 1215, clause 14 of which required the monarch to call the “common counsel of the kingdom” before assessing certain taxes; (2) the rise of the bourgeoisie<sup>2</sup>; (3) the rediscovery during the Renaissance of ancient Greek direct democracy and the Roman republic; (4) the development of the English common law, which protected private property and enforced contracts; (5) the Protestant ethic of accumulation; and, (6) the enclosure movement<sup>3</sup> forced peasants off the land so that there was a source of unemployed labor willing to work for wages, as well as provided landowners flexibility to use labor saving tools and machines, and to put the land to more lucrative uses. This is not a complete list.

To these factors should be added: A well-armed population of commoners.

Nearly all commoners in historical England were armed. A significant portion of them possessed the longbow, that era’s equivalent of a heavy automatic rifle. A trained archer with a longbow could loose 12 arrows a minute with a lethal range of over 200 yards.

Over the centuries, England’s well-armed commoners engaged several insurrections against the monarchy and aristocracy. The existence of an armed, determined general population acted as

a check against the rapacity of governing elites and led directly to the actualization of ideas such as “consent of the governed,” government for the common good, and equality of opportunity. The widespread bearing of arms even facilitated the development of capitalism because the government had to be cautious not to seize too much of peoples’ wealth for fear of starting a rebellion. The wealth that the people were allowed to keep was capital that people could use to form their own economic ventures, which led to a strong private sector. English settlers transmitted these ideas and institutions to the American colonies, where they further flourished amidst and armed and trained general population. Prohibiting the people or certain groups from being armed has always been used to keep them down. During slavery, blacks were not allowed to possess guns or weapons of any kind. A smart plantation owner would even keep farm tools locked up at night.

The culmination of the power of the armed English commoner was in the late 1640s. Thousands of wealthy commoners armed and outfitted themselves as heavy cavalry, and fought on the side of Parliament against the king in the English Civil War. Known as the “Ironsides,” they defeated the Royalist heavy cavalry, and so destroyed the notion that the aristocracy was superior to the common person. The victory of Parliament established the supremacy of representative government. The Ironsides were crucial in the making of the world we know- a world where a railsplitter could rise to be President of the United States.

This article began as a response to the debate on gun ownership between Piers Morgan and Alex Jones, which aired on January 7, 2013. This author was surprised to realize that Morgan, who is the product of the reputedly outstanding British educational system, and supposedly earns \$2 million per year, is ignorant the history of his own nation, and is a glib simpleton. Widespread arms ownership is part of what made England the birthplace of modern representative government and capitalism. For England to have all-but-banned firearms ownership, for Piers Morgan to advocate that policy for the United States, is to embark on a dangerous social experiment.

The history of England stands for the proposition that firearms laws should be the most permissive reasonably possible: Civilians

should be allowed to own guns, and gun ownership should be widespread.<sup>4</sup> This history is still highly relevant today.

## **MEDIEVAL ENGLAND: EVERYBODY WAS REQUIRED TO BEAR ARMS**

It was mandatory for every (male) person to bear arms according to their financial means. By the Assizes of Arms of 1181 and 1252, knights and sheriffs of every county, were to make a tour and convene “burghers, free tenants, villagers, and others of fifteen years of age to sixty years of age, and they should have them all swear to bear arms according to the amount of their lands and cattle. Also all those who are able to have bows and arrows outside the forest should have them.” By a statute of 1285, the above laws were affirmed and provision was made for constables to inspect whether people were following the law, to prosecute them if they were not, and present a list of those in default to parliament and the king each year.<sup>5</sup> The Archery Law of 1363 “forbade, on pain of death, all sport that took up time better spent on war training especially archery practice.”

By these statutes, every male in England between the ages of 15-60 was supposed to bear arms and train in their use. That alone would still would leave the knights and aristocrats with the power and ability to dominate society because they could afford the heaviest armor and weapons.

However, crucially, nearly every commoner in England was supposed to have “bows and arrows,” and that meant the longbow. The longbow, which the English almost certainly acquired from the Welsh, and may have improved, was a crucial English military asset from around 1150 A.D. to 1550 A.D.

Nearly every able male commoner was training regularly in the longbow. In contrast, the knights and nobility were training with the heaviest armor, horses, and swords they could get. The English elites did so according to custom and in competition with their counterparts in continental Europe.

A longbow arrow fired from 150 feet away could deliver 66 pounds of force concentrated in the tip of the arrowhead. For

comparison, a heavy axe or sword can deliver about 95 pounds of force, but across the entire axe head or sword blade that connects with the target. With all the force in that small tip of the arrow head, the arrow could pierce through chain mail and even through plate armor 1 millimeter or more thick.<sup>6</sup> Any knight in the 1100s, in the 1200s, and into the 1300s until thick plate armor was developed, could be killed by a single longbow shot unless the knight could block it with a thick shield.

The longbow was devastating at the Battles of Crecy (1346), Poitiers (1356), and Agincourt (1415). At Crecy, the French lost 11 lords, and thousands of knights to the longbow. At Poitiers, the French had some 6,000 killed, with their king, 2 of his sons, and 33 nobles captured.<sup>7</sup> English casualties in each engagement were about 300.

By the time of Agincourt, armor had advanced to the point that the French knights were impervious to the longbow arrows. However, their horses were not so heavily armored and the charging, mounted knights had their horses cut out from under them, and fell onto a muddy battlefield with 70 lbs. of armor.<sup>8</sup> If they were not injured in the fall, they were unwieldy and disoriented and were hacked to pieces by English soldiers not so encumbered. French casualties were as many as 6,000. English casualties were in the hundreds.

English armies generally relied upon many thousands of archers. At Agincourt for example, the English army consisted of 5,000 commoner archers, and 2,000 knights and men-at-arms. Estimates for the size of the French armies range from 30,000 to 60,000; such numbers approaching over open fields provided abundant targets for the longbow.

The French casualties were detailed so that the reader can grasp the caution, if not fear, with which English elites must have viewed the English commoners, who were so frequently armed and trained in the use of the longbow.

Why did the English system rely on armed commoners rather than a standing, professional army as did ancient Rome? On balance, it benefitted the governing elites. There were not enough nobles and knights to supply sufficient numbers of archers. Armed commoners could repel an invasion or be used for offensive purposes such as

in France. It was less expensive than a standing army. But it was a “a dual-headed arrow”, because the crown had to contend with another armed power base in society, one that could be very difficult to control.

Ultimately, the English system may have its origin in the Anglo-Saxon general fyrd, or general levy. The general fyrd appears in the Laws of King Ine of Wessex (circa 694 A.D.). All ceorls (free commoners) between the ages of 15 and 60 were required to take part in military service when summoned. The Anglo-Saxon system evolved over time and was retained by the Normans, at least to some extent. The Domesday Book (1089) entry for the County of Berkshire reveals the existence of the ‘select’ fyrd. Under the select fyrd, every fifth household had to supply a soldier to the king, and the other four households had to contribute wages and supplies to that soldier.<sup>9</sup> Once the English realized the potential of the longbow, the monarchy may have realized that in order to get the thousands of archers it needed, it would return to a general fyrd system.

**300 YEARS OF ARMED INSURRECTIONS  
BY COMMONERS WERE CRUCIAL TO THE  
DEVELOPMENT OF “CONSENT OF THE  
GOVERNED”, GOVERNMENT FOR THE COMMON  
GOOD, EQUALITY OF OPPORTUNITY, AND  
FACILITATED THE DEVELOPMENT OF CAPITALISM**

The widespread possession of and training in the longbow by the commoners of England posed an ever-present check upon the elites of England, who were overwhelmingly mounted knights. The English monarchy and nobility had to know that if they pushed the commoners too far, they could be faced with a rebellion that they simply could not handle. This is a major reason why the concept of “the consent of the governed” took solid hold in England. If you were an English commoner who could bring down the highest noble with one longbow shot, would you really believe that such people were ‘superior’ to you? The ground was fertile for notions of equality to sink deep roots.

In 1381 there was the Peasants’ Revolt, also known as Wat Tyler’s Rebellion. This was a tax revolt, just like the American Revolution.

The rebels destroyed the palace of the king's uncle, John of Gaunt, and seized the Tower of London. The Lord Chancellor, the Lord Treasurer, and the Grand Prior of the Knights Hospitallers were captured and executed by the rebels.

The Peasant's Revolt made the following 2 demands, among others: "That there should be equality among all people save only the King." and that there should be "no serfdom or villeinage, but that all men should be free and of one condition."<sup>10</sup> It was during this revolt that a sympathetic priest asked in a sermon, "When Adam delved and Eve span, who was then the gentleman?"

Dr. Andrew Wood of the University of East Anglia writes that there were a number of revolts after 1381 that sought to remind rulers of their duties or espoused alternative visions of the distribution of power in society.<sup>11</sup> In 1400, a 2 Earls, and 40 retainers were attacked by the citizens of Cirencester.

A chronicler wrote that .. Seeing 'that every way out was blocked with beams and other great pieces of wood', the earls and their retainers attempted to break out, attacking the townspeople 'with lances and arrows'. The locals forced them back and 'began to shoot arrows at the lodging – some through the windows, some at the doors and gates – with the result that no place was safe for them, and not only were they unable to get out, they were not even able to look out'. This fight lasted from the middle of the night until three o'clock the next day, when the earls eventually gave up, handed themselves over to the townspeople, begging not to be put to death before they had had an opportunity to speak to the king.<sup>12</sup>

But there was an escape attempt resulting in the earls being executed under the leadership of prominent locals.<sup>13</sup>

Contrast this situation of feudal England to that in feudal Japan. If 2 samurai lords marched with 40 retainers into a town, the commoners would likely have prostrated themselves in submission. Because under the Japanese feudal system, only the samurai class could carry swords and be trained in their use. The Japanese sword – arguably the best sword in the world- was the best weapon that



country had. This monopoly on force by the samurai class was designed to keep the elites in power, and it resulted in the subjugation of the rest of society. It was a dictatorship of the aristocracy, and, not surprisingly, it led to dictatorial forms of government in the 20th century. Could it be that Japanese elites functioned best in the politics of force, and that is the way they dealt with the rest of world? By contrast, in England, there was a balance of forces between the classes. Elites had to use persuasion, employ soft power, and make accommodations to the other strata of society.

Again in England, Jack Cade's rebellion occurred in the year 1450. It originated in Kent. It seems to have started with a rumor that the king intended to punish Kent for the death of the Duke of Suffolk, for which the Kentish insisted they were blameless. The local gentry led an army of commoners. "All were as high as pig's feat," reads the Chronicle of Gregory, a diary of current events written by a 15th century citizen of London.<sup>14</sup>

Jack Cade apparently was in command; it is unclear exactly who he was. The rebels killed the High Sheriff of Kent (like killing a police commissioner today). At the Battle of Sevenoaks, the advance force of the royal army was destroyed by the rearguard of the Kentish army. The King then retreated with the remainder of the royal army, leaving the road to London open. The army of commoners then marched on London and held sway there for 6 days. During that time they killed the Lord Chancellor (who was also the Archbishop of Canterbury) and the Lord High Treasurer (who was also a Baron). These two were the second and third highest advisors to the king (like killing the Secretary of State and the Secretary of the Treasury). They were beheaded, and their heads placed upon London Bridge.<sup>15</sup>

## FOR THE COMYN WELE OF ENGLAND

The Chronicle of Gregory remarked of Jack Cade's rebellion that "in that furiousness they went, as they said, for the comyn wele of the realm of England."

That the rebellion claimed to act for the "comyn wele" of England is important. Scholar David Rollison writes of the struggle of an ideology of government by and for elites against an ideology of "commonweal", which after 1520 became "commonwealth,"

meaning a culture and government that “connected and encompassed all the communities and inhabitants of England.” In other words, government for all persons.<sup>16</sup> This is something remarkable in history. Ancient Athens had a democracy, but really the citizens some 30,000 adult males out of a population of 250,000. Decisions were made in the interests of a relatively narrow band.

### **ANY LONGBOW MASSACRES OF CIVILIANS?**

The longbow was an automatic weapon in its day. A trained, competent archer could loose up to 12 shots a minute, and the bow had an effective range against unprotected flesh of over 200 yards. A crazed archer who climbed a tower near the local market on a Sunday and started firing at the population could easily have killed 12 people. The bow would be almost silent in the noise of a crowded market: a few victims could have gone down before anybody sounded the alarm.

But is there any record of a longbow massacre? Could it be that anyone who considered doing this knew that there would certainly be a significant number of archers that would quickly begin firing arrows right back at him? Or is the real difference that Medieval England handled mental illness better than we in the United States today? Alternatively, a Ph.D. anthropologist at the American Museum of Natural History in New York informed me that in his extensive travels among primitive tribes, one of which is the Huaorani in Ecuador, he has never encountered a case of mental illness. We should look at the causes of mental illness in this society, and how we handle mental illness, before we forbid reasonable, temperate law-abiding people from possessing weapons.

### **CONSENT OF THE GOVERNED AND THE RISE OF CAPITALISM**

Around 1471, Sir John Fortescue (1394-1476) wrote that England was the supreme example of a limited monarchy, while France had the supreme example of an absolute monarchy.<sup>17</sup> The key difference lay in the way taxes were levied. In France, the king

could tax the people at will. In England, the king could only tax with the agreement of Parliament. Parliament first met in 1236 and the House of Commons first deliberated separately from the King and Nobles in 1341. The King could not just levy taxes—he had to request that Parliament agree to levy taxes.

If the people you are taxing are well-armed, many with longbows, you better secure their consent before taxing them. When there are real consequences for tyranny, the concept of “consent of the governed” germinates in fertile soil and can develop into an institution with deep roots.

Fortescue strongly disapproved of the French system in which the king could tax the people at will: it made the king rich, but kept the people poor. The common people retaining their money was essential to the emergence of capitalism—which happened in Great Britain (England, Wales, and Scotland) first—because people need to accumulate capital in order to invest it. You can’t do that if the king is taxing away all your money to fund wars and extravagances.

Rollison writes in A Commonwealth of the People that there was a centuries long social revolution in England beginning with The Peasant’s Rebellion of 1381 in which the concepts of equality, freedom, and government by consent were proclaimed, sustained, and finally triumphant.

“In a succession of crises from the fourteenth to the seventeenth centuries, commonwealth ideology formed in opposition to existing government. At such times, the state and senior ruling classes were forced, if only momentarily, not only to acknowledge but negotiate and even bow to a higher authority: commonweal. ... At its most dramatic, in a series of large-scale regional rebellions from 1381-1649, commonweal’s army rose in the form of a popular army with the capacity, momentarily, to defeat any band of knights the state could put into the field against it.”<sup>18</sup>

1649 brings us to the English Civil War and Oliver Cromwell

## **OLIVER CROMWELL—A MAN WHO MADE THE MODERN WORLD**

In 2008, an article in Bloomberg/BusinessWeek characterized Oliver Cromwell as being “in the dust of English history.” I wrote in to the editor that this simply is not so.

We have seen that in English history, the existence of trained and armed commoners, especially those wielding the longbow, meant that insurrections could pose a serious, if temporary threat to the English government. But these rebellions did not coalesce into a broad, nation-wide movement. As a result, the monarch and nobles could gather their knights and enough loyal commoners with longbows to suppress an insurrection.

The armorer eventually won the battle with the longbow: by the 1400s quality armor had advanced to the point where no arrow could penetrate. Commoners continued to use the longbow, and they could force knights to dismount from their horses and could slow and bruise them with arrows delivering 66 pounds of force knocking on the armor, but the knight was the tank of the battlefield.

Firearms were the innovation that allowed a projectile to pierce armor and kill a knight. And so the armored knight became obsolete. Musketeers were much easier to train, while the longbow required constant practice from childhood. Muskets did not fire nearly as many rounds per minute as the longbow could loose, but huge numbers of musketeers were relatively easy to obtain so the slower rate of fire of huge numbers matched the rapid fire of fewer longbowmen. So musketeers supplanted the longbowmen. Musketeers were almost always commoners.

Replacing the armored knight was heavy cavalry. Full body armor that could stop a bullet was beyond the technology of the time. But heavy cavalry did wear a thick breastplate that could sometimes stop a bullet. In the early 1600s, heavy cavalry was still the domain of knights and nobles, just as the mounted, armored knight had been previously. It was very expensive to get the equipment and training needed to field heavy cavalry. You were best off with a 1500 pound horse, and it had to be fast. The horse had to be fed, housed and trained. You needed years of training to control the horse. You needed several pistols (that gave you one shot each), a sword, a

helmet, light armor on strategic areas of the body such as the shins, and finally the heavy, armored breastplate.

Heavy cavalry was useful for raids that could seize an objective before the opposing side reached it by foot. It was also useful for quickly riding around to the side of an opposing army (known as outflanking it), and charging into that unprotected side, which could result in the army being rolled up from that side and routed.

Oliver Cromwell was a commoner born into the gentry, yet who as an adult at one time owned no land and was leasing a farm. During that period, his status may simply been “freeman”. But he came from a prominent gentry family with several knightoods, members of Parliament, and a Lord Mayor of London within two generations in the lineage. Oliver Cromwell, was however, beset by monetary difficulties until an inheritance in 1636 returned him firmly to the gentry class. He then had enough money to buy his own heavy horse and weapons. As a member of the gentry in his youth, he must have already been trained in their use.

The English Civil War started in 1642. Parliament was fighting against the Monarchy of Charles II, who asserted absolute powers. Cromwell raised a troop of 60 cavalry riders at his own expense.<sup>19</sup> In the early battles, the Royalist cavalry bested the Parliamentary cavalry. Cromwell wrote to his cousin, John Hampden, a wealthy commoner and member of Parliament, describing the cavalry troopers of each side frankly:

Your troopers are most of them old decayed servingmen and tapsters; and their [the Royalist] troopers are gentlemens’ sons, younger sons and persons of quality; do you think that the spirits of such base and mean fellows [the Parliamentary troopers] will ever be able to encounter gentlemen that have honour and courage and resolution in them?<sup>20</sup>

In other words, the Royalist cavalry was composed of: (1) knights, (2) nobility, (3) the younger sons of nobility who would not inherit the title due to primogeniture, and so were looking to distinguish themselves in battle and thereby earn their own title, and (4) wealthy commoners who sought to distinguish themselves in service of the king and thereby earn a knightood or noble title.

To meet this challenge, Cromwell recruited, trained, and led a cavalry force known as the Ironsides. This was a double regiment consisting of 14 troops of approximately 60 horse to each troop (~ 840 total). The Ironsides were almost exclusively commoners, mainly recruited from the gentry, and many were Puritans. Aside from Cromwell's original troop, the rest of the Ironsides supplied their own arms and war horse. "This regiment was universally regarded as the best regiment, man for man, in either the Royalist or Parliamentary Army."<sup>21</sup>

The Ironsides consistently bested the Royalist cavalry. They were decisive in battle after battle- first driving off the Royalist cavalry, and then charging and routing the Royalist foot soldiers. The nickname "Ironsides" was bestowed upon them by Prince Rupert.

A man of comparatively low station, leading a cavalry force of similar men, proved to have the "honour and courage and resolution in them" to exceed the ruling class in martial affairs.

None of the accomplishments of Cromwell and the Ironsides have been possible, but for the widespread bearing of and training with arms by the commoners. These were considered heavy weapons- heavy cavalry was the tank of its time.

The Ironsides became the model for the entire Parliamentary army. Cromwell became a Lieutenant General and second-in-command of the army by 1647. He eventually became commander-in-chief of the army, and then competently led England for 5 years (1653-1658) as Lord Protector of the Commonwealth of England, Scotland, and Ireland.

Cromwell's military victories and ability to govern the country showed that the aristocracy was no better than the commoners.<sup>22</sup> Oliver Cromwell and the Ironsides therefore were pivotal in making our modern world characterized by equality of opportunity and respect for all persons regardless of their social origin. This laid the groundwork for a nation in which a railsplitter could become President.

As David Rollison explains it, in the 1640s similar ideas as were seen in the Peasant's Revolt of 1381 were asserted, "but the rebels did not melt away. They defeated and executed Charles I in terms which rebels against unjust kings and lords had been using since Magna Carta (1215): in the name of commonweal or (a common

usage after 1540) commonwealth. In 1649, commonwealth replaced kingdom, and became what it had been fighting for centuries, the state.”

After the execution of Charles I by Parliament, England was declared to be a commonwealth. As Rollison has explained, the meaning of “commonwealth” was a realm which connected and encompassed all the communities and inhabitants of England.

The establishment of Parliamentary government was not complete until 1689. The knowledgeable reader will recognize that this brief summary has left out much about the English Civil Wars of 1642-1649 and subsequent history. The intent was to hit the relevant points while not telling falsehoods by omission.<sup>23</sup>

Specifically, the Levellers were a faction of the New Model Army and the citizenry of southern England. Leveller colonels and soldiers asked for universal male suffrage at the Putney Debates in the year 1647. Elements of the New Model Army nearly mutinied on the basis of Leveller ideology several times in 1647-49. This was not properly part of the story of commoners bearing arms resulting in politico-economic change. It was an army becoming radicalized by citizen agitators because they had not been paid for a year. Unpaid armies get radicalized and even stage coups, but it is not properly part of the story of freedom due to the right of the citizens to bear arms.

## **CORE CONCLUSION**

The widespread bearing of arms was essential to the emergence and institutionalization of ‘consent of the governed’, government for the common good, and equality of opportunity in England. It facilitated the development of capitalism. These concepts and institutions were transported to the American colonies by English settlers and laid the groundwork for the republican form of government and capitalism in the colonies. It is beyond the scope of this essay at this time to continue the story in the United States.

## RELEVANCE TO THE PRESENT DAY AND THE UNITED STATES

The stock counterargument to this article is: “That was England 400 years ago. The notion of well-armed commoners, which translates to widespread gun ownership in the current day, is irrelevant to combat government tyranny in the face of Predator drones, M-1 battle tanks, and F-35 stealth fighters.”

I answer that gun ownership is still relevant to combat dictatorship. In Syria, a revolt of people that would have been called “commoners” in medieval England has proven to have staying power against a brutal, well-equipped government. The rebels were armed at first only with pistols and automatic weapons before they were able to secure outside aid. It does appear to be true that Islamic fundamentalists play a significant role in the Syrian rebellion. What do you expect? These people have had to face Mi-24 helicopter gunships with AK-47s. You almost have to be insane to do that. However, the rebellion started with peaceful marches and calls for political reform. The government of Bashar Assad had in 2000-2002 indicated it might be open to such reform. It was the murderous response of the Syrian regime that led to the armed rebellion. For example, a singer/songwriter named Ibrahim Qashoush had written several songs that were sung at Anti-Assad rallies. In July of 2011, his body was found in a river with its throat cut out and vocal chords removed. Everybody knew it was done by the regime or its paramilitaries. That was one of many such incidents.

In Libya, the population had access to small arms. In Benghazi in particular, the population was so strongly against the Gaddafi regime that they were able to seize the main government bastions. It is true that the Gaddafi regime had dispatched an armored column to crush this revolt, and it was only the intervention of Western airpower that saved the rebels in Benghazi.

The point is that small arms can be enough to get an armed struggle started in today’s world, although outside assistance is soon needed to maintain it. The American colonials would have been unable to win the Revolutionary War without significant assistance from France.<sup>24</sup>



Another argument against widespread gun ownership is, “We live in a Republic. It is not necessary for the citizens to own guns in our political system.” The response is that we do not know what this country will be like in 50 years. If the reader thinks that a dictatorship cannot happen here, the reader is unwise. Hitler was lawfully elected to the office of Chancellor in a constitutional republic. He then turned the mechanism of government to the creation of the Nazi regime. The same nation that produced Goethe, Kant, Hegel, Beethoven, Heidegger, Max Weber, Hannah Arendt, Max Planck and many other luminaries also became the Third Reich. Widespread gun ownership in the United States would be essential to resisting a future tyranny.

The type of tyranny that might emerge in the United States could be characterized by corporate control of the government and media, a national security state that continuously expands its powers and replaces old enemies with new ones (terrorism replaced communism), all in a polygamous marriage with an executive branch that steadily aggrandizes its powers beyond Constitutional limits. The outlines of this potential tyranny are now becoming clear. A separate article could envisage how such a tyranny would function.

## **CHOOSE CIVIL DISOBEDIENCE**

In the United States today, any sort of armed resistance to government brutality is met with overwhelming force by “the authorities.” Even with 300 million guns owned by civilians, the most potent weapons at the disposal of the populace are the video camera, the internet, and public opinion.

Rodney King was beaten in 1993, but there was a video. Mass arrests of protesters were perpetrated during the 2004 Republican National Convention in New York. The police claimed resisting arrest. But the defendants had video of the protesters being arrested peacefully. The charges were immediately dropped once the video was shown, and the episode diminished the reputation of the NYPD.

During Occupy Wall Street, there was police violence against the participants. Some of the incidents were captured on video. One instance was Deputy Inspector Anthony Bologna of the NYPD

maliciously and gratuitously pepper spraying female non-violent protesters. That incident “helped galvanize worldwide support for the movement, which until then had attracted minimal media attention.”<sup>25</sup>

Video and its dissemination over the web have the effect of turning government violence into some of the best publicity dissidents can get, resulting in the broadcast to the world of the ideas the dissenters are trying to communicate. Additionally, civil lawsuits against the perpetrators can compensate the victims of violence. In the current situation, the wiser choice is not to use force back if the U.S. government employs force against you.

Civil Disobedience works against governments that claim to be civilized and subject to the rule of law. Gandhi employed civil disobedience against the British. Britain claimed to be the leading civilized nation in the world. Gandhi forced them to live up to it. Martin Luther King employed civil disobedience in the United States.

In other scenarios, guns are essential. Brutal regimes such as Gadaffi’s Libya, Assad’s Syria or Germany’s Nazis will simply kill those who resist. Meeting a gun-toting madman with non-violence is not going to work.

Having said all of the above, I am pessimistic about the prospects for effecting change in the United States. Occupy Wall Street appears to have achieved nothing. Journalist Chris Hedges recently told a forum at MIT, “We have political paralysis in this country. We have a system that is incapable of responding to the legitimate grievances and injustices that are being visited upon tens of millions of Americans.”<sup>26</sup>

Effecting change may require extensive, long-term civil disobedience. Very few people have the necessary time or reserves of money. But it is essential to use non-violent means as early as possible. Once a tyrannical system becomes entrenched, it becomes all the more difficult to dislodge. It is easier to stop a stream than a river.

The rebellions in Libya and Syria demonstrate that widespread gun ownership continues to be essential to resisting tyranny. As the United States debates gun control, whatever solutions we adopt should be as protective as possible of the right to bear arms. None of this rules out enacting reasonable measures to prevent mass

shootings by underage and/or insane persons such as Columbine, Aurora, Virginia Tech, and Newtown. But if we go too far in restricting gun ownership, we could strip our descendants of the ability to resist tyranny in a future in which it would be unwise to predict that “it can’t happen here.”

## ENDNOTES

1. J.D. Boston University, Attorney, NY State; all-but-dissertation University Maryland, Department of Government and Politics.
2. Feudalism was not as rigid in England as on the continent so that a wealthy stratum of commoners could develop. For example, Ann Boleyn was descended from wealthy linen merchants who, as commoners, had purchased Hever Castle by 1462, presumably from the aristocracy.
3. The Statute of Merton of 1235 indicates that landowners were already converting arable land over to sheep grazing, dispersing the peasantry in the process. See: Simon Fairlie, *A Short History of Enclosure in Britain, The Land (Magazine)*, Issue 7, Summer 2009.
4. After completing this article, the author discovered a peer-reviewed journal article that has a different emphasis but is highly accurate: *The History of the Second Amendment*, 28 VAL. U.L.R. 1007 (1994).
5. *Medieval Warfare* by Hans Delbruck, Bison Books, 1990. Pages 174 and 177.
6. Paul Bourke and David Whettham, *A Report on the Findings of the Defence Academy Warbow Trials Part 1 Summer 2005, Arms & Armour*, Vol. 4, No. 1, 2007. The Kinetic Energy the longbow arrow delivered to the target is a product of the small mass and high velocity of the arrow ( $1/2 mv^2$ ). It is measured in joules and can be converted to foot pounds.
7. Figures for the numbers of the French armies in these battles are as high as 60,000. 30,000 seems more reasonable given the size of the population at the time, and the size of the English armies opposing them. So for Poitiers, where the estimates are that 20% of the French army was killed, that would mean 6,000.
8. *Battlefield Detectives, Agincourt's Dark Secrets*, 2003 on Britain's Channel 5, a Granada Production in association with The Discovery Channel.
9. *The Anglo-Saxon Thegn A.D. 449-1066*, Mark Harrison, Oxford, Osprey Publishing, 1993 at 6-10.

10. <http://historical-academy.co.uk/blog/2011/10/14/“how-far-was-the-rising-of-1381-revolutionary-in-character-how-far-reactionary”/>
11. *Riot, Rebellion and Popular Politics in Early Modern England*, by Andrew Wood, Palgrave Macmillan, 2001.
12. Rollison, *A Commonwealth of the People* (pp. 254-255). Cambridge University Press.
13. If the situation of the nobles and retainers trapped at Circencester unable even to look out of the windows sounds like a scene out of a Western movie set in the late 1800s USA, the similarity between the longbow and the six-shooter shoot not be overlooked. If anything, the long bow was a more powerful and versatile weapon in its time.
14. The text of the Chronicle is available at: <http://www.british-history.ac.uk/source.aspx?pubid=326>
15. Due to time and space constraints, I am omitting a discussion of Kett's Rebellion, which took place in 1549 and involved 14,000 rebels seizing the city of Norwich and destroying a 1,500 man royal force, but then being defeated by a large royal army.
16. Rollison, pp. 275-278; [www.britainexpress.com/History/medieval/cade.htm](http://www.britainexpress.com/History/medieval/cade.htm)
17. *The Governance of England*, also known as “the difference between an Absolute and a Limited monarchy.” Written circa 1471 after the Battle of Tewkesbury.
18. David Rollison, *A Commonwealth of the People: Popular Politics and England's Long Social Revolution: 1066-1649*, Cambridge University Press, 2009.
19. William Godwin, *History of the Commonwealth of England*, University of Michigan (2009) at pp. 22, 109-110.
20. Roger Raymond Sellman, *Civil War and Commonwealth*, Methuen & Co. (1973), at page 29.
21. Stephen C. Manganiello, *The Concise Encyclopedia of the Revolutions and Wars of England, Scotland, and Ireland, 1639-1660*, Scarecrow Press (2004), at page 81.
22. The side of Parliament in the English Civil War was not taken only by the gentry and commoners. Many nobles sided with Parliament, including the Earl of Essex, the Earl of Manchester, Lord Fairfax of Scotland, the Earl of Warwick, and the Earl of Denbigh to name some. Indeed it was the participation of nobles on the side of Parliament that probably explains why the House of Lords retained its power, and the nobility continued to

enjoy most of their privileges after Parliament was victorious in the Civil War. Many lords probably believed that King Charles I's assertions of absolute monarchy were in violation of an understanding of the powers of the King that dated back to the Magna Carta of 1215. However, none of the nobles proved as able a military commander as Cromwell. All land commanders were eventually sidelined in favor of Cromwell. Nor was Cromwell an exception, as there were many highly able commoner generals and politicians, such as Hampden, if one reads through the history.

23. Professor Mark Kishlansky of Harvard University has posted on the web a "Harvard@home" series of video lectures from his actual Harvard course about Cromwell.

24. However, France would not have intervened in the war unless at Saratoga 12,000 militia had come out to help the 5,000 Continental army regulars who would otherwise have been outmatched by the 7,000 British troops under Bourgoyne. Nickerson, Hoffman (1967). *The Turning Point of the Revolution*. Port Washington, NY: Kennikat, at page 437. It was the victory at Saratoga that convinced France to enter the war. The Battle of Bennington set the stage strategically for Saratoga. Bennington was fought entirely by militia on the American side.

25. Christina Boyle, Deputy Inspector Anthony Bologna's Decision to Pepper Spray Occupy Wall Street protesters, NY Daily News, September 9, 2012.

26. MIT Forum, The Occupy Movement and Economic Inequality, December 6, 2012. Available on C-Span 3.

# **THE U.N. ARMS TRADE TREATY: A PROCESS, NOT AN EVENT**

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With the adoption by the U.N. General Assembly of the Arms Trade Treaty (ATT) on April 2, 2013, and its opening for national signature on June 3, 2013, the ATT came into being. It will not take long for the treaty to secure the fifty national ratifications that it needs to come into force. But the single most important fact about the ATT is that it is a process, not an event. Thus, while the ATT's entry into force will be a significant milestone, it merely marks the shift from one part of the campaign that led to the creation of the treaty to another. In order to understand the ATT today, and the risks that it is likely to pose in the coming years, the history of the negotiation of the ATT is even more relevant than the text of the actual treaty, because that history shaped the text and will shape the campaign to interpret and implement it in the decades to come.

## **THE CONTEXT OF THE “NEW DIPLOMACY”**

The ATT is ultimately part of a much broader phenomenon: the rise of a new kind of diplomacy, and treaty-making. This diplomacy is now well over a decade old. It was central to the adoption of the Ottawa Convention on anti-personnel land-mines in 1997, and the Convention on Cluster Munitions in 2008, as well as the creation of the International Criminal Court (ICC) in 1998.

This diplomacy is characterized by several factors. First, it is pressed by organized campaigns driven by Western non-governmental organizations (NGOs). These campaigns make sophisticated use of the emotive display of suffering individuals and of the demonization of carefully-chosen villains (Israel, in the case of cluster munitions),

as well as statements by famous individuals (Princess Diana, in the case of land mines), demonstrations, and social media. Second, they are aided by a regularly changing but reasonably stable set of governments centered in Western Europe. Third, these groups are profoundly skeptical about state sovereignty and state-centered diplomacy, the United Nations, the traditional laws of war, and international law as embodying the customary and well-established practice of nations, preferring in all areas to emphasize the supposed standing of a transnational network of NGOs to speak on behalf of the people to a supranational elite who are responsible for making and administering the rules that will govern the world.<sup>1</sup> In all these respects, it takes a number of lessons from the governing practices of the European Union, which explains in part why these campaigns tend to be led from Europe.

The ideology behind this vision coalesced in the 1990s. After the end of the Cold War and before 9/11, there was a widespread if profoundly mistaken view that arms control—and indeed diplomacy, security, and the entire international state system—needed to be and could be transformed. This mindset produced the concept of “human security”; institutions such as the ICC that are based on the rejection of state sovereignty; and the belief that arms control is fundamentally about fulfilling human rights.<sup>2</sup> Many states were basically uninterested in these beliefs, but in each case a few were willing to go along, in part so they could claim the credit of being out in front on the advance into this brave new world.

In the 1990s, more and more institutions and treaties were created on a narrow base of states. The Kyoto Protocol (1997) required 55 ratifications. The Ottawa Convention (1997) entered into force after only 40 ratifications, only one-fifth of the world’s states. The Rome Statute (1998) that created the ICC required 60 ratifications. Each time, advocates claimed that the new institution or treaty constituted a step forward for the world, a new source of moral suasion, and a new source of customary international law that would ultimately bind even non-signatories—a profoundly political argument that is based on their contempt for sovereign, democratic states. That contempt often extends to the United Nations, in large part because it is based on state sovereignty and often on a requirement for consensus, which explains why the Ottawa and the Cluster Munitions conventions were adopted outside the U.N. system. It also extends

to the United States, which was either skeptical about, or directly opposed to, all of these new institutions and treaties.

The reality is that when these treaties and institutions came into being, they represented only a minority of the world. While many states signed later, many fewer altered their behavior or believed that the treaties they were signing would ever apply to them. These creations illustrate the decay, not the growth, of international institutions because the new institutions are not created by serious, verifiable, treaty commitments among responsible democratic nation-states. This decay derives ultimately from the transnationalist attack on sovereignty, the refusal of transnational activists to accept that signing a treaty is not the same as solving a problem, and their desire to use the treaty process to circumvent domestic political processes to achieve their political objectives. When David Davenport wrote a groundbreaking article on “The New Diplomacy” in 2002, he noted that the “Ottawa Process” which drove the creation of that convention, “took on more of the character of a marketing campaign than of a traditional treaty negotiation.”<sup>3</sup> It is easy, in considering these treaties, to place too much emphasis on their texts, and too little on the campaigning vision behind them. But it is that vision which inspired and animates them, that vision which will shape their implementation and interpretation, and that vision which will drive their expansion when they fail to solve the problems at which they are nominally directed.

## **THE ORIGINS OF THE ARMS TRADE TREATY**

The ATT is part of this history, though it has distinguishing features of its own. In the widest sense, the ATT began with the belief that, as the Cold War came to an end, it was time for arms control to turn from placing limits on weapons of mass destruction to a focus on controlling small arms and light weapons. Simultaneously, a series of wars and crises – from the first Gulf War, to the Balkans conflicts, to the 1994 Rwanda genocide and the disintegration of the Democratic Republic of the Congo (DRC) – helped to build the perception that something had to be done. After several years of academic conferences and campaigns by NGOs, U.N. Secretary-



General Boutros Boutros-Ghali brought the movement to the U.N. in 1995 when he encouraged states to focus on “the weapons that are actually killing people in the hundreds of thousands.”<sup>4</sup> Kofi Annan, the next U.N. Secretary-General, reinforced the campaign in 2000 by calling for a worldwide effort to prevent war by reducing the “illicit transfers of weapons, money, or natural resources” that he argued help to fuel conflicts.<sup>5</sup>

The campaign received its biggest boost when a group of Nobel Peace Laureates, led by former Costa Rican President Oscar Arias, began to campaign in 1996 for a global agreement to control arms transfers. This group was brought together and their aspirations were shaped by the NGOs, led by Amnesty International, which formed a group that grew steadily and was formalized into the Control Arms campaign – founded by Amnesty, Oxfam, and the International Action Network on Small Arms (IANSA) – in 2003. As early as 2001, the NGOs were circulating a draft treaty, which – like the final ATT – sought to embody international humanitarian and international human rights law into a relatively short text. As Amnesty proudly notes, the activists “engaged in innovative public stunts aimed at pressing governments to introduce the draft treaty at the UN. The public events included a camel caravan across the Sahel in Mali, elephants in India, and a Control Arms-branded longboat which won the annual boat festival in Cambodia’s capital Phnom Penh.”<sup>6</sup>

This campaign drew virtually no attention from any non-governmental opposition, and indeed garnered little coverage in the press. But it demonstrated a formidable level of sophistication and commitment. Particularly impressive was the focus of the campaign on the slogan – repeated with tiresome regularity – that the world regulates bananas more tightly than it does the trade in conventional arms.<sup>7</sup> The fact that many nations were evidently uninterested in, or incapable of, regulating that trade might have suggested that a treaty would not achieve much, but as a device for implying the necessity of action, the slogan worked brilliantly, and the reference to bananas lent itself to innumerable public relations stunts. As a matter of fact, though, the world of conventional diplomacy was hardly inactive. In 1997, President Bill Clinton signed the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms,

Ammunition, Explosives, and Other Relations Materials, commonly known by its Spanish-language acronym, CIFTA. This Convention was negotiated under the auspices of the Organization of American States, and applies only to OAS members. The U.S. Senate has not ratified the Convention, which, because it is broadly drafted, poses serious prudential risks to liberties protected by the First and Second Amendments.<sup>8</sup>

On the global level, action – some well-advised, some less so – was also under way. In 1996, the “Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies,” named for a suburb of The Hague, came into operation. The Arrangement was a successor to the West’s controls on defense and dual-use trade with the nations behind the Iron Curtain during the Cold War. As of mid-2013, it is composed of 41 nations. It operates by consensus – i.e. by agreement of all participants – and in confidence, and is essentially a process of discussion of export control systems and proposed arms transfers between trusted nations that continue to operate their own systems.<sup>9</sup> In addition to Wassenaar, other specialized non-proliferation regimes, including the Missile Technology Control Regime (1987) and the Australia Group on chemical and biological weapons (1985), as well as the U.S.-led Proliferation Security Initiative (2003) have come into existence over the past several decades. For its part, the U.N. General Assembly agreed on guidelines for international arms transfers in 1996 – though these guidelines are, of course, not binding – and in the wake of 9/11, the U.N. Security Council unanimously passed Resolution 1373, which requires all U.N. members to take wide-ranging actions against terrorism, including “eliminating the supply of weapons to terrorists.”<sup>10</sup> The Security Council has also adopted a series of arms embargoes around the world, from Sierra Leone to the DRC.

Finally, and specifically focused on small arms and light weapons, the U.N. Programme of Action to Prevent, Combat, and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects” (PoA) was launched in 2001, after a U.N. General Assembly resolution of 1996 led to the creation of a Group of Governmental Experts. The Administration of President George W. Bush viewed the PoA with considerable skepticism, but allowed

it just enough daylight to survive. The PoA is now fully intertwined with a series of other – nominally unrelated – initiatives, including the U.N. Firearms Protocol (2005, negotiated as part of the U.N. Convention Against Transnational Organized Crime), the U.N. International Tracing Instrument (2005), and the International Small Arms Control Standards (ISACS), a so-called “set of internationally accepted and validated standards” under development by the U.N. Coordinating Action on Small Arms (CASA) mechanism.<sup>11</sup>

It is therefore far from correct to assert that the so-called international community was inactive in the face of the small arms and light weapons issue. But none of these initiatives satisfied the activists. The Wassenaar Arrangement had too few members to be attractive, and was in any case not legally binding. The PoA was also not a treaty process, and though its supporters continue to want to try to make it into one, the evidence that the PoA has so far been ineffective is so overwhelming that even its backers can muster only tepid support for it. The activists entertain great hopes for ISACS, which has so far operated in the background, but that project is still in embryo. Finally, and most brazenly, the ATT’s supporters openly recognize that most U.N. Security Council arm embargoes have failed – and from this, they draw the conclusion that a treaty is necessary and will work. Bearing in mind that the Security Council could choose to enforce its embargoes under Chapter Seven of the U.N. Charter – in plain words, with force – while the ATT will be enforced only nationally, and is thus a weaker instrument, this argument has a lack of coherence that is genuinely remarkable.<sup>12</sup> It amounts to an assertion that since the highest U.N. body responsible for preserving peace and security has failed, a U.N. treaty will do the job.

In spite of the incoherence of the arguments in its favor, the ATT steadily picked up momentum. The decisive moment, in retrospect, was a speech by British Foreign Secretary Jack Straw on September 30, 2004 declaring that Britain supported the negotiation of a treaty on the international arms trade.<sup>13</sup> Straw spoke at the annual conference of the then-ruling Labour Party, and at the time, and later, insiders believed that Straw had acted at least in part to quiet Party opposition to the Iraq War, which was extremely controversial in Britain. Straw’s speech, and Britain’s support, led to

action in the United Nations. The U.N. General Assembly passed resolutions supporting the negotiation of the ATT in 2006 and 2008, the Secretary-General solicited the views of member states in 2007, a Group of Government Experts reported in 2008, and an Open-Ended Working Group reported in 2009.<sup>14</sup>

Throughout this process, the U.S. was one of the few nations publicly opposed to the negotiation of an ATT: in 2008, for example, the only two nations that voted against the resolution were the U.S. and Zimbabwe, though Russia and China abstained, apparently confident that their votes would go unnoticed and that the U.S. would take the heat for voting in the negative. This calculation was correct: throughout the negotiation of the ATT, the treaty supporters have consistently downplayed the significance of abstentions by major autocratic players and focused on blaming the U.S. The U.S. position, on the other hand, was based on the calculation that the ATT offered the U.S. little if any upside, and a lot of downside: the treaty would not make it any easier to administer the U.S. export control system, would not restrain bad actors abroad, and was all too likely to end up trying to reach inside the U.S. in ways that the Administration feared would restrict freedoms protected by the Second Amendment. One Administration official described it, when out of office, as “a feel-good measure that causes the high-minded to swoon but earns nothing but sniggers from the people who actually regulate their governments’ arms transfers.”<sup>15</sup>

But, by 2009, the U.S., with a new administration headed by President Barack Obama, faced a dilemma. It could keep on opposing the treaty, and perhaps keep it from coming into existence through the U.N., but at the cost of considerable opprobrium and with the risk of driving the entire treaty process out of the U.N. entirely, as had already happened with land mines and cluster munitions. An ATT created outside the U.N. would almost certainly be even worse than one created inside of it. Or the U.S. could decide to support the negotiation of the treaty and try to limit the damage by keeping it in the U.N. With so many nations supporting the negotiation of the treaty, backing it also offered the enticing possibility of an easy win, in a context that would demonstrate – at home and abroad – the commitment of the new Administration to support the U.N. and to be as unlike the Administration of President George W. Bush

in as many ways as possible. And, finally, the treaty did command some genuine support within the Administration, from supporters of the U.N. and for other reasons. It was with this combination of concern about the likely results of continued opposition combined with hopeful optimism about the effects of obtaining it that the U.S. moved, in a statement on October 14, 2009 by then-Secretary of State Hillary Clinton, to announce its support for the negotiation of the treaty.<sup>16</sup>

## **THE NEGOTIATING CONFERENCES OF 2012 AND 2013**

After that, the ATT process moved rapidly. Four Preparatory Conferences followed in 2010-2012, along with two further collections of U.N. member state views on the ATT in July 2011 and June 2012, and, ultimately, a negotiating conference in July 2012. In this process, four important facts became evident. First, as the U.N. Institute for Disarmament had recognized as early as 2007, while there was virtual unanimity on the demand for an ATT, nations wanted the ATT for reasons that had little if anything to do with the demands of the activists: as the Institute itself noted, the single most-requested clause in an ATT was one guaranteeing the right of all nations to manufacture, import, export, transfer, and retain conventional arms.<sup>17</sup> Far from being a measure to control the international arms trade, many nations viewed an ATT as necessary to give it a new and firmer legitimacy. Other nations wanted the treaty because it would, in the words of the October 2008 resolution, supposedly deny arms to criminals and terrorists. One need only recall that the government of Syria describes the rebels who have sought since 2011 to overthrow it as terrorists to recognize the purpose of this claim: many U.N. member states began the negotiation process by viewing an ATT as a promising coup prevention plan.

These differences of view would emerge with considerable effect in the treaty negotiating conference of 2012. But three further facts also shaped the outcome of that conference. Though there was wide canvassing of views, and much activity by NGOs, the July 2012 negotiating conference began its four weeks of work on July 2 with

only a year-old paper by the Conference chairman as the basis for negotiation, and facing the tacit opposition of nations such as Iran, which did all they could to obstruct the conference. Second, few nations actually have the expertise necessary to discuss the issues involved in export control in a serious way: one member of the U.S. delegation put the number of technically competent delegations at no more than ten of the almost two hundred attending the March conference.<sup>18</sup> Third, and finally, the U.S. strategy throughout the process was to avoid appearing as the road block to consensus, which was itself a key U.S. redline. If the treaty was going to fail, in short, it was going to fail because of someone other than the United States. The public relations advantages of this strategy are obvious, but collectively, these facts meant that in retrospect, the first negotiating conference, in July 2012, had little chance of success: the entire world, operating throughout the conference almost entirely in a plenary format, was trying to negotiate a treaty from scratch on the trade in all conventional arms in only four weeks. It was a futile gesture.

The July 2012 conference came to an ignominious end when, on its final day, the U.S. pointed out that the treaty was not ready for signature, and could not be fixed in the remaining hours. This was correct, though it signaled the failure of the Administration's negotiating strategy, because it allowed the NGOs and nations supporting the ATT to blame the U.S. for their own failure to come up with an acceptable text. (This led to a sequel in the March 2013 negotiating conference when a complex lie, readily swallowed by the media, was spread widely about the end of the July conference.)<sup>19</sup> What the collapse in July showed was that, apart from wanting a strong treaty, the pro-treaty forces had no interest in the actual content of the treaty, whether it fit the form required of treaties, or whether the treaty could actually be implemented in practice. For them, the important thing was simply to have a treaty.

The lack of expertise on many delegations undoubtedly contributed to this clamor, as did the fact that an unknown but substantial number of national delegations were actually working for the pro-treaty NGOs. This scandalous practice is common at U.N. conferences, where many poorer nations are glad to round out their numbers with individuals who have no actual connection to the

nation that they are nominally serving.<sup>20</sup> It means that many nations regularly endorse whatever the NGOs want, and it means that the skeptical NGOs at the U.N. are completely outnumbered by the reflexively supportive ones.<sup>21</sup>

The July collapse did not stop the process for long. In November, the U.N. General Assembly voted through a renewed negotiating mandate, leading to the second and – in the U.N.’s words – “final” conference in March 2013. The emphasis on “final” made it clear that, if this conference did not conclude a treaty, one was very likely to be negotiated outside the framework of the U.N. entirely. Throughout this process – in spite of assertions to the contrary – the U.S. position remained unaltered: the U.S. voted in favor of renewed negotiations in November, after the U.S. elections, but this was no post-election surprise. Proceedings at the U.N. had been delayed by Hurricane Sandy, and there is no reason to believe the U.S. would have acted any differently if the vote had taken place as scheduled before the elections.<sup>22</sup>

The March conference did have the advantage of working from the July text, but it still failed to achieve consensus, when at the last moment Iran, North Korea, and Syria objected to the agreed text. This was unexpected: most conference attendees were confident that a treaty would be reached by consensus, and the pro-treaty NGOs at the conference were trumpeting, immediately before the final session, a statement from the Iranian media stating the Iran had agreed to support the ATT. The text itself was repeatedly amended, and its last revision appeared to have the purpose of winning the support of the recalcitrant dictatorships. But if so, they were insufficient. After a ridiculous last-second effort by Mexico to redefine the concept of consensus was blocked by Russia, and after a string of skeptical speeches – at least 29 nations condemned the draft text – the conference closed late on Thursday night, April 27, without agreement. But the following Tuesday, May 2, the U.N. General Assembly heard the conference report and, on a vote of 154 in favor to 3 against (Syria, North Korea, and Iran), and with 23 abstentions (including China, Cuba, Egypt, India, Indonesia, Russia, and many Arab regimes) it adopted the ATT.<sup>23</sup>

## THE PROCESS AND SUBSTANCE OF THE ATT

The ATT opened for signature on June 3, 2013 at the United Nations. It will enter into force ninety days after the deposit of the fiftieth instrument of ratification, which is likely to happen by 2014, if not sooner. A Conference of States Parties will be convened no later than one year following the ATT's entry into force, meaning that such a conference is likely to be held in summer 2014.

In the United States, the Administration has already announced that – after a review that surprisingly took no more than six weeks – it plans to sign the treaty.<sup>24</sup> The prospects for Senate ratification are cloudy at best: the ATT has already been the subject of a series of Dear Colleague letters, Senate resolutions, and Senate and House concurrent resolutions. All of these measures have attracted the support of at least 34 Senators, which would, if maintained during consideration of the treaty, be sufficient to block it. An amendment sponsored by Sen. Inhofe (R-OK) in March 2013 was approved by a vote of 53-46, indicating that a majority of Senators oppose the treaty.

But U.S. signature of a treaty, even absent Senate advice and consent, has consequences. The U.S. holds itself bound to “refrain from acts which would defeat the object and purpose of [a signed] treaty.” This obligation lasts as long as the treaty is signed but not ratified. The obligation derives in part from the 1969 Vienna Convention on the Law of Treaties. The State Department “considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law,” and therefore the U.S. will generally act in a manner consistent with its terms. Deciding what acts would defeat the object and purpose of a treaty is not an objective exercise: the 1986 edition of the Restatement of the Law: The Foreign Relations Law of the United States says that “it is often unclear what actions would have such effect.” But, in essence, the “object and purpose” obligation is a back door to something that is in the neighborhood of, but not the same as, Senate ratification without the Senate (or the House) being involved at all.<sup>25</sup> This weakness in the U.S. treaty system is well-known to those who follow the process closely, but usually comes as a surprise to the media, and even to members of the Senate. Thus, once the U.S. signs the ATT,



it will be up to the State Department's lawyers, in collaboration with their colleagues in other relevant executive departments, to decide how the U.S. must act in order to avoid defeating the ATT's object and purpose.

This will not be easy. At the outset, it should be noted that the ATT, contrary to standard treaty practice, does not define most of its terms, and to the extent it contains any definitions at all, these are based on concepts that are themselves undefined. The ATT does contain, in Article 1, a statement of its "object and purpose." But in Article 5, it directs signatories to implement the treaty not in accordance with Article 1, but "bearing in mind the principles referred to in this Treaty." This directs the reader back to the Principles section at the opening of the treaty text. This curious construction appeared only in the final treaty draft, and appears to have been an effort to persuade the dictator nations to support the ATT, as the treaty Principles – among other points – reaffirm the principle of non-intervention in internal affairs, which is highly prized by the dictators (and by the United States, though for entirely different reasons).<sup>26</sup> But this drafting makes it unclear whether it is the Article 1 that actually defines the "object and purpose" of the treaty, or whether it is really the Principles that are central to it. That, in turn, makes it even more difficult than normal to ascertain what the "object and purpose" standard requires.

The process by which the treaty was adopted raises its own set of concerns. One of the U.S. red lines for its participation in the entire negotiating process was that the treaty be adopted by consensus. This was in part to protect U.S. interests, but it was also to ensure, as then-Secretary of State Hillary Clinton put it, that "all countries can be held to standards that will actually improve the global situation." This did not happen: three nations opposed the ATT, and, in the General Assembly vote, a further 23 – including most of the world's most irresponsible arms exporters – abstained. Yet the Administration abandoned its own red line and supported the adoption of the treaty through the majority rule General Assembly. This is not the first time a treaty has been adopted in this way: in 1996, the General Assembly was used to circumvent India's opposition to the Comprehensive Test Ban Treaty. But the ATT is a much broader treaty, and has much less support. By abandoning its

consensus red line, the U.S. has reinforced a dangerous precedent: by backing the move to the GA, the U.S. has given the numerous opponents of consensus a precedent they are free to use as a threat against it in all future negotiations.<sup>27</sup>

A further concern relates to the ATT's amendment process. The U.S. wanted all treaty amendments to be adopted by consensus, but in the end, it was forced (Article 20.3) to accept a process that allows for amendments by a three-quarters majority vote. In return, the U.S. won a provision (Article 20.1) postponing any amendments until six years after the treaty enters into force, which will likely be in 2019. The treaty also makes clear (Article 20.4) that amendments apply only to nations that accept them. But particularly given the treaty's creation of a Secretariat (Article 18), a majority rule amendment process will over time create an international instrument with diverging interpretations and commitments. Such an instrument will be a source of political and legal pressure on the United States to comply in practice with amendments it has not accepted. Treaty supporters have already compiled a lengthy list of desired amendments, and will undoubtedly accumulate many more in the coming six years.<sup>28</sup>

But in the end, the debate on the ATT will likely revolve around the core provisions in its text. In the U.S., that debate has focused on concerns related to the Second Amendment, but it should be noted that the treaty raises a wide range of other concerns. Its impact on museums of military history or on sports shooters travelling abroad could be severe, depending on how its terms are interpreted.<sup>29</sup> Centrally, though, the treaty relates to the conduct of U.S. foreign policy, and it is on this that concerns are likely to focus. Two issues are salient. First, at the core of the treaty are Articles 6 and 7, which ban arms exports in certain circumstances and set up a series of human rights standards for assessing potential exports, and require nations to assess whether they have "knowledge" that a transfer would be used to commit or "facilitate" a violation of those standards.

The U.S. already has a system for assessing arms exports, which was set out in Presidential Decision Directive 34, issued by President Clinton on February 17, 1995, and has been retained unaltered by the Administrations of George W. Bush and Barack Obama. This system includes assessing the human rights consequences of a U.S.

arms sale. But the treaty uses the terms “international humanitarian law” – formerly known as the laws of war – “international human rights law,” and “serious acts of gender-based violence.” These terms have no stable meaning, and in practice are subject to constant redefinition and expansion. The U.S. does not and cannot know what will be meant by these terms in the future, so in practice the treaty will be a steadily-moving conveyor belt pulling the U.S. along in the direction of the norms devised by the transnational elite and the NGOs who support the “new diplomacy.” The treaty’s undefined “facilitate” criterion makes this problem even worse, as almost any arms export could be said to have (Article 7.1) “the potential” to facilitate an undesirable outcome. Finally, the “knowledge” criterion is a negligence standard – a “known or should have known” standard – and will open up signatories to U.N.-led investigations to determine what policy-makers knew and when they knew it. Collectively, the heart of the treaty has no clearly defined meaning, is based on terms that are readily and frequently politicized, and is custom-built to promote a transnational agenda. It was perhaps for this reason that Assistant Secretary of State Tom Countryman, who led the U.S. delegation to both U.N. conferences, described the ATT as “ambiguous.”<sup>30</sup> The second core problem in the realm of foreign policy relates to the Reagan Doctrine, the U.S.’s bipartisan post-war policy of arming opponents of totalitarian or autocratic regimes when it serves the U.S.’s national interests. It is unlikely that many rebels would reliably pass the human rights tests in the ATT, and even if they do, the treaty also requires signatories (Principles) to “prevent . . . [the] diversion” of arms. It is a certainty that any regime will define shipments of arms to its internal opponents as diversion. Thus, the treaty raises a high legal bar against the arming of rebel movements anywhere, an argument that some high-profile treaty supporters are already making in particular cases.<sup>31</sup> This parallels the broader hypocrisy of the treaty advocates towards the U.S., which they alternately praise as the nation with the most responsible arms export control system in the world and condemn as world’s largest arms supplier, with the implication (vehemently denied by the Administration) that the treaty will clamp down on U.S. arms sales more broadly.<sup>32</sup> That is certainly the wish of at least some treaty advocates, and given the conveyor belt effect that the vague terms at

the heart of the treaty will have over time, it is likely that they will get their way, regardless of the desires, or the intentions, of the Obama Administration.

The other fundamental area of concern, of course, relates to the treaty's potential domestic effects. The relevant problems can be broken down into three main areas. First, there are the potential commercial effects. Many firearms firms that sell in the U.S. market are foreign-owned – including Remington, Winchester, and Glock – and regardless of whether or not the U.S. signs or ratifies the ATT, the U.S. market could be affected by the decision of foreign signatories to interpret its terms in such a way as to limit the export of firearms, or of parts and components for them, to the U.S. Moreover, most major U.S. firms source at least some components from foreign suppliers, and virtually all such firms rely on international markets for financing and insurance. In both the domestic U.S. market – where imported firearms constitute approximately 35 percent of new sales – and as regards the resale of U.S. arms with foreign components to third parties (such as Israel or Taiwan), the treaty creates the serious possibility of what amounts to commercial or financial blackmail by foreign suppliers, or foreign nations.<sup>33</sup>

Second, there are the specific provisions of the treaty text. The ambiguity of the treaty makes it difficult to assess, but two points are particularly troubling. First, in three places – the Preamble, Article 8(1) on imports, and Article 12(3) on record keeping – it refers to “end user” or “users.” This term applies to the final, authorized user of a weapon, and can therefore refer to individual firearm owners. The U.S. fought hard to remove this language from the treaty, but was unsuccessful. Article 12(3) states that “Each State Party is encouraged to include in those records [of imported arms] . . . end users, as appropriate,” and Article 13, on reporting, requires nations party to the treaty to “submit annually to the [treaty] Secretariat . . . a report for the preceding calendar year concerning authorized or actual exports and imports of conventional arms.” It is unclear whether the reports to be collected in Article 12(3), which could include the identity of individual firearms owners, are the same reports that are to be sent to the Secretariat in Article 13. But the urgency with which the U.S. opposed the treaty's use of the term “end users” indicates that it felt concerns on this score, and Article

12(3) certainly implies that the best form of treaty compliance is to create a national register containing the identities of individual owners of imported firearms.

The treaty also focuses extensively – three times in the Preamble, once in the Principles, and in Articles 1, 11, 13, and 15 – on the issue of diversion, meaning the transfer of a weapon to an unlicensed or otherwise unauthorized user. For the U.S. this is problematic in part because it is the states, not the federal government, that license firearms: treaty provisions that seek to transfer the entire responsibility for diversion prevention to the federal government run afoul of federalism. It is also problematic because the emphasis on diversion stems in large part from Mexico, which has long sought to use the ATT to promote gun control inside the United States.<sup>34</sup> Indeed, the treaty's nearly incomprehensible Article 11(2), on diversion, was reportedly written in Spanish, translated into English by a non-native speaker, and dropped into the text at the last moment.<sup>35</sup> Above all, there is the sixth treaty Principle, which notes:

The responsibility of all States, in accordance with their respective international obligations, to effectively regulate the international trade in conventional arms, and to prevent their diversion, as well as the primary responsibility of all States in establishing and implementing their respective national control systems.

This Principle does not explicitly limit the responsibility to prevent diversion to the international trade – implying that nations have an obligation to prevent it domestically as well. It also gives nations only a “primary” responsibility – not an exclusive one -- for operating their own national control system. (This latter phrase is not sinister: the U.S. already has an export and import control system.) As with much of the treaty, ambiguous drafting makes the treaty's obligations difficult to ascertain with certainty, but it implies that nations party to the treaty have a broad responsibility to prevent diversion, which could be used to justify the imposition of further domestic regulations.

Defenders of the treaty often assert that it has nothing to do with domestic ownership of firearms, that it recognizes the legitimacy of such ownership, and that it does not in any way

touch rights protected by the Second Amendment. The claim that the treaty focuses only on the international trade is at best a half-truth, because the treaty does seek to regulate brokering (Article 10), which is a domestic activity. This claim also ignores Mexico's argument – which many treaty advocates accept – that there is no such thing as genuinely domestic ownership, as any firearm could at some point conceivably be exported or transferred to another nation. The treaty also says far less about legal civilian ownership than its supporters imply. The relevant text appears only in the Preamble, which is not legally binding, and it states, in its entirety, that signatories are:

Mindful of the legitimate trade and lawful ownership, and use of certain conventional arms for recreational, cultural, historical, and sporting activities, where such trade, ownership and use are permitted or protected by law.

This clause omits the right of individual self-defense. Like the entire treaty, it is also predicated on the belief that, while governments have an inherent right to weapons, individuals can bear arms only if “permitted” to do so by governments or when such an activity is “protected.” This is a philosophy that is almost diametrically opposed to the belief that undergirds the Second Amendment, which is that the right to keep and bear arms is inherent, and exists apart from government permissions or protections.

But focusing narrowly on articles in the treaty risks missing the third, and final, concern: because the treaty does not define its terms, it has no set meaning. Barbara Frey, a U.N. Special Rapporteur for the U.N. Commission on Human Rights, has already argued that gun control is a human right.<sup>36</sup> If this interpretation is widely accepted, the treaty's text will not change, , but what is meant by its reference to “international human rights law” certainly will. Moreover, the number of influential individuals and organizations involved in the ATT, and related treaties and processes, who have advocated gun control or expressed skepticism about the Second Amendment is substantial. This strongly suggests that voices supporting, or even

urging, the reinterpretation of the treaty's vague requirements and even vaguer terms will not be lacking.

For example, Harold Koh, former Dean of the Yale Law School and the State Department's Legal Adviser during President Obama's first term, has argued – following Mexico's lead – that “the only meaningful mechanism to regulate illicit [international] transfers is stronger domestic regulation,” and that “[s]upply-side control measures within the United States” are essential.<sup>37</sup> Rachel Stohl condemns the U.S. for “consistently object[ing] to international restrictions on civil ownership.”<sup>38</sup> Amnesty International, the NGO that began the push for the ATT, states that the Treaty is only a “start” on the road to the control of “domestic internal gun sales.”<sup>39</sup> The U.N. CASA program, in a paper on “The Impact of Poorly Regulated Arms Transfers on the Work of the UN,” argues that, through the ATT, the “arms trade must . . . be regulated in ways that would . . . minimize the risk of misuse of legally owned weapons,” and in a phrase that has particular resonance given the treaty's language on gender-based violence, opposes “community attitudes” that “contribute to the powerful cultural conditioning that equates masculinity with owning and using a gun, and regards gun misuse by men as acceptable.”<sup>40</sup> The overwhelming impression left by treaty advocates is not that they support the right to keep and bear arms: it is that they recognize that criticizing this right is bad politics but are occasionally unable to restrain themselves.

The Arms Trade Treaty is not a ‘gun grab.’ It is, though, a vehicle that could be driven in many directions. Arguments to the contrary are ultimately based on a simple argument: trust me. Article 12(3) clearly contains, for example, a reference to collecting the identity of individual end users of imported firearms. It also contains language allowing signatories to justify their decision not to collect those identities. A promise that the U.S. government will rely on this language and not collect identities is nothing more than that: a promise. The ATT requires governments to take some domestic actions, and it suggests, encourages, and justifies many more such actions. The current Administration has already demonstrated its commitment to pursuing public policy on firearms by way of unilateral executive action. Any contention that the ATT is consistent with the Second Amendment rest fundamentally on an unsupported assumption that

this Administration—and all future Administrations—will not use it as a justification for issuing new executive orders, executive actions, regulations, and the like.<sup>41</sup>

During the drafting of the ATT, the negotiating conference was repeatedly warned that, by failing to clearly exclude lawfully owned civilian weapons from the scope of the treaty, it risked arousing domestic U.S. hostility.<sup>42</sup> This advice was rejected, on the grounds that excluding civilian weapons would create a loophole. But since the entire treaty is supposed to be implemented at the national level, this was and is untrue: there is no good reason why such implementation cannot respect lawfully owned civilian weapons on a nation-by-nation basis. The treaty's failure to include language of this sort only makes sense if the treaty is, as many of its supporters hint, ultimately intended to have a much broader reach. It is here where the U.N.'s many other activities, including through the PoA and ISACS, come into play. The ATT is formally and legally separate from all of these, but many of the same individuals and U.N. institutions work in all of them, and concepts developed in one forum will flow into all of them. The risk of the ATT is not that it will lead to a gun grab. Claims of that nature actually distract attention from the real problem which is that the ATT will provide a treaty-based mechanism for the slow exertion of pressure from so-called norms derived through ISACS and PoA, and through the best practice guidelines, implementation standards, and model legislation that the U.N., the NGOs, and even industry will create when the ATT enters into force.

In, as there were many highly able commoner generals and politicians, such as Hampden, if one reads through the history.

## CONCLUSION

The ATT is ambiguous for a reason. There was no chance that all the world's nations would ever have been able to negotiate a clear treaty, with careful definitions, regulating the entire world's trade in conventional arms. Moreover, if they had been able to do so, it is very unlikely that such a treaty would have been acceptable to the United States, because it would almost certainly have sought to place unacceptable limits on civilian ownership. Ambiguity was



therefore a negotiating necessity, as well as, for the U.S., a negotiating strategy. But it also necessarily resulted in an unclear treaty that raises unanswerable concerns about the effect it will have on U.S. foreign and domestic policy, and in a treaty that is an ideal vehicle for the transfer of transnational norms into the U.S. policy and legal system. It was never likely that the ATT would be genuinely satisfactory for the U.S. The basic fact is that the U.S. is a federal system, with a Second Amendment, and has unique security interests and responsibilities around the world. No treaty that fits other nations would work for it. The only way to square the circle was to create an ambiguous treaty. The U.S. delegation at both U.N. negotiating conferences was effective, and did the best it could, but once the idea of the ATT came into existence, and especially once it was picked up at the U.N., the U.S. was playing a losing hand – though as the example of Harold Koh suggests, it was a game that at least some in the Administration may not have wanted to win.

The irony is that the U.S. was one of the very few responsible exporters in the room at the U.N. With all of the world's nations present, some of them must have been responsible for the evils they all freely condemned, but in the world of the ATT, irresponsible arms sales are always the other guy's fault. All too frequently, the fault was placed on the head of supposedly rogue arms traffickers, above all Viktor Bout, who, if he did not exist, would have had to be invented. But this is hypocritical nonsense: it is the U.N. member states, including a number of those that called most loudly for the ATT, who are overwhelmingly responsible for the irresponsible trade in arms.<sup>43</sup> No treaty that falls to recognize that basic fact can have a hope of success, and no treaty negotiated through the U.N. will ever recognize that basic fact. Its supporters will instead follow a predictable course: blame U.S. foreign and domestic policies, and seek to steadily tighten the terms of the treaty in order to constrain the U.S.

The risks of the ATT are best summarized with an anecdote. On the last day of the March conference, I was sitting in the U.N. conference room. It had been a long two weeks, and I was looking forward to getting out of the U.N. Sitting next to me was a long-time veteran of the process, a convinced treaty supporter. We began to chat, and I said "I'm looking forward to this being over." She looked

at me penetratingly, and replied “Don’t you realize? This will never be over.” And then, with a guilty tone, she added “Don’t quote me.” She was right. The ATT is a process that will never be over.

## ENDNOTES

1. For an exploration of some of these points, in the context of the Ottawa Convention, see Ted R. Bromund and Steven Groves, “The Ottawa Mine Ban Convention: Unacceptable on Substance and Process,” Heritage Foundation Backgrounder No. 2496, at <http://www.heritage.org/Research/Reports/2010/12/The-Ottawa-Mine-Ban-Convention-Unacceptable-on-Substance-and-Process>
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4. U.N. Secretary-General, Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, U.N. Document A/50/60-S/1995/1, January 3, 1995, Section III.D, at <http://www.un.org/Docs/SG/agsupp.html> (May 7, 2009).
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7. For one example among many, see “Why We Need A Global Arms Trade Treaty,” Oxfam, 2013, at <http://oxf.am/ZBX>.
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9. Information about the Wassenaar Arrangement can be found at <http://www.wassenaar.org/>.
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19. Ted R. Bromund, "The Arms Trade Treaty: The Big Lie About July 2012," Heritage Foundation Foundry, April 1, 2013, at <http://blog.heritage.org/2013/04/01/the-arms-trade-treaty-the-big-lie-about-july-2012/>.
20. Ted R. Bromund, "The U.S. Cannot Fix the U.N. Arms Trade Treaty," p. 4, March 13, 2013, Heritage Foundation Backgrounder #2774, at <http://www.heritage.org/research/reports/2013/03/the-us-cannot-fix-the-un-arms-trade-treaty>.
21. The Reaching Critical Will site does not include all NGO statements on the ATT. For these statements, consult at <http://www.un.org/disarmament/ATT/statements/>. In July 2012 and March 2013, a total of seven skeptical NGOs spoke, as against one supportive NGO, but since many national delegations contained NGO staffers, and since many of the skeptical NGOs were raising points of particular interest – not opposing the ATT outright – this count does not mean the skeptics predominated.
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27. This and related process problems are explored further in Ted R. Bromund, "Arms Trade Treaty: Problems with Substance and Process," Heritage Foundation Issue Brief #3892, April 4, 2013, at <http://www.heritage.org/Research/Reports/2013/04/Arms-Trade-Treaty-Problems-with-Substance-and-Process>.

28. For one list, see Catherine Defontaine, "After Years of Pressure, the UN Adopts an Arms Trade Treaty," *The Nation*, May 7, 2013, at <http://www.thenation.com/article/174207/after-years-pressure-un-adopts-arms-trade-treaty#>.

29. For example, Article 2(3), which states that the Treaty "shall not apply to the international movement of conventional arms by, or on behalf of, a State Party for its use," may apply to national museums, museums that obtain a government license, or to no museums at all.

30. "Discussion of Next Steps For The Arms Trade Treaty," event held at the Stimson Center, Washington, D.C., April 5, 2013, at <http://www.stimson.org/events/discussion-of-next-steps-for-the-arms-trade-treaty/>.

31. See, for example, Rachel Stohl and Alison Griffen, "Why Arming the Syrian Rebels Is A Bad Idea," *Politico*, October 26, 2012, at <http://www.politico.com/news/stories/1012/82887.html>. Stohl is a prominent advocate of the ATT and was a consultant to the president of both U.N. negotiating conferences.

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37. Harold Hongju Koh, "A World Drowning in Guns," *Fordham Law Review*, Vol. 71, No. 6 (May 2003), pp. 2354, 2358, and 2355, at <http://law2.fordham.edu/publications/articles/500flspub11111.pdf>.
38. Rachel Stohl, Matt Schroeder, and Dan Smith, *The Small Arms Trade: A Beginner's Guide* (Oneworld, 2007), p. 48, in chapter 4, attributed to Stohl.
39. "Africa: Global Arms Trade Treaty – A Beginner's Guide," March 11, 2013, AllAfrica, at <http://allafrica.com/stories/201303111100.html?viewall=1>.
40. Ted R. Bromund, "The U.N. Speaks: The Arms Trade Treaty Will Affect 'Legally Owned Weapons'," Heritage Foundation Foundry, June 22, 2012, at <http://blog.heritage.org/2012/06/22/the-u-n-speaks-the-arms-trade-treaty-will-affect-legally-owned-weapons/>.
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42. For one such suggestion, see Allen Youngman, Executive Director of the Defense Small Arms Advisory Committee, statement to the Arms Trade Treaty Final Negotiating Conference, March 21, 2013, at [http://www.un.org/disarmament/ATT/statements/docs/20130321/ngo/20130321\\_dsaac.pdf](http://www.un.org/disarmament/ATT/statements/docs/20130321/ngo/20130321_dsaac.pdf).
43. John Reed, "T-72s Were Indeed Being Sent to Sudan Rebel Army," *DefenseTech*, December 9, 2010, at <http://defensetech.org/2010/12/09/t-72s-were-indeed-being-sent-to-sudan-rebel-army/>. Kenya was a major African supporter of the ATT that was, at the same time, smuggling T-72 tanks to South Sudan.

# VIOLENCE POLICY CENTER'S CONCEALED CARRY KILLERS: LESS THAN IT APPEARS

By Clayton E. Cramer<sup>1</sup>

The Violence Policy Center maintains a website titled *Concealed Carry Killers* as part of their effort to show that many Americans who receive licenses under the increasingly popular “shall-issue” concealed license laws are not only disreputable figures, but a threat to public safety. This list included, as of May 12, 2012, a total of 374 deaths—and at first glance, it is quite disturbing. Unaccountably, the primary web page listed these as 12 law enforcement deaths and 228 civilian deaths, although perhaps they simply neglected to recalculate based on the data they had.<sup>2</sup>

This paper provides a detailed analysis of the incidents, finding that many are incorrectly described. A few of the criminal cases have been settled in favor of the accused and some are criminal cases that are still pending. Many of the incidents are single suicides which, while sad, are not criminal matters or public safety concerns and are not relevant to may-issue vs. shall-issue concealed carry licensing. A number involve situations where possession of a concealed weapon license is completely irrelevant to the tragedy that unfolded. In some cases, these incidents involve licenses issued in “may-issue” states and licensees who are retired police officers, who are almost always issued such licenses even in the strictest of “may-issue” jurisdictions.

There are some legitimate concerns about concealed carry licenses that these events expose. This paper suggests some areas where states may want to consider either minor revisions to existing issuance laws, or improved compliance with the laws already on the books in the interests of public safety.

## NOT LICENSEES

One of the most troubling aspects of the data is that a number of the incidents that Concealed Carry Killers lists involve people who we know did not have concealed carry licenses. Some of these incidents that VPC list involve killings by people who, by VPC's own admission, did not have a concealed weapon permit. Richard Vithya Tauch of California is described as having "a permit to carry a firearm as a security guard."<sup>3</sup> Not only is California a may-issue state, but the security guard permit does not carry except when on duty with and "does not authorize you to carry a concealed weapon" [emphasis in original].<sup>4</sup> Other incidents involved armed security guards who are licensed quite separately from ordinary civilians, such as George Zadolny who was an "employee of an outside security company" at a Lockheed plant. Zadolny murdered a woman who had broken off their relationship, then he committed suicide.<sup>5</sup>

In other incidents, VPC describes the killer as a "legal concealed handgun carrier" because the incident took place in a state that does not require concealed carry licenses to carry a handgun.<sup>6</sup> While such incidents might be an argument against abolishing the license requirement to carry a concealed weapon, it is not an argument against shall-issue laws, because these persons did not have licenses.

In other incidents that VPC lists, a more thorough examination of the facts demonstrates that the killer did not have a license; VPC has jumped to conclusions. Humberto Delgado, Jr., who murdered a Tampa police officer in 2009, is described as having "a concealed handgun permit issued in North Carolina. Florida has reciprocity with North Carolina."<sup>7</sup> But none of the sources cited by VPC that are currently accessible indicate this. One of VPC's sources says that he had "a North Carolina driver's license" and "a certificate for a firearms safety course."<sup>8</sup> What appears to be an updated version of another VPC source says nothing about Delgado having a concealed weapon permit from anywhere—but does list that one of the many criminal charges against him was "carrying a concealed firearm."<sup>9</sup> If Delgado had a North Carolina's concealed weapon permit, it is a bit odd that almost a month after the murder, Florida authorities would charge him with carrying a concealed weapon. No source (other than VPC) makes the claim that Delgado had a permit.



This would not be the first time that VPC has misread such an incident. A local newspaper incorrectly reported Michael C. Itheme of Minnesota had a concealed weapon permit after his arrest for murdering his wife, and VPC at the time reported this as a fact. Careful review of the records found that Itheme was subject to a restraining order (which would have caused revocation of such a permit). More importantly, the booking paperwork clearly showed that Itheme did not have a permit. What the police found in Itheme's car was "a Minnesota permit to purchase a handgun"<sup>10</sup> which was abbreviated by the newspaper to "gun permit."<sup>11</sup> A Minnesota permit to purchase a handgun is not the same as a permit to carry a handgun concealed. While Itheme's incident no longer appears in VPC's report, it is apparent that VPC has a history of jumping to allow a guard to conclusions.

Another example of jumping to conclusions is the case of Omar Thornton, who murdered eight co-workers and then killed himself, after he was caught stealing beer from his employer. VPC claims that, "Thornton had a current Connecticut pistol permit that allowed him to carry concealed."<sup>12</sup> But Connecticut has two different licenses: a "pistol eligibility certificate" required to purchase a handgun,<sup>13</sup> and a "State Permit to Carry Pistols and Revolvers."<sup>14</sup> A Nexis search found numerous references to Thornton having a "pistol permit", but none that referred to him having a permit to carry, except in articles by gun control advocates.<sup>15</sup>

VPC claims to have received documents concerning Thornton's concealed handgun license from the Connecticut Department of Public Safety. If this is true, a criminal investigation is in order. Connecticut law prohibits release of information on a carry licensee except to law enforcement agencies, local authorities, and the Commissioner of Mental Health and Addiction Services. There is no provision for release of such information to advocacy groups.<sup>16</sup>

The tragic accidental death of Jose Alvarado is another example. VPC reports that his mother, "Yaritza Alvarado, had a concealed handgun permit." Examination of the two cited sources strongly suggests otherwise. One account does say that, "neighbors told the Express Times that the boy's mother had a registered gun and a license to carry in their home..."<sup>17</sup> But Pennsylvania does not issue or require a license to carry a firearm in your home.<sup>18</sup> The neighbors may have assumed that there was a license required to carry in your

home. A later news story (not cited by the VPC) makes no mention of any license; the father was charged with involuntary manslaughter for putting the handgun (normally kept under the mattress of Mr. Alvarado and his wife) in the backpack where Jose kept his video games.<sup>19</sup>

Alex Kopystenski pled guilty to child abuse and neglect for the accidental death of his son, who “picked up a 9mm handgun from the vehicle’s front console and fatally shot himself in the head.” Review of VPC’s source for this article strongly suggests that they are jumping to conclusions; the evidence is pretty persuasive that he did not have a concealed carry license and, indeed, could not have had a license. The news report does say that Kopystenski “had a permit for the 9mm handgun” but this does not necessarily mean a concealed carry license. Clark County (where Kopystenski lives, and where this incident took place) requires registration of pistols.<sup>20</sup> In addition, Kopystenski had an extensive criminal history, including a conviction for carrying a concealed weapon in 2006, and an assault with a deadly weapon charge “in 2001 [that] concluded with Kopystenski completing the court’s instructions.”<sup>21</sup>

Another article quoted Kopystenski’s mother Rena as saying that Kopystenski carried a gun “to protect himself” and that “he has had the right to bear arms since he was 18.”<sup>22</sup> Rena clearly believed that Kopystenski’s “right to bear arms” was not dependent on a concealed carry license (which is only available to those 21 years of age and older).<sup>23</sup> This expansive and extralegal view of Kopystenski’s right to bear arms would explain his concealed carry conviction in 2006. All of this suggests that he had only registered the gun, as required by law—not that he had a concealed carry license.

VPC lists Guillermo Zarabozo as a Florida concealed carry licensee, but no news source that we have examined makes that claim. Zarabozo’s crimes took place when he was 19, and Florida law requires that “you must be at least 21 years of age unless you are a service member, as defined in Section 250.01, Florida Statutes, or you are a veteran of the United States Armed Forces who was discharged under honorable conditions.”<sup>24</sup> He was apparently training to be a security guard, and an early Associated Press story about these murders on the high seas says that he “held a state

permit to carry three types of handguns.”<sup>25</sup> At age 19, this might be a security guard permit, but not a concealed carry permit.

In some cases, the killer had a concealed handgun license in the past, but previous misbehavior caused its revocation. The license was not valid at the time of the crime. One example is Kevin Hoover, whom VPC lists as a “concealed handgun permit holder.” News coverage of his conviction that VPC seems to have missed is very clear, “Hoover had a permit to carry a concealed weapon but it had been revoked because of a misdemeanor charge.”<sup>26</sup>

There are also three incidents, with a total of three deaths, where the licensee did not kill anyone. One involved a licensee who engaged in a remarkably foolish prank that caused another person (not a licensee) to shoot and kill a friend.<sup>27</sup> Another incident involved a parking lot confrontation between Shannon Scott Paul, a licensee, and Ryan Dickens. Paul shot Dickens (perhaps in a lawful act of self-defense); Dickens wrestled Paul’s gun away from him, and killed Paul.<sup>28</sup> A tragedy, but to include the death of Paul at the hand of a non-licensee artificially inflates the death count. A third example was a suicide by a non-licensee who had gone target shooting with a licensee.<sup>29</sup>

At least 8 of the 174 incidents, with a total of 25 deaths, do not involve concealed carry licensees. Three of the 174 incidents, with a total of 25 deaths, do not involve concealed carry licensees. Three of the 174 incidents, with a total of three deaths, involve licensees, but they did not kill anyone.

## **REALLY LICENSED?**

There are other cases in which VPC claimed that the killer had a concealed carry license, but we are unable to find sources to back up this claim.<sup>30</sup> In some cases, VPC relies on a single newspaper account that is hardly persuasive. VPC reports on a Solomon Davis who they describe as a “concealed handgun permit holder” based on the initial news report: “Witnesses at the apartments told police that the suspect had a gun and a permit for it.”<sup>31</sup> It is not clear how witnesses would know that the shooter had a permit. The only other

news story about this incident (including a Nexis search) calls him Solomon Dawson, and makes no mention of any sort of permit.<sup>32</sup>

Another example is Akbar Rana. VPC cites two sources; one of the reports no longer can be found on the MSNBC website or through Nexis and the other news report says nothing about a concealed carry license.<sup>33</sup> A third news report, not cited by VPC, says “the gun was legally registered to Rana” but says nothing about a concealed carry license.<sup>34</sup>

Yet another troubling example is Amanda Knight, convicted of first-degree murder. Knight was part of a Washington State home invasion in which one of the residents was murdered by one of Knight’s fellow criminals. The only evidence that Knight had a Washington State license was from when Knight and her fellow home invaders were pulled over in Daly City, California. They needed to explain the presence of false IDs, marijuana, and a gun in the car. “Knight claimed the gun was hers and that she had a concealed weapons permit in Washington State. The permit was not valid in California and she was arrested on suspicion of having the weapon, Mangan said.”<sup>35</sup> No other news accounts of this crime, or of Knight’s subsequent conviction for first-degree murder, mentions a license. A claim by a convicted murderer with no corroboration while attempting to avoid an arrest on multiple criminal charges is hardly persuasive.

We have attempted to verify every claim of VPC that a person was a licensee. While some of our failures to confirm a license may be because the sources upon which VPC relied have disappeared, there are enough cases of the types mentioned above to make us skeptical. We were able to confirm that of the 174 incidents, 149 involved licensees totaling 219 deaths (including the suicide by a non-license target shooting with a licensee).<sup>36</sup> Not all of these deaths were criminal, however.

## **NOT A CRIME**

A number of incidents that are described by VPC as “pending” were resolved in favor of the licensee. Vincent Williams and Lashaun Davis (or Lashawn Davis, depending on the news report) had a

gunfight in Pine Bluff, Arkansas on February 21, 2010. Lashawn Davis died, Vincent Williams ended up in the hospital. Only two publicly visible accounts mention the incident, and neither makes any mention of a concealed handgun license.<sup>37</sup> The article that VPC references for the claim comes from the Pine Bluff Commercial, but their website shows no article on that date which references this incident.<sup>38</sup> However, an end of the year summary of homicides says that the death of Lashawn Davis was ruled justifiable.<sup>39</sup>

Many other incidents VPC describes as “pending,” sometimes more than five years later, and where we can find no subsequent news coverage. The circumstances initially reported suggest that the lack of further news coverage is because the criminal justice system concluded that there was no crime, or that the evidence was so weak that it did not justify prosecution. One example is Jerry Bourque’s killing of two teenagers in front of his house in Malden, Massachusetts on September 7, 2010. He claimed that he was defending himself from a robbery.<sup>40</sup> We have been unable to find any subsequent coverage of this incident in the newspaper that initially reported the incident, or through Nexis. Another example is Gabriel Mobley, who shot and killed two men on February 28, 2008. His claim was self-defense, and more than four years later, we can find no evidence that he has gone to trial.

There are incidents in which the death of the licensee meant that there was no subsequent attempt to determine who was in the right—but some of these incidents do not neatly fit into VPC’s assumption that these deaths were unlawful. As an example, Arlando Davis shot and killed Jarmel Hodges “following a dispute about a loud party.” Davis had a concealed handgun license, and it is not clear from reading the sole news account cited by VPC that Davis was in the wrong. Hodges also had a gun, and shot and killed Davis.<sup>41</sup> Other news accounts indicate that Davis was attempting to break up an argument that Hodges, who was drunk, was having with someone else, when Hodges shot Davis.<sup>42</sup> It was not an optimum result, but in the absence of other evidence, it seems likely that had Davis not been armed, he would still be dead—and Hodges would still be alive.

In a few cases, VPC describes the licensee as “convicted,” but detailed examination of the news accounts shows that the killing was determined to be justified, and the conviction was for another aspect

of the incident. As an example, Reginald Royals, Jr. shot and killed Juan Carlos Ovalle and wounded Marcus McGee after a parking lot collision led to an argument, then a fistfight. Both Royals and Ovalle had concealed handgun permits; Ovalle left his handgun in the car before getting into the confrontation with Royals.

At trial, Royals argued that he believed that Ovalle was reaching for a gun, and that he feared for his life. This was perhaps a reasonable concern, since it appears that Ovalle and McGee had been the aggressors in the argument and fistfight. The jury agreed, and found Royals guilty only of “unlawful wounding” of McGee. The sentence was 90 days in jail and a fine of \$2,500.<sup>43</sup> The jury’s unwillingness to convict on any charge related to Ovalle’s death, and conviction of only the minor crime of “unlawful wounding” of McGee (who was shot five times), suggests that they felt Royals’ actions were wrong, but not terribly wrong.

At least 8 incidents, with 8 deaths, we categorize as justifiable, based on the criminal justice system finding the licensee was in the right.<sup>44</sup> There are at least 21 incidents with 23 deaths that appear to be still pending (or at least no news reports appear showing a conviction or dropping of charges). Some of these incidents are four or more years old; charges were likely dropped as it became apparent that the licensee was in the right.<sup>45</sup>

Some cases involved licensees who, even according to VPC’s account, had not even been charged with a crime, and yet VPC still listed them as “pending.”<sup>46</sup> At least some of these cases, even by VPC’s description, give reason to see why some of these cases, even as much as four years later, have not resulted in a guilty verdict. Some of the very recent cases at least have a plausible self-defense basis to them. Allana Carey claimed that she was protecting herself from her boyfriend who was threatening her with a knife.<sup>47</sup> George Zimmerman had injuries consistent with his statement to police that he was defending himself from life-threatening attack by Trayvon Martin. Trevor Dooley claimed that he pulled his gun when David James attempted to choke him after a verbal argument.<sup>48</sup> Michael Moreno claims that the deceased Reed opened fire on him during an argument about reckless driving.<sup>49</sup>

## DOUBLE COUNTING

VPC also uses the 2011 Michigan Concealed Pistol License report as its source for a total of four criminal homicides of civilians pending for the fiscal year ending June 30, 2011, and five criminal homicides of civilians pending for fiscal year ending June 30, 2008. It is impossible to determine how many of these pending cases have since led to conviction, exoneration, or are already counted in other incidents VPC lists for Michigan. There are five licensees (a total of six deaths) listed separately by VPC for Michigan in this period that possibly include all four of the pending charges for the year ending June 30, 2011,<sup>50</sup> which would make these double-counted. A similar issue appears with three licensees listed as convicted of murder or manslaughter. Additionally, the same incident involving Dam Lopez appears twice in VPC's list, once as convicted, once as pending.

VPC also points to the 2008 Michigan Concealed Pistol License report to list one person convicted of negligent homicide.<sup>51</sup> In the official Michigan state report, this incident is listed with the note "No Pistol Carried During Crime."<sup>52</sup> Was it an accidental death caused by negligent storage of a firearm? Did it even involve a firearm? We don't know, and listing this in a report on *Concealed Carry Killers* with no other information is useless.

VPC again extracts from the Michigan State Police report that "one Michigan concealed handgun permit holder had criminal homicide charges pending for the killing of a law enforcement officer" in the fiscal year ending June 30, 2011.<sup>53</sup> Yet attempting to determine who this licensee was suggests that the Michigan State Police report may have suffered some clerical error.

There were five police officers feloniously killed in Michigan January 1, 2010 through June 30, 2011, and none of them provide a plausible basis for this claim. Cross-checking the FBI's "Summaries of Officers Feloniously Killed" for 2010 shows one officer murdered by a suspect with "an extensive prior criminal history that included police assault, was a known drug dealer, and was on conditional release at the time of the incident"<sup>54</sup> which precludes this suspect being a licensee.

The second murderer was a "63-year-old offender [who] had a prior criminal history that included a previous murder and weapons

violations.”<sup>55</sup> A more detailed account from local press reports that the killer, Elvin D. Potts, had felony convictions for drunk driving and carrying a concealed weapon, which would disqualify him from gun ownership, much less a license.<sup>56</sup>

The third murder, of Taylor police officer Matthew Lloyd Edwards, by Tyress Mathews, also cannot be by a licensee. Mathews had an extensive criminal history, including multiple felony convictions and thirteen years in prison.<sup>57</sup>

The fourth Michigan police officer feloniously killed in this period was Livonia officer Larry Nehasil, murdered by Larry Bowling. Before being charged with the second degree murder of Nehasil, “Bowling had six felony convictions and nine misdemeanors.”<sup>58</sup>

A fifth officer murdered was Eric Emiliano Zapata. Leonard Statler committed suicide after murdering Zapata, but we know that Statler was a convicted felon, because his father “pled guilty” to federal charges of “disposing of firearms to a felon” in allowing his son access to the gun used in the murder.<sup>59</sup> All of the criminals who murdered Michigan police officers in the period conceivably covered by the Michigan State Police report were ineligible for a concealed handgun license, and absent any way to verify the data, we must therefore assume that the report’s claim is inaccurate.

A criticism from local officials in Michigan is that the data from the state records of pending charges against licensees is often misleading or confusing. Oakland County, for example, filed “nearly 1,000 charges” against permit holders 2007-2011, but “more than 700 cases” still listed no disposition. Another example was “Kent County’s most recent annual report listed 48 charges against license holders, with 37 unresolved. In reality, the prosecutor said all but one of his cases were resolved.”<sup>60</sup>

VPC’s data on nine incidents in which police officers were killed by concealed handgun licensees<sup>61</sup> includes two incidents where charges are still pending. As with the homicide pending examples above, one of these incidents comes from annual state reports, and thus there are no details on who did it, if the killer has been convicted, and, oddly enough, VPC references no news accounts of this murder. It seems unlikely that the murder of a police officer would produce no news coverage.<sup>62</sup> The other still pending incident involves James Wonder, charged with the death of a police officer,



and still pending almost four years later.<sup>63</sup> While the criminal justice system works very slowly, the slow motion here may be because there seems to be some question as to whether the off-duty federal officer who James Wonder killed might have given the licensee legitimate reason to use deadly force.<sup>64</sup>

VPC also used Texas' annual report on concealed handgun licenses revoked to include three licensees convicted in calendar year 2008, and one in 2009.<sup>65</sup> VPC's data shows no news accounts of licensees convicted in either calendar year. These might have been convictions for murders committed before May of 2007, or that received no news coverage, or they might be, like the Michigan State Police report, clerical errors.

## **MAY-ISSUE STATE INCIDENTS & RETIRED POLICE OFFICERS**

While the VPC report argues against shall-issue laws, it includes ten incidents, with a total of nineteen deaths, in may-issue states (California, Maryland, Massachusetts, New York, Rhode Island). While these could be part of an argument against may-issue laws, they can hardly be evidence against shall-issue laws. In some cases, the incidents that VPC lists involve persons who would receive a permit in any may-issue state, such as retired Maryland police officer Charles "Pete" Richter Jr., who killed a neighbor in a dispute that is still pending.<sup>66</sup> Another example in a may-issue state is Nicholas Gianquitti, a retired Rhode Island police officer. Even according to VPC, Gianquitti "held a concealed handgun license as a privilege conveyed to former law enforcement officers." Even more troubling is that he was convicted for shooting a neighbor who had come to Gianquitti's door and punched him in the nose,<sup>67</sup> circumstances that might qualify as excusable homicide, not a criminal act—and in any case, took place in Gianquitti's home, where he needed no license. Other incidents involve licensees who committed murder in a may-issue state that did not recognize the killer's license.<sup>68</sup>

Even in the shall-issue states, some of VPC's incidents involve retired police officers—who are usually exempt from concealed weapon permit requirements, or are seldom refused issuance, even

in the most stringent may-issue states. One example is Ronnie Cook, a retired police officer in Texas who murdered his wife.<sup>69</sup>

## SOLE SUICIDES

A surprising number of the incidents listed by VPC involve a concealed handgun licensee who committed suicide, apparently with no one else killed. Some of these suicides VPC derived from annual state concealed handgun licensure reports; it is unclear how many of the other incidents that VPC reports which end in a suicide are included in those aggregates, and are thus double-counted.<sup>70</sup> It is not even certain that all of these 129 suicides were committed with firearms. Because we cannot verify that these 129 suicides derived from state reports or determine how many actually duplicate other entries in VPC's collection, there seems little point in giving much credence to them as indicative of a problem with shall-issue. Removing these aggregate suicides alone reduces the total death count by 45%—a most dramatic change.

In addition, the incidents derived from news accounts show there are two sole suicide incidents (where a licensee killed himself, and shot no one else).<sup>71</sup> While all suicides are tragedies, it is hard to see how a concealed handgun license, much less shall-issue licensing, leads to them. You do not need a concealed handgun license to own a handgun, and it is hard to see how the absence of such a license would prevent these suicides.

There is also one suicide that shows the misleading nature of VPC's claim that these were deaths caused by licensees. It involved a Kara M. Leonard who "was target shooting on Mother's Day with concealed handgun permit holder Ty Takaezu... Leonard used Takaezu's handgun to commit suicide..."<sup>72</sup> Leonard did not have a license. Takaezu did not shoot her. Target shooting does not require a concealed handgun license.

Removing these unverifiable and sole suicide incidents reduces the death count from 282 to 150.

## WHERE NO LICENSE IS REQUIRED

Many of these criminal homicides took place where no concealed carry license is required to carry a gun: the homes or businesses

of the licensees, or a violent rampage murder spree started in the licensee's home. A total of 38 incidents, totaling 72 deaths took place in such locations. Included in this total are two incidents in which four police officers were murdered.<sup>73</sup> It is hard to imagine that shall-issue laws could make any difference in such cases.

## WHERE NO LICENSE MATTERS

There are some cases where the licensees were breaking the law in carrying a gun even before they drew that weapon. When Bobby Ray Bordeaux Jr. went into a bar, drunk and carrying a concealed gun, he was already in violation of North Carolina law, which prohibits carrying a concealed handgun "while consuming alcohol or at any time while the person has remaining in the person's body any alcohol or in the person's blood a controlled substance previously consumed."<sup>74</sup> Similarly, Brian McGuire was convicted of "first-degree manslaughter and unlawful possession of a weapon on school property"—a place where his Kentucky concealed weapon permit was not valid.<sup>75</sup>

Another example is Justin Luckhardt, who was carrying concealed while intoxicated and in a bar in Michigan, when he murdered Kim Luchie.<sup>76</sup> Kevin Hoover was intoxicated when he shot and killed his father-in-law at a backyard barbecue, again a violation of Michigan law.<sup>77</sup> Vishna Beepot, who pulled a gun in the course of an argument in a bar in Lauderdale Lakes, Florida, was also clearly breaking the law, regardless of his license.<sup>78</sup> Justin Campos' "confrontation outside Lookers strip club" in Florida was almost certainly also a violation, since Lookers is described as a "full bar."<sup>79</sup> Matthew Culbertson, who killed a friend after a day spent drinking to stupidity, was in violation of Ohio law as well which prohibits carrying a gun while under the influence.<sup>80</sup>

Another example, not involving alcohol is Paul Warren Pardus, who killed his 84-year-old mother, a doctor, and himself at Johns Hopkins hospital in Maryland. While Pardus had a concealed handgun license issued by Virginia,<sup>81</sup> it was not valid in Maryland. Pardus certainly knew that he was in violation of the law when

carried the gun into Maryland. From a legal standpoint, Virginia being “shall-issue” was irrelevant to his actions.

We find ten incidents, totaling fifteen dead, involving licensees who were in violation of the law by having a gun with them at the time of the incident, well before they had any occasion to draw a gun.<sup>82</sup> These were not subtle errors, but gross and obvious violations of existing laws. It is hard to imagine that a person prepared to violate the state laws prohibiting intoxication while armed, or carrying a gun into a state where the licensee knows that their license is not valid, is going to be discouraged from such crimes by failure to get a license.

## **PREMEDITATED MURDERS**

Amanda Knight—for whom the evidence that she had a Washington State concealed handgun license is too scant to take seriously—was clearly engaged in a criminal act when she and three others forced entry into a home to commit a robbery that led to the death of one of the residents.<sup>83</sup> This was obviously a criminal act, and it is hard to imagine that not having a license would have prevented Knight from participating in this felony that led to murder.

Another powerful example is Troy Brake, who had a concealed handgun license. He murdered the Zimmer family so that he could rape and kill the 18 year old girlfriend of one of the sons. He was caught when he beat up a prostitute a month later, and police matched his gun to the Zimmer murders.<sup>84</sup> It is hard to imagine that Brake would not have committed this horrible crime just because he lacked a license to carry.

Perhaps the strangest of these incidents involves Mary Nance Hanson. She murdered her ex-daughter-in-law in a parking lot, having laid in wait for her. Her relatives were surprised that she even owned a gun. It appears that her concealed weapon permit was only three months old.<sup>85</sup> After killing her ex-daughter-in-law, she called 911 to report what she had done, and could not explain why. But when she came up for trial, she pled guilty, explaining that, “My physical health is deteriorating rapidly, and I do not believe it would be in the best interests of taxpayers or of myself to pursue a trial.” In court, she asked the judge to sentence her to death by

lethal injection. When told that the crime did not qualify for capital punishment, “Well, then, I guess I didn’t do a good enough job.”<sup>86</sup>

It would appear that once she discovered that she was going to die of congestive heart failure, she wanted the state to kill her. To that end, she bought a gun, obtained a concealed weapon permit, and murdered someone in a way that would be unambiguously horrible. It is hard to imagine that not getting a permit would have stopped someone this cunning and evil.

It is conceivable that shall-issue laws encourage people to carry guns who otherwise might not do so. It is also very unlikely that a person prepared to ignore the laws against rape, murder, and armed robbery, will be deterred by lacking a concealed handgun license.

We found 36 incidents (totaling 96 deaths) that were premeditated attacks where it seems that the licensee planned the attack in advance and, sometimes, had no intention of surviving. We determined that a crime was premeditated by including all first-degree murder convictions where premeditation appears to have been an element of the crime, as well as those crimes where there is clear evidence that the killer had planned the attack in advance. Many of the murder/suicides of ex-wives are clearly in this category, especially those that took place on the morning of final divorce decrees. It seems implausible that the killers who planned such murders would have been restrained by the absence of a license to carry.<sup>87</sup>

## **GUILTY, BUT BARELY**

There are a number of cases where, sometimes after many years of effort by the criminal justice system, licensees were found guilty. But one can only say, “barely guilty.” The sentences are so light as to suggest that while the licensee was in the wrong, perhaps he was not severely in the wrong. The alternative is that the prosecutor plea bargained down what seemed an otherwise unwinnable case. One example is Richard Calderon who was charged with murder. He had hit and run another car, and an off-duty, Texas State University police officer in her personal vehicle gave chase to get Calderon’s license plate number.

Calderon’s version is that “the front-seat passenger leaned out the window holding what appeared to be something shiny.”

Assuming it was a gun, Calderon fired, killing the thirteen-year-old girl in the back seat. Clearly, it wasn't, and a witness to the event denied that anyone leaned out of the front-seat passenger window.<sup>88</sup> Yet the resolution of the case suggests that prosecutors either found Calderon's self-defense claim strong enough to justify a plea bargain, or the circumstances were genuinely ambiguous. Calderon was given a Deferred Adjudication of Guilt for Manslaughter,<sup>89</sup> which means that upon completion of ninety days in county jail, restitution to the mother of the victim, and seven years of probation, "[T]he judge shall dismiss the proceedings against the defendant and discharge him." This "may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense."<sup>90</sup> If Calderon was clearly and utterly in the wrong, this would be an unconscionable sentence for the killing of a thirteen-year-old bystander.

Another example is Kathy Lowe. Lowe shot her husband, a retired investigator for the sheriff's department, to death in their home. Her version was that he was dying of a terminal illness, and had become increasingly violent and threatening because of renal failure, and that she feared for her life. The district attorney testified for the defense that David Lowe had admitted to threatening Kathy Lowe's life and that David Lowe "took a medical retirement from his job" because of his terminal health problems.<sup>91</sup> The special prosecutor assigned to the case claimed that Lowe killed her husband to profit from life insurance policies she took out on him about the same time that she applied for a pistol permit.<sup>92</sup> The fact that he was terminally ill and she needed to worry about paying the bills after her husband was gone might have been a less sinister motive for the life insurance.

Why did Lowe apply for a concealed handgun license? At the suggestion of the sheriff, her husband's boss.<sup>93</sup> After two mistrials in which juries could not agree on a verdict, she pled guilty to manslaughter, in exchange for probation—no time in jail or prison.<sup>94</sup>

Similarly, Johnnie Pulley was convicted of second degree murder for the killing of 17-year-old Brandon Colenburg.<sup>95</sup> Yet, in spite of this, Pulley received a suspended ten year sentence.<sup>96</sup> It suggests that there were some mitigating circumstances that while not excusing Pulley's actions indicated that there was more

going on behind the scenes than VPC's simple statement of the facts would indicate.

Another example is Willie Donaldson, who was initially charged with second-degree murder for shooting Matthew Hicks. Donaldson had responded to an "erotic services" ad on Craigslist, and a man and woman came over to Donaldson's house. The woman passed out in the Jacuzzi, at which point Donaldson claimed that Hicks attacked him, threatening to kill him. Donaldson was certainly seriously injured, making his claim of self-defense sufficiently plausible. The first judge who heard the case dismissed the charges because "the prosecutors had not met their burden of proof."<sup>97</sup> Several months later, Donaldson struck a bargain with prosecutors to plead no contest to manslaughter, "but he will not serve any jail time."<sup>98</sup> One might conclude that prosecutors sought to punish Donaldson for a death that came about because of an act of prostitution, not because Donaldson's actions were actually criminal.

Another very troubling conviction is James Matthew Menard. Except that he was trespassing in a gated community, he might well have successfully argued self-defense. During a confrontation with some teenagers, one of the teenagers pulled out an Uzi submachine gun, at which point Menard shot and killed him. But it turned out to be a toy Uzi. Menard was convicted of third-degree murder.<sup>99</sup>

While these incidents do not qualify as justifiable homicides, they are a reminder that not every incident that ends up with a guilty plea was completely unjustified.

## ACCIDENTS

A number of the deaths that VPC lists are accidents. Some of them are accidents that led to convictions for negligent manslaughter, a few were simply accidents, and some were accidents involving children who gained access to a gun, and fired it, with tragic results. However, not all the accidents are particularly relevant to the question of shall-issue. Accidents which took place within the licensee's home or business, where a concealed carry license is not required to possess a loaded firearm, would likely have taken place under may-issue or even no-issue laws. It is at least plausible that a

few licensees might not have bought a gun, or kept it loaded, except for shall-issue laws, but what percentage would be simply a guess.

There were eight deaths in eight accidents inside the licensee's home. A typical such incident was the death of Zacharia Nesbitt, a five-year-old who shot himself with his father's Glock 9mm pistol, which had been stored, loaded in a closet.<sup>100</sup> Some of the accidents are so unlikely that it is a bit hard to believe that they happened the way newspapers describe them—but the death of Julia Bennett seems, more than a year later, not to have led to any criminal charges. News accounts indicate that Hewart Bailey's two year old son found and fired a Glock 9mm pistol, killing his father's girlfriend. There is also some disagreement from the news accounts if the two year old was Bailey's son, or Bennett's son.<sup>101</sup>

There were 16 deaths in 16 accidents in other places, and which might be ascribed to the increased number of licensees caused by shall-issue. One rather typical (and inexcusable) accident involved Moises Zambrana, who was asked at church to show his 9mm pistol to another parishioner. He went into a closet, removed the magazine, and forgot to remove the round in the chamber. While explaining the pistol's safety features, he accidentally fired the gun, killing a 20-year-old on the other side of a wall.<sup>102</sup>

## **CONCEALED WEAPON? WHAT CONCEALED WEAPON?**

In some cases, these incidents did not involve a concealed weapon at all. Shawn Kortz appears to have strangled Michael Hollon in January of 2012—and it must have been quite a remarkable struggle, because “Hollon's body was in a pool of blood, and blood was splattered across the den walls and ceiling.” Kortz, an interstate trucker, “had been awake for more than 30 hours at the time of Hollon's death” and had just returned from a long-haul trip. This is clearly a violation of federal law concerning required sleep for truck drivers. One might wonder if whatever Kortz was taking to stay awake that long could explain the level of violence involved.

Kortz and Hollon had been drinking for several hours when the fight happened. Kortz has no memory of what happened, but



seems to be arguing self-defense (Hollon's blood alcohol level was .375 per cent—suggesting that Kortz's claim of a memory erasing drinking binge and self-defense might be true). What if Kortz had been armed? He was. He had his gun with him, and took it with him when left Hollon's house.<sup>103</sup>

Tony Villegas was another concealed handgun licensee who murdered by strangulation, as even VPC's account acknowledges.<sup>104</sup> It is hard to imagine how may-issue laws (or even a complete gun ban) would have made a difference in such a case.

Other situations involve long guns, either exclusively, or where the handgun was secondary to the rifle or shotgun as the killing weapon. It is hard to imagine that any of these 10 incidents, totaling 28 deaths, would have been different if the licensees had lived in no-issue or may-issue states.<sup>105</sup>

## **SITUATIONS THAT DON'T MAKE SENSE**

There are some incidents where VPC and police assume that the licensee was the killer because he committed suicide—but there remain troubling questions. We will not second-guess these reports, except to give one example that is a reminder that sometimes a simple solution wraps up a tragedy—but that does not mean that the simple solution is always and clearly right.

Concealed handgun licensee Austin Agee committed suicide two days after the murder of Lisa Davis, who Agee had just met for the first time. Agee left behind suicide notes that seemed to take responsibility for Davis' death, and told where her body was. Yet both Agee's family, unsurprisingly, and more surprisingly, even Davis' family, point to curious inconsistencies in the evidence that suggest someone else might have committed the murder. In particular, Davis had, shortly before her death, changed the beneficiary on her life insurance from "Chad Brantley to family members. She also told several people that 'if anything happens to me, you tell the police to look at Chad' and confided to some friends and relatives that she was 'a little afraid' of him." Chad Brantley was a Shelby County deputy sheriff with whom Davis had recently broken off an engagement,

and who still had a key to Lisa Davis' home. Police investigated Brantley, but cleared him, even before Agee's suicide.<sup>106</sup>

## **FAILURES IN EXISTING LAW ENFORCEMENT**

There are incidents in VPC's list that raise serious questions as to whether existing laws are being adequately enforced. In some cases, we may be seeing systemic problems that require states to revisit particular parts of their processes for issuing licenses. In some cases, we may be looking at rare clerical failures. Even a 0.1% error rate involving 100,000 licensees means 100 mistakes.

Some of the incidents do suggest that some states are not taking sufficient care to revoke licenses by those with serious alcohol problems, such as Bobby Bordeaux, Jr., who "admitted himself to area hospitals twice seeking rehabilitation for his alcohol abuse, but ended both treatments shortly afterwards." He had received psychiatric evaluations at a total of four hospitals in the region, because of his alcoholism. Bordeaux was so drunk the night that he killed Clifton Jackson in a bar that police were unable to even question him.<sup>107</sup> Similarly, while there is no news coverage that indicates John K. Gallagher III's alcohol problem should have been a matter of public record, the evidence suggests that Gallagher's alcohol and mental illness problems were quite severe.<sup>108</sup> Severe alcohol abuse is, unsurprisingly, a common factor in a number of these crimes.<sup>109</sup>

Other incidents suggest that police failed to revoke licenses when there was apparently sufficient authority, even under shall-issue laws. We are unable to verify that Brian Scott Kolesar actually had a concealed weapon license. But if he did have one, it would appear that police were not doing their job. Brian Scott Kolesar was involved in a "troubled relationship" with his girlfriend Julie Arnold, to the point that she obtained a protective order from the courts because she was afraid of him. He was booked January 25, 2011, some months before the murder/suicide, for violating a temporary protective order (apparently a different TPO than the one in effect at the time of the murder/suicide). This should have been sufficient reason for revocation of a concealed carry permit (assuming that

he had one—the only source for this claim appears to be Arnold). Curiously, sheriff's deputies had been at the home hours before the killings, and in spite of concerns about Kolesar's mental health, took no action to disarm him.<sup>110</sup> This raises serious questions as to whether Kolesar actually had a license, or simply told Arnold that he had one.

Johnny Swack murdered his former wife. This was not a surprise to his sister. She had contacted police because her brother had been “treated at a mental institution just weeks before the murder.” They declined to take any action, because he had a permit. In the weeks before the murder, he had been trying to turn himself in at police stations, but he wasn't wanted, so they declined to arrest him. She warned the mental hospital “he's paranoid schizophrenic. He has guns and y'all need to do something about him.”<sup>111</sup> So the hospital released him. It seems hard to believe that there was no basis for suspending his license if he had been hospitalized for schizophrenia. If Tennessee law actually has a loophole in this respect, it needs correction.

In the aftermath of Michael Joe Hood's murder of his sister, her ex-husband, and their son, the sister of one of Hood's victims asked, “I don't understand why someone who has a history of mental illness can have a legal permit to carry a gun.”<sup>112</sup> Tennessee law has a detailed list of mental illness disqualifiers. It might be worth examining whether Hood was already within one of these categories, or if there might be an argument for broadening the disqualifier list.

Clinton Gallagher murdered his son and committed suicide in Lone Jack, Missouri. He had pled guilty to misdemeanor domestic violence in 2009, and the Jackson County sheriff revoked his license because of it. Amazingly enough, he successfully sued and won, demanding restoration of his license—in spite of a federal law that prohibits domestic violence misdemeanants even possessing a firearm in one's home, much less having a concealed carry license.<sup>113</sup> It appears from news coverage that the Jackson County sheriff does not know this: “Police say that someone convicted of domestic violence isn't normally supposed to be able to get a conceal and carry permit, but they admit that a misdemeanor conviction would not have prevented Gallagher from possessing a gun in his own home.”<sup>114</sup> Gallagher's license was irrelevant to this crime, which took

place in his own home, but the failure of Jackson County police to even be aware that Gallagher could not even own a gun, much less carry it concealed, may well have contributed to it.

Jeremy J. Hobbs murdered Ahmed Cepalo outside a pool hall in Boise, Idaho March 14, 2009. Hobbs had an Idaho concealed weapon license. Yet, criminal charges were pending against him from December 23, 2008 for misdemeanor battery.<sup>115</sup> A person awaiting trial for a misdemeanor crime of violence is ineligible for a concealed weapon license in Idaho.<sup>116</sup> It seems likely that Hobbs would have carried without a license (whether Idaho was may-issue, shall-issue, or no-issue). He was, after all, arrested for doing so on April 8, 2002 (along with drug paraphernalia possession), and was allowed a “withheld judgment,” conditional on completing probation.<sup>117</sup> Idaho should determine why Hobbs’ license was not suspended when he was charged with misdemeanor battery, and take corrective actions.

Jason Kenneth Hamilton is perhaps the most disturbing case of all. Hamilton had a domestic violence misdemeanor conviction for attempting to kill his girlfriend by strangulation. A domestic violence misdemeanor completely prohibits possession of any firearm. Yet he not only had an Idaho concealed handgun license, but more amazingly, a National Firearms Act tax stamp (what the federal government requires to purchase or possess a *machine gun*).<sup>118</sup>

Hamilton had been subject to a mental illness evaluation a few months before his rampage because of a suicide attempt using prescription drugs. During that evaluation, he told the doctor evaluating him that he would not do it this way again: “if he wanted to commit suicide he wouldn’t do it this way, but he would take a whole bunch of people with him, either by a shooting or by a bomb.” He was released from the hospital.<sup>119</sup> Idaho law would certainly have allowed Hamilton’s involuntary commitment based on those statements.<sup>120</sup> Commitment would have been sufficient reason to revoke Hamilton’s concealed carry license and his federal tax stamp.<sup>121</sup> Of course, Hamilton not having a license would have made no difference. This was a premeditated mass murder, committed with a rifle. Hamilton had no intention of surviving.

William Garrido, in spite of pleading no contest to aggravated assault in 1997, had a concealed handgun license in Florida.<sup>122</sup> Equally disturbing was the murder by Adam Hill, who had a long

history of mental illness including hospitalization, had separated from “the military under some questionable circumstances that involved a firearm,” and had a criminal history that suggests the criminal justice system in Florida was not working. People “who knew Hill and were aware of his mental problems called the St. Augustine Police Department and St. John’s County Sheriff’s Office with concerns that Hill had a gun. Their fear, they say, was that Hill didn’t understand the concept of what a firearm could do.”<sup>123</sup> Like Idaho, Florida should figure out how this happened.

Marc Kidby committed suicide on April 1, 2008. He had made two previous suicide attempts, both in public. His wife received a protection order from the courts that should have led to immediate suspension of his license and seizure of his weapons by the police. But neither took place; the Athens County, Ohio sheriff’s department “apparently was unaware that the law requires sheriffs to immediately suspend gun permits when a protection order is issued against permit holders.”<sup>124</sup>

Moises Gonzalez was charged with burglary two weeks before his multi-county crime spree in Texas on December 30, 2008. Under Texas law, his license should have been suspended pending resolution of this criminal charge.<sup>125</sup> It does seem most unlikely that, in the absence of a license, Gonzalez would not have engaged in the crimes of murder, kidnapping, vehicle theft, brandishing firearms, and “eluding police in high-speed chases.”<sup>126</sup> Nonetheless, his license should have been suspended when charged.

Roger Troy’s murder/suicide of Alissa Blanton might also have been prevented. A week before, she had requested a protective order against Troy because he was stalking her—and a judge decided that he did not have enough information to decide whether Troy’s actions qualified as stalking: “bombarding her with profane-emails, sitting outside her home and following her to her job in Orlando.” He had blocked her car in the parking lot at her job as well.<sup>127</sup> It is not clear that Florida suspending Troy’s license would have prevented this crime by a man clearly obsessed with a woman with whom he had no previous relationship; but if this does not qualify as stalking, what does?

There are some situations where we do not know if police failed to enforce existing law, or if the victims failed to inform police of

the threat. Anthony Rodecker had a troublesome relationship with a former girlfriend. There was certainly reason to be concerned what he might do, and perhaps sufficient reason for police to have revoked his license and pursued criminal charges. “He’d been barred from the City Limits Cafe, where she bartended, and her relatives told her to stop giving in when he threatened to kill himself if she wouldn’t see him.” Rodecker murdered her and then killed himself in October of 2008.<sup>128</sup> A court would have had no problem issuing a civil protection order against Anthony Rodecker—which would have caused suspension of his license.<sup>129</sup> There is no mention of a civil protection order—and in light of Rodecker’s behavior, it would have been a very good idea. But Rodecker’s actions, murdering Brenda Keeler on her birthday (which implies premeditation),<sup>130</sup> suggest that no law alone was going to make much of a difference.

We have identified 8 incidents, in which a total of 13 deaths took place, where existing laws concerning issuance or revocation of permits do not appear to have been enforced.

## **DOMESTIC VIOLENCE**

A very large fraction of these crimes are domestic violence: 53 incidents, totaling 91 deaths. This is unsurprising; domestic violence remains a major problem in our society, and most of these incidents were murder-suicides. These are among the hardest crimes to prevent, for a variety of reasons: the killer often has no intention of facing trial; the relationships create opportunities for the killer to approach the victim in a way that a stranger could not; and in the incidents in this sample, the killer is almost always a man, who seldom needs the mechanical advantage of a firearm. By comparison, female victims and children are especially vulnerable because of the physical strength differential. As tragic as these incidents are, shall-issue laws are probably an advantage in such situations, because a woman is in a better position to defend herself from a murderous intimate partner with a gun than without.

## MENTAL ILLNESS

At least 11 of these incidents, totaling 32 deaths, involve killers with what appear to have been significant mental illness problems.<sup>131</sup> However: two of those incidents, totaling seven deaths, involve person who by VPC's own admission either did *not* have a license,<sup>132</sup> or the evidence strongly suggests that they did not.<sup>133</sup> In another case, a licensee was actually disarmed by police six months before the incident, but a judge ordered the guns returned after a psychological evaluation. The incident in which Paul Kallenbach killed a convicted felon after a verbal confrontation in a convenience store can be interpreted several different ways, but it does suggest that the concerns that caused police to disarm him originally had merit.<sup>134</sup>

While it might be tempting to assume that states are failing to do their job in performing mental health background checks, privacy issues may be the larger problem. Nonetheless, it would be worthwhile for states to examine whether their existing statutes sufficiently deal with the problem of mentally ill persons who apply for permits. The Jason Hamilton incident is an indicator not only of defects in enforcement of Idaho's existing concealed weapon permit law, but a reminder that the policy of deinstitutionalization—the conscious decision to make it very difficult to hospitalize mentally ill persons against their will—has substantial consequences.<sup>135</sup>

## THE BOTTOM LINE

Because of the enormous number of errors contained in VPC's list, the appropriate count of incidents and deaths which can be attributed to shall-issue concealed carry laws is what is left after removing the following: incidents in which the killer clearly did not have a license (8 incidents, 25 deaths); where the licensee did not kill anyone (3 and 3); sole suicides (3 and 3); where the murder took place in the licensee's home or business (38 and 72); where an accidental death (even if it eventually led to a criminal conviction) took place in the licensee's home or business (8 and 8); incidents that show clear evidence of premeditation (36 and 96); where no gun was used (2 and 2); which took place in may-issue states, or to

retired police officers who would certainly have received a license regardless (10 and 19); where long guns were primarily used for the crime (8 and 26); incidents where the licensee was clearly in violation of existing law in advance of the incident (10 and 15); as well as the incidents derived from tabulations that make it impossible to verify if it is accurately described or to determine whether VPC is double-counting (120 deaths).<sup>136</sup>

We are giving the benefit of the doubt to VPC concerning those cases where we could not verify a concealed weapon license (even though their track record on this is less than perfect), which constitute 25 incidents and 219 deaths. We are also giving the benefit of the doubt to VPC concerning the 21 incidents (23 deaths) that appear to be pending, some of them many years after the deaths.

Because there is substantial overlap in these categories, we cannot simply subtract all of these numbers from VPC's total. Instead, we must remove them row by row from the spreadsheet. What we are left with are 79 incidents, totaling 92 deaths—still a sobering number, even over a period of more than five years.

A September 2011 compilation of published data on concealed weapon permits shows for 26 states for which such data was readily available, there were 5,538,323 current licensees.<sup>137</sup> While some states issue to non-residents, and thus this count of current licensees includes some people who have licenses from more than one state, it seems likely that the number of unique individuals for these 26 states, which includes 62.5 per cent of the U.S. population,<sup>138</sup> is more than five million.

In addition, the 23 states for which data was not available include a number of shall-issue states where these laws are decades old (such as Washington State, since 1961) or where the gun culture is strong (such as New Mexico and Alabama). Extrapolating from data for these 26 states for the other 23 (Illinois does not issue permits) suggests that about 7.6 million Americans have a concealed handgun license. Using VPC's data, corrected for situations where shall-issue laws have no direct effect on these deaths, this indicates that shall-issue laws at worst are responsible for 0.24 murders per 100,000 concealed weapon licensees per year since May of 2007, or 4.6% per cent of the average U.S. murder rate of 5.23/100,000 people for the years 2007 through 2010.<sup>139</sup> And this is still assuming that all 79 of



the incidents in the filtered list are licensees and all of the pending cases lead to conviction. We were unable to verify a license for 7 of these remaining incidents, totaling 13 deaths. In addition, 14 of the filtered incidents, totaling 15 deaths, remain pending, some almost four years later. In some cases, the lawyers have been busy; in others, we suspect that prosecutors dropped criminal charges, and it did not make the news.

There are some legitimate questions as to whether some states could do a better job of suspending, revoking, or not issuing permits to persons who are clearly not qualified under existing law. There are some serious problems with our system for dealing with mentally ill persons, and unfortunately, concealed handgun licensing is only part of the problem. There is some room for improvement. What is quite clear is that VPC's data, carefully analyzed, does not make a case that shall-issue laws make Americans less safe.

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**TESTIMONY OF  
DAVID T. HARDY  
BEFORE THE SENATE  
COMMITTEE ON THE  
JUDICIARY:  
REGARDING THE ASSAULT  
WEAPONS BAN OF 2013, S. 150**

**SUMMARY**

“Assault Rifles” The very term “semiautomatic assault rifle” is internally contradictory. In World War II, rifles of standard military power could not be made full automatic, because the recoil (“kick”) was too powerful. The “assault rifle” concept involved cutting the cartridge’s power, and thus its recoil, in half, so that it could be controlled in full automatic fire. An assault rifle redesigned to be semiautomatic is simply a semiautomatic firing cartridges with half the traditional military power.

Definition by trade name. Since “semiautomatic assault rifle” is contradictory and meaningless, legislation supposedly directed at such firearms must define the term arbitrarily. S. 150 lists rifles by their trade name and declares them “semiautomatic assault rifle,” even though many fire cartridges of full military power, or are already tightly regulated, or do not exist in the United States. It bans guns that are functionally identical to those it exempts from being banned – shooting the same cartridge from the same magazines, the main difference being that the exempted rifle has a wooden stock. In short, S. 150

- Arbitrarily bans guns that have almost nothing in common, and



- Arbitrarily bans some guns and exempts other that are functionally identical.

Definition by features. S. 150 also bans firearms that have certain features. The features have nothing to do with crime, and are sometimes based on myth. One banned feature is the “pistol grip” – but almost all modern rifles and shotguns have a pistol grip. If “separate pistol grip” is meant, such a grip is an artifact of re-designing the rifle stock so as to reduce tendency of the barrel to flip up during recoil. Another banned feature is the folding stock – but the AR-15 folding stock only shortens the rifle by three inches, hardly making it concealable. A third is the presence of a grenade launcher on the barrel – but functional rifle grenades have long been outlawed and are unobtainable, so there is nothing it can launch. It cannot be said that any of these measures will affect criminal use.

The same may be said of banning new manufacture of large capacity magazines. In a mass slaying, police response time averages around twenty minutes. The criminal has plenty of time to reload. Moreover, the great majority of mass killers have planned carefully and carried two, three, or more guns.

It is sometimes claimed that these are “weapons of war” that “belong on a battlefield.” With the exception of full automatic fire (fire like that of a machine gun, of which semi-automatics are by definition not capable)<sup>1</sup>, there has historically been little distinction between military and civilian arms. In the 1920s, the Director of Civilian Marksmanship sold Krag military rifles to the public, and after WWII it sold Springfield 1903s and M-1 rifles and carbines. Books were published (I have one in my library) showing how to convert these into deer rifles and target firearms. Manufacturers created civilian rifles based on military designs. At many points, civilian arms were more advanced than military ones. Americans for a century used rifles while their military stuck to smoothbores. Our civilians used repeating rifles for twenty years while the military stayed with single-shot ones. Civilians were hunting with semiautomatics (the Remington Model 8) a quarter century before the military went semiautomatic with the M-1. Other than full automatic fire, there simply is no line between military and civilian arms.

## NATURE OF THE “SEMIAUTOMATIC ASSAULT WEAPON” CONCEPT

“Assault rifle” is a rough translation of the German “sturmgewehr,” or “storm-rifle.” The concept underlying this class of firearms dates to World War II. Most of the nations involved in that conflict entered it with semiautomatic or bolt action rifles firing cartridges that were remarkably similar, developing somewhat over 2,000 foot-pounds of energy, and designed to be effective out to 600-800 yards. The United States, for example, entered the war with the M-1 Garand, firing the .30-06 cartridge in semiautomatic mode, i.e., one shot per trigger pull.

These cartridges were too powerful for full automatic fire from a standard weight rifle: no soldier could stand the recoil or control the rifle at full automatic, with the rifle slamming his shoulder ten times a second or more.

During the War, however, German engineers realized that infantry battles occurred at 200-300 yards, not at 600-800 yards. The existing military rifles were greatly over-powered at the closer ranges.

The engineers reasoned that if the military cartridge’s power were cut by about half, it could be fired at full automatic, and still suffice for conflicts at a realistic 200-300 yards. This gave rise to the first sturmgewehr, the MP 43/44, firing a smaller and less powerful rifle cartridge at full automatic.

Thus any true “assault rifle” is capable of full automatic fire; that is its core purpose. A “semiautomatic assault rifle” is simply a semiautomatic rifle with half the power of a standard WWII semiautomatic. To give a concrete example, we can compare two semiautomatic rifles, the M-1 of World War II, and the modern AR-15:

Rifle	Cartridge	Bullet Muzzle Energy
M-1	.30-06	2,400 foot-pounds
AR-15	.223	1,250 foot-pounds

So we must ask what is the origin of the idea that there is such a thing as a “semiautomatic assault rifle,” and that it is somewhere

especially dangerous? In 2011, 323 homicides were committed using rifles of any type.

This is 2.5% of U.S. homicides; over twice as many were committed with bare hands. Of that 2.5%, “semiautomatic assault rifles” are a fraction, and likely a small one. Why is this unknown, but tiny, fraction of homicides the focus of so much concern and effort?

We can precisely pin down the origin of the idea that “semiautomatic assault weapons” should be a legislative focus.

In the late 1980s, the Violence Policy Center proposed it as a way to give new life to the quest for gun control, noting “It will be a new topic in what has become to the press and public an ‘old debate,’” and that “Efforts to restrict assault weapons are more likely to succeed than those to restrict handguns.” It explained that these rifles’

“menacing looks, coupled with the public’s confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons.”<sup>2</sup>

The idea caught on. Organizations advocating gun control quickly dropped “handgun” from their name and inserted “gun” to reflect an agenda increasingly aimed at rifles. The organization long known as “Handgun Control Inc.” became “The Brady Campaign to Stop Gun Violence.” “National Coalition to Ban Handguns” became the “Coalition to Stop Gun Violence.”

## **THE SCOPE OF THE SECOND AMENDMENT: “FIREARMS IN GENERAL USE”**

*Heller v. District of Columbia* noted that “*Miller* said, as we have explained, that the sorts of weapons protected were those ‘in common use at the time.’” 128 S.Ct. at 2817. I have elsewhere noted my difficulties with this test<sup>3</sup>, but it is clear that the AR-15 platform has become the epitome of a firearm “in common use.”

I refer to it as a platform, since the AR-15 is “modular”; its receiver has two parts: an upper receiver into which the barrel mounts, and a lower receiver, which holds the firing assembly, and mounts the buttstock and lower grip. The two can be disconnected in about a minute. By mounting another upper receiver and barrel, an AR-15 can be enabled to fire a wide range of rifle and handgun cartridges, and the length and weight of the barrel can be changed to suit the owner’s needs. A single rifle can thus suffice for target matches, law enforcement, and hunting small and large game. While other firearms can be re-barreled to a new caliber or cartridge, this is generally work that can only be done by a gunsmith with specialized tools. An AR-15 owner can, however, switch in a minute between .223 or .22-250 for small game and target competition, 6.8 mm for deer hunting, and .50 Beowulf for home protection or larger game.

The AR-15 is probably the semiautomatic rifle in most common use by Americans today. Assessing this is not a simple task, because rifle manufacturers are required to report to the government only the total number of rifles made, not break that number down by design. I base this conclusion on the following:

1. A friend and fellow researcher, Mark Overstreet, has compiled a breakdown of rifle manufacturers who produce only AR-15 type rifles. In 2008, the most recent year for which data was available, these manufacturers produced 22% of American civilian rifle production.
2. There are also many manufacturers who make AR-15s together with other firearms, and this number is rising. For example, the handgun manufacturer Smith and Wesson recently brought out two rifles, both of them AR-15 types. Ruger Arms, which manufactured the AR-15’s main competition, the Ruger Mini-14, has now brought out its own AR-15 platform rifle.
3. In 2010, the National Shooting Sports Foundation surveyed over 8,000 shooters. The results indicated that about 8.9 million Americans went target shooting with AR-15 type rifles in the previous year.<sup>4</sup>

4. A 2012 survey by the National Shooting Sports Foundation found that 26.3% of shooters owned an AR-15-type firearm, up from 18.1% the previous year. In addition, 21% of shooters who did not already own one planned to acquire one in the next year.<sup>5</sup>

Based on these data, it is clear that the AR-15 platform qualifies as a firearm “in common use.” The same would be true of the AR-15’s standard magazines, which hold 20 or 30 rounds. The number of these in use (many of them sold as surplus by the government itself) is certainly in the tens, and perhaps in the hundreds, of millions.

Of course, the AR-15 is only one firearm that would be banned under proposals such as S. 150. To gain an estimate of how many would be banned, I consulted the 2012 Gun Digest, a 562-page book giving an extensive list of firearms in current production. Since the banned features are cosmetic, I examined those semiautomatic rifles that had images shown. S. 150 would ban 51 of the 57, or 89%, of the semiautomatic rifles so listed. S. 150 clearly restricts rifles “in common use,” and which are thus constitutionally protected.

## **PERMISSIBLE RESTRICTIONS**

Of course, constitutionally-protected activity is subject to some restrictions. Freedom of speech does not protect blackmail threats, and freedom of religious belief does not generally protect illicit action based on that belief. The Heller decision indicates that arms restrictions must pass some level of heightened scrutiny – either strict scrutiny or intermediate review – which alike require proof of some relationship to genuinely (i.e., not in theory or speculation) achieving an important legislative goal, while minimizing unnecessary impact on the protected activities. There are two considerations here, relating to the persons affected and to the arms regulated.

## **PERSONS AFFECTED**

Police and “civilians” own firearms for the same reason: self-defense against criminal activity. It is difficult to justify any legislation

that would bind one but not the other, when both have the same purpose and need. Law enforcement officials today commonly carry handguns with large capacity magazines, and the AR-15 is a popular squad car gun.

The Department of Homeland Security recently sought bids for 7,000 rifles in .223 caliber, with pistol grips and folding stocks, each with two 30 round magazines.<sup>6</sup> They were not to be called “assault rifles,” let alone “weapons of war,” but rather “personal defense weapons.” I would submit that private citizens also need “personal defense weapons.”

Even less explicable are laws which (like S. 150) exempt not only serving LEOs, but also retired ones. Retirement includes disability retirement, which includes disability due to mental issues. A measure which imposes restrictions on private citizens that are not imposed on government retirees found to suffer from mental disorders is plainly arbitrary and cannot be justified under the Second Amendment.

**SCOPE OF REGULATION**

As noted above, “semiautomatic assault rifle” is internally contradictory and thus meaningless. A “semiautomatic assault rifle” is simply a semiautomatic rifle of about half standard military power. Drafters of legislation are thus forced to define what they would restrict in ways that are arbitrary and irrational.

One approach is to ban rifles by name; this is exceptionally arbitrary, since it can ban one firearm while allowing others with exactly the same capabilities to be made and sold. S.150 bans the AR-15 platform but not the Ruger Mini-14 (indeed, the Mini-14 is expressly exempted from any ban), even though both firearms are functionally identical. Here is a simple comparison of the two firearms:

	Cartridge	Standard Magazine	Length	Weight
AR-15	.223	20-30 rounds	35.5”	6.3 – 6.9 lbs
Mini-14	.223	20-30 rounds	37”	6.7 – 7 lbs

The two rifles are functionally identical. The main difference is that the Mini-14 has a conventional wooden stock and looks “traditional.” Restrictions upon a constitutional right cannot be based on whether an arm has a wooden or plastic stock.

The other approach is to ban rifles with certain features, cosmetic in nature, affecting appearance but not function. To take some examples, from S.150:

Grenade launcher on end of barrel. Any real, functional, rifle grenade is so tightly regulated as to be impossible to obtain. A launcher for one is a matter of appearance, not of function. S.150 strangely includes “rocket launchers.” To the best of my knowledge, no one has ever developed a rifle-mounted rocket launcher, probably because its exhaust would set the user on fire.

Flash suppressors/threaded barrels. The flash suppressor is a small structure at the end of the barrel, designed to minimize the firearm’s flash at night. With modern ammunition, fired at semi-automatic rates, it is nearly impossible to see the flash, even without such a suppressor. I have verified this by firing an AR-15 with and without the suppressor in a completely dark rifle range. This may explain why some firearms (e.g., the AK-47) have no suppressor. Again, this is not something that has any effect on function or on criminal use.

There is another structure that can be put on the end of the barrel, known as a muzzle brake. This diverts gasses sideways, thereby reducing recoil. Under the 1994 ban—

The picture on the left is of a flash suppressor, and forbidden. The one on the right is a muzzle brake, and allowed.

The main difference is that the flash suppressor has its slits



parallel to the barrel, and the muzzle brake has them running at right

angles to it. Changing the angle of the slits cannot have any effect on crime. This is arbitrary and thus unconstitutional.

S. 150 attempts to sidestep the issue by banning any firearm with a barrel threaded to take any device. In that event, flash suppressors and muzzle brakes alike will simply be silver-soldered in place, rather than held by threads. S. 150 is directed at cosmetic features, but in this case will not affect even those “Pistol grips.” S. 150 lists this as a banned feature. I put this in quotations since almost all modern rifles and shotguns have a pistol grip.

The rifle above (a 1903 Springfield) has no pistol grip; the rifle below (a modern Remington deer gun) has one. Such a grip simply provides a more comfortable position for the rifleman’s hand.

Indeed, S. 150 defines the term broadly, to include almost



anything and any rifle: “The term ‘pistol grip’ means a grip, a thumbhole stock, or any other characteristic that can function as a grip.” By that definition, even the 1903 Springfield (and for that matter, a 17th century musket) has a “pistol grip.” They have parts of the stock that are designed to be “gripped,” which suffices under S. 150.

What was intended, I presume, is a pistol grip separate from the buttstock, the portion of the stock that leads back to the rifleman’s shoulder. This is the definition used in the 1994 ban, but it is absent from S. 150. An example:

Here, the pistol grip is separate from and below the buttstock. The separate pistol grip is a byproduct of designs that raised the



buttstock, in order to reduce “muzzle flip.” When a rifle fires, the recoil (or “kick”) comes back along the line of the barrel. Traditionally, the line of the barrel would pass well above the center of the shoulder. (visualize, on the above three images, the line of the



barrel and the center of the shooter’s shoulder). This causes the rifle to flip up in recoil. This was undesirable in full automatic fire, since only the first shot would go where it was aimed, the following shots would tend to go high.

The solution was to move the shoulder stock higher, closer to the line of the barrel, thus making the recoil push the shooter straight back, without the barrel flipping upward. But if the pistol grip remained integral with the buttstock, the hand holding the grip would be twisted into an unnatural position. The solution was to make the pistol grip separate from the buttstock. This result was an artifact of the engineering decision to raise the buttstock.

With semiautomatic rifles, the problem of the rifle climbing during firing a burst does not exist. The separate pistol grip is a matter of appearance, not of function. Again, this has no effect upon criminal use, and thus is arbitrary and impermissible as regulation of a constitutional right.

*Folding or Telescoping Stocks.* These were originally designed for paratroopers, who had to jump through a narrow hatch. They remain in use because some like their looks, and they make it a little easier to exit from a vehicle. I emphasize “a little.” Collapsing the AR-15’s folding stock shortens the rifle an entire three and half inches, from 35.5” to 32” in length. It hardly makes it “concealable.” Again, an arbitrary restriction is imposed.

*Barrel shroud.* It is sometimes stated that the barrel shroud is intended to protect the shooter’s hand from a hot barrel, and

S. 150 makes exactly this statement. While this cannot be ruled out, I seriously doubt it. American rifles have been fitted with its equivalent – a wooden upper handguard – since the Krag rifle of 1892, which was a rather slow-to-reload bolt action rifle.

Further, on many rifles (1903 Springfield, the 1898 Mauser) the “handguard” doesn’t cover the area above where the shooter’s hand would rest, while on others (the Krag, the 1903 Springfield, the British Enfield), it extends almost to the end of the barrel, where the shooter’s hand cannot reach.

A more likely explanation was that these devices were meant to protect the barrel from damage during rough handling. On the AR-15, this would certainly be the case. The AR-15’s shroud protects the gas tube, a small and easily bent or crushed aluminum tube atop the barrel that carries powder gasses back to work the action. What such a barrel shroud would have to do with criminal use is beyond me.

To sum up: the term “assault rifle” has a specific meaning, but requires that the firearm in question be capable of full automatic fire; that is the reason for halving its power. If made into a semi-automatic, it is simply a semi-auto with half full military power.

Because “semi-automatic assault rifle” is a contradiction in terms, legislation aimed at this fiction must arbitrarily focus upon considerations such as a firearm’s trade name or its appearance (down to a bayonet lug or where the grip is located). S150 takes both approaches.

I have outlined above why the list of cosmetic features is meaningless and arbitrary. S. 150’s attempt to ban guns by name fares no better. The listed guns include:

The FN-FAL, a full-size semiautomatic rifle in .308 Winchester, comparable to WWII full power military cartridges, and not an “assault rifle” by any possible definition.

The HK91, CETME Sporter, AR-10, L1A1 Sporter, and the SAR-48, which are the same, and shoot the same cartridge.

The Thompson M1SB, which shoots a pistol cartridge and is covered by the National Firearms Act (meaning the purchaser

must register with ATF and go through an FBI fingerprint check).

The Daewoo K1 and K2, which are full automatic and require the same registration (I can find no indication that there even are any of these in the U.S.).

The Steyr AUG, which is a collector's item costing \$2,000 - \$5,000.

In short, the named firearms appear to be chosen in a completely arbitrary manner, including full size rifles of full military power, rifles that shoot low-power pistol cartridges, firearms already required to be registered, rifles that apparently do not exist in the U.S., and expensive collector pieces. Such arbitrary restrictions cannot be justified as limits on a constitutional right.

### **“SEMIAUTOMATIC ASSAULT RIFLES” AND THE QUESTION OF SELF-DEFENSE.**

As noted above, the Department of Homeland Security is even now soliciting bids for 7,000 “Personal Defense Weapons,” meeting the definition of “Semiautomatic Assault Weapons,” each to be delivered with two 30 round magazines. Americans who are not government employees have similar needs for “Personal Defense Weapons.”

Here in the southwest, no sane person approaches the border without the ability to defend themselves: the odds are running across drug or people smugglers who resent your presence and are prepared to give a pointed display of their displeasure are simply too high. I am informed by ranchers (and by local criminal defense attorneys) that marihuana smugglers commonly carry pistols, but cocaine smugglers (who carry less of a load) favor rifles.

A worse risk is encountering a “rip crew,” such as the one that murdered BP Agent Brian Terry: the only thing more dangerous than running into a members of a drug cartel is running into people who make their living robbing drug cartels.

Among these ranchers, the AR-platform is a favorite. It is lightweight and can easily be carried, accurate far beyond pistol

ranges, and gives the ability to protect against gangs of drug smugglers.

### **OUTLAWING PRIVATE FIREARM SALES (I.E. THOSE THAT DO NOT GO THROUGH A FEDERALLY LICENSED DEALER).**

This is not a portion of S. 150, but deserves some comment. Three reflections are appropriate here.

First, claims have been made that about 40% of firearms are acquired through private sales. The only evidence here is a 1994 survey that involved only 251 respondents. The conclusion was that 17% had acquired from a member of the family, 12% from a friend, and 4% at a gun show.<sup>7</sup> The legislative proposals that I have seen would exempt transfers between family members, and so (if this small sampling is accurate, and it may not be)<sup>8</sup> we are at most talking about 16% of acquisitions, not 40%.

Second, claims have been made that gun shows are a source of criminal guns. Gun shows probably have an exceptionally high percentage of off-duty police in attendance, and thus are unlikely to attract criminals. The Bureau of Criminal Justice Statistics has done two surveys, each of thousands of incarcerated criminals. Those who possessed a gun were asked for its source. Both surveys found that under one percent named gun shows as their source: 0.6% in one survey, 0.7% in the other.<sup>9</sup>

Third, a ban on private sales will be unenforceable until far in the future. BATF reports on tracing indicate that the average time between a traced gun's first retail sale, and its tracing (which reflects when it came to the attention of police, for whatever reason), is over eleven years. So for a great many years into the future, the average firearm will have been circulating before the ban, and thus could have acquired in a private sale.

Fourth, even decades into the future, it will be difficult to prove a case of illegal private sale, unless the suspect helpfully confesses. Suppose a person with a firearm comes to the attention of law enforcement, and tracing shows the firearm was first sold at retail, to someone else, after the effective date of the ban on private sales.

The government still doesn't have a case. It still must be shown, beyond a reasonable doubt, that the transfer to the present possessor did not involve passing it, used, through a licensed dealer, and to prove that BATF must examine the records of every licensed dealer in his State. This is an impossible burden in a simple firearms possession case.

These legal problem could be solved in one of two ways, either of which, I submit, is constitutionally unacceptable, or practically impossible. Congress could, in addition to the private sales ban, either:

1. Impose national firearm registration, covering all firearms in private possession,<sup>10</sup> or
2. It could make all firearm possession illegal, period, providing for a defense if the gun owner can prove they bought the gun before the effective date of the ban, or bought it from a licensed dealer after the ban. Then anyone who possesses a firearm could be arrested and indicted on that possession alone, and be made bear the burden of proving the legality of their acquisition of the firearm at trial.

Absent (1) or (2), a private sales ban could not be enforced. (1) would require greater precision than appears possible at this time,<sup>11</sup> and (2) would be, I submit, clearly unconstitutional, since it treats exercise of a constitutional right as presumptively a crime.

## **LARGE CAPACITY MAGAZINES**

S. 150 would "grandfather in" existing magazines. As I note above, the number of AR-15 magazines alone in private possession numbers in the tens and perhaps hundreds of millions. Add in large capacity magazine for all other firearms and we are certainly over a hundred million. S. 150 accordingly cannot be expected to have any effect on criminal misuse.

Even if all magazines of this sort could be made to vanish, S. 150 could have little if any effect on mass slayings. Most of those killers prepare in advance, and so commit their crimes while carrying more than one firearm. The Columbine killers carried two shotguns,

two pistols, and a carbine. At Virginia Tech, Cho carried two pistols. The Aurora, Colorado killer began with a shotgun, then switched to a rifle (which jammed) and to a handgun. The killer at Newtown apparently had a rifle and two handguns, plus a shotgun in his car. Under those conditions, the size of the magazines in the criminal's guns determines nothing.

It is also noteworthy that S.150 classifies as an assault weapon any shotgun whose magazine can hold more than five rounds of ammunition: "a fixed magazine with the capacity to accept more than 5 rounds." This would encompass almost all semiautomatic shotguns. A shotgun's magazine capacity is traditionally expressed in terms how many 2 ¾ inch or 3 inch shells it can hold.<sup>12</sup>

In recent years, however, ammunition manufacturers have produced low-recoil ammunition that is appreciably shorter than this – 2 inch, and even 1 ¾ inch shells. A shotgun whose magazine holds five 2 ¾ inch shells can easily hold six 2 inch ones; a shotgun that can hold five 3 inch shells can hold seven 2 inch ones. S.150's definition might thus restrict the majority of semiautomatic sporting shotguns.

In sum, there is no reason to believe that a limit on magazine size will reduce mass killings. Almost all such killers carry multiple guns, often three or four, and with police response time averaging about twenty minutes, have plenty of time to shoot and reload. What does prevent mass killings is a defender, out of uniform and thus not known to the killer, who can deliver immediate and accurate counter-fire. Thus:

- In San Antonio, an off-duty officer shot the attacker down, and limited losses to two persons wounded.<sup>13</sup>
- In the New Destiny Center shooting in Aurora, Colorado, the gunman was brought down by Jeanne Assam, a church-goer with a concealed weapons permit; the death toll was two.<sup>14</sup>
- The shooting at Pearl High School in 1997 ended when the vice-principal drew a .45 and confronted the shooter. The death toll was three.

A study, made by a non-academic but using a thoroughly scientific approach, plotted the average number of deaths in mass slayings stopped by police and in those stopped by private individuals (whether armed or unarmed).<sup>15</sup> The results were:

Average deaths in mass slayings stopped by police arrival: 14.3

Average deaths in mass slayings stopped by private citizens: 2.3

Average deaths in mass slayings stopped by armed citizens: 1.8

This reflects the difference between a response time of twenty minutes, and one of ten seconds.

## CONCLUSION

To pass constitutional muster under any applicable standard of review, a law must bear a provable, not speculative, relationship to an important social goal, and not unnecessarily impact other exercises of a constitutional right. S. 150 fails under this standard. It has no provable relationship to reducing crime or mass slayings. It places considerable burdens on lawful exercise of a constitutional right. There was only one Adam Lanzer, one Seung-Hui Cho, but S. 150 attempts to deal with them by regulating the other 300 million Americans' exercise of a constitutional right. S. 150's arbitrary standards fail any test for constitutionality and, for that matter, wise policy.

- S. 150 arbitrarily bans guns by name, including firearms that have little in common, some which do not even exist in the U.S..
- It arbitrarily bans firearms by features, where the features have no relationship to criminal use.
- It would ban all semiautomatic rifles or shotguns with a “pistol grip” – and virtually all semiautomatic rifles and

shotguns have these, so it effectively bans all semiautomatic long guns.

- It arbitrarily applies restrictions to peaceful private citizens, while exempting LEOs who had to be retired due to mental disorders.

## ENDNOTES

1. I include under full automatic firearms which can be set to fire three round bursts. Full automatic means, in essence, that a firearm shoots more than one shot per trigger pull. Since most modern firearms of this type can also fire semi-automatic, they are sometimes called “select fire.”

2. <http://www.vpc.org/studies/awaconc.htm>

3. Among other things, it tends to be circular. In context, it also tends to be militia-centric, whereas Heller focuses upon personal self-defense.

4. [http://www.nssf.org/NewsRoom/release/show\\_cfm?PR=041910.cfm&path=2010](http://www.nssf.org/NewsRoom/release/show_cfm?PR=041910.cfm&path=2010)

5. [http://www.nssf.org/PDF/research/0412SurveyTrackerSupplement\\_MSR.pdf](http://www.nssf.org/PDF/research/0412SurveyTrackerSupplement_MSR.pdf).

6. <http://radioviceonline.com/department-of-homeland-security-sport-rifle-ar-15-suitable-for-personal-defense/>

7. Nat'l Institute of Justice, *Guns in America* (May 1997) at 6. Online at <https://www.ncjrs.gov/pdffiles/165476.pdf>. I say “at most” because licensed dealers can also sell at gun shows, so asking people whether they bought from a dealer or at a gun show divides those responses.

8. It also found that 68% of handguns and 60% of long guns were acquired as new rather than used. Under the Gun Control Act of 1968, it is impossible to acquire a new gun except through a licensed dealer. These numbers appear inconsistent with 40% claiming that they obtained the firearms through a non-dealer, even if we assume that every single used firearm was bought privately, which is quite unlikely.

9. BCJS, *Firearm Use by Offenders* (Nov. 2001). Online at: <http://bjs.ojp.usdoj.gov/content/pub/pdf/fuo.pdf>. I have heard the figure of 1.7% mentioned, but I have no idea of its origin. The actual figures given were a fraction of that.



10. Requiring dealers to report, and an agency to register, all future sales would be insufficient, since a result of “no record of sale through a dealer could be found” would not exclude the possibility that the present firearm possessor acquired the firearm prior to the effective date of the ban on private sales. As noted above, the average time between first retail sale and tracing is eleven years, so the possibility of an initial lawful transfer will likely continue through our lifetimes.

11. Present databases on firearms are notoriously unreliable. The problems with the National Firearms Act database have been repeatedly documented over the past four decades. My experience with the database on stolen firearms suggests it has even greater problems. I represented a dealer whose inventory was illegally seized. When I secured its return, ATF said it could not return six firearms, since they were stolen. We demonstrated that five of the six entries were wrong – most involved reports of the firearms being stolen, far away, at dates when they were already in the ATF evidence locker. The sixth had a different serial number from the report, so the data was erroneous in six out of six cases.

12. Or 3 ½ inch shells, in the case of magnum chamberings.

13. <http://pjmedia.com/tatler/2013/01/02/armed-defenders-do-stop-mass-murders/>

14. <http://freedomoutpost.com/2012/07/the-aurora-shooting-you-didnt-hear-about-in-the-media/>

15. <http://dailyanarchist.com/2012/07/31/auditing-shooting-rampage-statistics/>

# BEARING ARMS IN SELF DEFENSE: A NATURAL LAW PERSPECTIVE

By Timothy Hsiao

*I argue that we possess a natural right to life which entails a corresponding natural right to keep and bear arms. Although I take “arms” to refer simply to defensive weaponry in general, this justifies a strong presumption in favor of a civil right to keep and bear firearms. This is because firearms – in particular, handguns – are the most effective means of exercising one’s right to self-defense in contemporary society. The argument I will defend is primarily non-utilitarian and makes no appeal to considerations of crime prevention or deterrence. Though my argument is intended as a defense of small arms ownership, I gesture briefly toward a possible extrapolation of this reasoning into a prima facie case for ownership of assault firearms.*

Proper respect for the dignity of human life requires a strong commitment to an individual’s right to keep and bear arms. This idea will immediately strike many as paradoxical, if not contradictory, for how is the value of life affirmed by recognizing a right to take it? But this is in fact a misrepresentation of the position I am defending. The right to keep and bear arms (Hereafter, RKBA) should not be equated with the right to take human life willy-nilly. Instead, RKBA should be thought of as an extension of the right to self-defense, which is itself an extension of one’s basic right to life. My argument for this goes as follows:

1. The possession of a right entails the ability to secure its object. (Premise)
2. We have a right to life. (Premise)
3. Therefore, we have a right of self-defense. (from 1, 2)
4. Therefore, we have a right to keep and bear arms. (from 1, 3)

I draw a distinction between arms and firearms. This is because my argument is not one for gun ownership per se, but simply for

the general right to use defensive weaponry in protection of one's life. Of course, this is a very modest conclusion; one that might seem uninteresting insofar as public policy is concerned. But, as I will do later, we can move from these general points about defensive weaponry to an argument for gun ownership based on the premise that guns – particularly, handguns – are the ideal and most effective means for an individual in contemporary society to defend his life. I make no reference here to principles of constitutional interpretation or existing law, since my approach here is concerned with justice and the rights that societies ought to recognize.

## **WHAT ARE RIGHTS?**

The goal of the moral life is to live excellently – to flourish according to the kind of being we are. Morality as a system exists to regulate and prescribe our conduct in pursuit of this ultimate end. However, we cannot flourish as we should without access to the basic goods necessary for our flourishing. This is where rights come in. Rights can be understood as claims to the basic goods necessary for our flourishing. They exist as a form of protection in our pursuit of the good and impose corresponding obligations on others to respect them, whether that be through non-interference or by requiring them to provide us with a good or service.

There are various types of rights. One distinction that can be drawn is between natural rights and positive rights. Natural rights are rights in the fullest sense of the term. They are rooted directly in one's human nature – hence why they are sometimes referred to as human rights – and are claims to goods necessary for the fulfillment of its various intrinsic capacities. Positive rights, also referred to as civil rights, are those rights that owe their existence to an act of the state. They enhance human rights by expanding the scope of acceptable activities and goods that are available to us. They also protect human rights within the political sphere by ensuring the proper dispensation of justice in the legal system. The central difference between the two is that human rights enable flourishing, while civil rights enhance flourishing. Another way to state this is that human rights are directly related to flourishing, while civil rights are only indirectly related.

## THE RIGHT TO LIFE

Arguably the most paradigmatic example of a human right is the right to life. No other rights make sense except when seen through it. The Universal Declaration of Human Rights and the American Declaration of Independence both affirm it and list as first among other rights. And for good reason too: It is the most fundamental human right, one which serves as the foundation for the having of other rights. Hence, liberty, happiness, property, and all other human goods are always attained within the context of life, for what good are these things to a dead man? It is a fundamental human good toward which all other human goods are aimed at perfecting. The foods we eat, relationships we pursue, and activities we engage in are judged good or bad depending on how well they conform to proper living. As one philosopher puts it, “[t]he good of life is part of the very moral framework within which the evaluation of action can take place, because every action is evaluated in terms of its contribution to a good life.”<sup>1</sup> Everything we do is in some way tied to the good of life, whether it is for better or for worse.

Though I suspect that few would challenge the truth of (2), my argument might very well work without it. Suppose that there is no right to life, in which case nobody is able to legitimately lay claim to their own existence. This consideration, far from undermining my argument at its roots, actually simplifies it. The typical argument against a strong civil right to keep and bear firearms seems to be that it poses a danger to the lives of others; therefore, civil governments should either prohibit or place heavy restrictions on their ownership. However, if there is no such thing as a right to life or if life isn't valuable, then in what sense can firearms be dangerous? Nothing of worth would be threatened by their presence. If that is the case, then why not allow people to own any type of weapon they please? One might still attempt a consequentialist argument, though the success of such an approach will depend on constantly changing statistics, and presumably the critic of a strong construal of RKBA will want to base his argument on a more rigid foundation. Moreover, it is hard to see how even this approach would work if life has no intrinsic value. It seems therefore that a critic should not focus his attack on

(2), since a version of my argument will go through no matter what truth value we assign to it.

## THE RIGHT OF SELF-DEFENSE

Rights are claims. They enable us to legitimately demand or take possession of goods that are necessary for our well-being. The possession of a right therefore entails the ability to secure its object, since that is just part of what it means to have a right. Their very purpose is to provide us with protection in our pursuit of the good. It would be incoherent for a right to empower you with the ability to demand some good while simultaneously denying you the ability to acquire it. Premise (1) of my initial argument is therefore true according to the very the definition of a right. Rights become mere ornaments with no real value unless one is permitted to exercise them.

A person who finds his rights threatened by another may therefore act in defense of his rights; for defending the object of a right against unjustified acquisition or destruction is simply another way of asserting one's legitimate claim to it. This is no different when it comes to the right to life. Should I come under attack, my right to life allows me to exercise defensive force in order to secure a good that is essential to my flourishing. What good is my life if it is not worth fighting for?

There are various ways of specifying how this right of self-defense is to be cashed out.<sup>2</sup> Without getting into the specifics of each model, I will simply outline two general criteria for legitimate self-defense that are common to most of them. First, defensive force must be used only as a last resort. All other options must have already been exhausted. If an attacker can be stopped by verbal persuasion, then one ought to resort to that method instead dealing a blow against him. Second, if deemed necessary, the level of defensive force must be proportional to the crime being repelled. This sets an upper limit to what a defender may do against his attacker. You are not, for example, allowed to defend yourself against a knife-wielding attacker by dropping a bomb on him. Nor are you not justified in killing him if you manage to knock him unconscious. In

both cases, defensive force must match the level of the threat. If the threat has been removed or is mitigated, then the acceptable level of force must be adjusted accordingly. Moreover, even in cases where lethal force is authorized because of the lethal nature of the crime, there should still be a presumption toward using minimal force. If a charging attacker can be stopped by a blow the leg, then one ought to aim at incapacitating his leg instead of his head.

What about the right to life of the attacker? Again there are various ways of cashing this out. Some say that the aggressor “forfeits” or “waives” his right to life when unjustly attacking another. Others say that it remains, but is “trumped” or “outweighed” by the victim’s right to life. Whatever solution one decides upon, most will agree that the attacker’s right to life no longer applies when he steps beyond its proper boundaries. Rights exist to protect one in his pursuit of the good. They are not blanket claims which guarantee protection regardless of what one does.

## **THE RIGHT TO KEEP AND BEAR ARMS**

The same reasoning used to derive the right of self-defense can be used to derive the right to keep and bear arms. One cannot defend his life without having access to the necessary means to do so. At the most general level, this simply extends to the use of his own person. (Literally bearing arms!) But this also applies equally to defensive weaponry that might be necessary to supplement one’s own physical strength in light of attack by a more powerful aggressor. A rights-bearer who is unable to exercise the force required to defend himself due to physical weakness, disability, or the presence of an aggressor’s weapon, is entitled to use his own weapons to aid in his defense. In that regard, persons ought to be allowed to own weapons so that they may bring them to bear when the situation demands. Note once again that I am speaking of “arms” here in a loose sense. I refer only to defensive weaponry in general, not to any particular weapon.

Imagine a society in which the rights to life and self-defense are affirmed, but RKBA is not. Someone who finds himself under attack would thus be forbidden to make use of anything other than his own physical self in defense against his attacker. Although he is

allowed to exercise his right of self-defense, he is severely limited in doing so. He would have no meaningful means of defense against an aggressor who is stronger than him. Such a society, though appearing to recognize the value of human life, actually cheapens it by disallowing the citizenry the ability to mount a reasonable defense of their own lives. It is not enough to simply recognize an individual's natural rights; the state must also empower him with the means to meaningfully exercise them. This is accomplished by the creation of civil rights to enhance their exercise. A well-ordered society will thus not only recognize the natural rights of the citizenry, but also provide provisions for these rights to flourish. Due respect for the dignity of human life therefore requires a strong commitment to the right to keep and bear arms. This principle has historically been affirmed within the system of English common law from which modern jurisprudence emerged.<sup>3</sup>

One may grant all of this and try to still resist the conclusion on the grounds that the protection of life is the responsibility of the police and military.<sup>4</sup> Yet it is hard to see how the police and military can have this responsibility unless it is first possessed by the citizenry. If individuals are forbidden from defending their own lives, then how can another person have the right to do so? The obligation of the police and military to protect the citizenry, it seems, derives from the citizens' inherent worth as individuals with the right to life. Each individual citizen possesses an individual right to life, and it is from this individual right to life that the individual rights to self-defense and bearing arms flow. The police and military only possess these rights because it has been delegated to them by the citizenry. Given this, it would be incoherent to affirm that each individual has their own right to life but at the same time deny that they have the ability to protect it. The ability to secure a right is part of what it means to have it. If the former does not exist, then neither does the latter.

It is important to remember that RKBA is justified on the grounds of self-defense, where defense refers to the act of repelling or stopping an attack under way by means of force. A weapon is defensive insofar as it dispenses force. Considerations of deterrence or prevention are secondary to this purpose. Brandishing a weapon may very well prevent or deter attacks that might have otherwise occurred, but only because of the threat of force implied in

deterrence. Thus, a weapon only has its preventative or deterrent effect insofar as it is intended to be used for the primary purpose of imparting force.<sup>5</sup> Although these other purposes enhance the effectiveness of weapons, they are not what justify RKBA. Without the threat of force, a weapon cannot properly be called a weapon. Hence, the fact that a weapon's preventative or deterrent effect may be negligible or even non-existent does not in the slightest count as a reason for its prohibition. Prevention and deterrence can only add to a weapon's effectiveness. It may be desirable that a weapon has these functions, but their lack has absolutely nothing to do with weapon's purpose.

Even if allowing weapons ownership had the consequence of increasing crime, this would still not count as a decisive reason for their prohibition. RKBA is, to reiterate, not justified on grounds of crime prevention, but on defense by means of force. It may be that the former typically accompanies the latter, but there is no logical connection between the two, meaning that it is at least conceivable that they may come apart. Additionally, a certain level of risk may be acceptably assumed if it is done so non-intentionally and judged commensurate to other goods. This is an attitude that society tends to adopt in regards to a host of other activities. So what makes weapons and crime so different? It may be that allowing people to own wall-sized flat screen TV's would increase crime, but surely this isn't a reason to prohibit their ownership. Weighing consequences against each other is a useful method in public policy formation, it never be decisive when rights factor into the equation. Nevertheless, while RKBA itself can never be outweighed by consequences due to its status as a natural right, the RKBA justification of a particular weapon can, within certain limits, be influenced by certain extrinsic considerations. To this we now turn.

## **WEAPON, ANY WEAPON?**

Possessing the right to free speech does not entitle us to say just anything. In the same way, possessing the right to keep and bear arms does not entitle us to the unrestricted use of weapons or the ownership of whatever weapon we please. No RKBA advocate



would endorse the personal ownership of nuclear weapons, but neither would any person who is not a total pacifist deny citizens ownership of some weapon to protect themselves. Weapons exist on a continuum, and the conditions which specify legitimate applications of RKBA need to be enumerated.

Because weapons exist on a continuum, it is hard to delineate an exact cutoff point – if one even exists – for acceptable weapon ownership and use. But broadly speaking, the primary criterion for a legitimate application of RKBA is proportionality in relation to one's own life; which can be analyzed in terms of other factors such as force-giving capacity, level of control, ease of use, and risk to the user. A good defensive weapon ought to be capable of dealing a wide (but limited) spectrum of force so as to be applicable in many circumstances. This requires that the user be able to control the amount of damage dealt so as to fit the type of threat he is defending himself against. Combined with ease of use, this helps in minimizing damage to third parties that might occur. Finally, it is important to note that proportionality is defined in relation to those means necessary to defend one's own life. The right of self-defense is the right to the means necessary for self-defense, not the means necessary for the defense of a city against an invading army. One does not have a right to ballistic missiles or poison gas. These criteria are by no means exhaustive, but provide a good reference point for an evaluation of legitimate weapon use.

Many weapons satisfy these criteria to varying degrees of effectiveness, but one class of weapons best exemplifies them: firearms; specifically, handguns. As Jeffrey Snyder aptly summarizes:

[T]here is a weapon for preserving life and liberty that can be wielded effectively by almost anyone — the handgun. Small and light enough to be carried habitually, lethal, but unlike the knife or sword, not demanding great skill or strength, it truly is the “great equalizer.” Requiring only hand-eye coordination and a modicum of ability to remain cool under pressure, it can be used effectively by the old and the weak against the young and the strong, by the one against the many.

The handgun is the only weapon that would give a lone female jogger a chance of prevailing against a gang of thugs intent on rape, a teacher a chance of protecting children at recess from a madman intent on massacring them, a family of tourists waiting at a mid-town subway station the means to protect themselves from a gang of teens armed with razors and knives.<sup>6</sup>

Unlike virtually any other weapon currently available, the handgun provides the best balance of force, control, ease of use, risk, and overall general effectiveness in relation to the proportionality standard. Armed with a handgun, one is able to repel a wide range of threats directed toward him. The amount of force dealt can be controlled within a reasonable degree, be it by aiming at a limb instead of a vital organ, using different kinds of ammunition, or simply firing warning shots. Although knives, batons, OC spray, and other weapons are also capable of fending off an assailant, handguns provide a level of protection that is unparalleled by any other weapon. One does not have to put himself at risk by physically engaging his assailant in close proximity in order to stop him, as a handgun allows one to decisively repel an attacker at a distance with minimal physical exertion on his part. A trained handgun owner is able to quickly dispatch an assailant while minimizing harm and collateral damage to him and others. This cannot be said of grenades, tanks, missiles, and other heavy armaments. And although a handgun owner may have his weapon turned against him in a fight, this is true of nearly any other weapon (And arguably it is more difficult with a handgun, given that an assailant must endanger himself by closing a physical distance). Handguns, therefore, seem to be the most effective means of exercising one's right to bear arms in self-defense.

Some might wonder whether this line of reasoning can be used to justify all sorts of weaponry. But as I have already alluded to, this is mistaken. First, as we saw with free speech, the possession of a right does not mean that its scope is unlimited. There is no reason to think that a right to own weapons entails the right to own any weapon. Second, explosives, biological weapons, and other "heavy weapons" do not adequately meet the criteria which I have outlined. It is practically impossible to maintain a meaningful sense of control over the power of a grenade, which works by spreading shrapnel in

every direction. Indeed, its very purpose is to deal indiscriminate damage. It is even more difficult to control the immense power of a tank shell, missile, or gas cloud. Such weapons pose a threat to every person within their immediate vicinity. They do not fall within the proportionality requirement. Third, parallels of this type are really just an argument against the very idea of weapon ownership itself, not just handguns. Firearms, baseball bats, tactical knives, batons, OC spray, and tasers differ only in the degree of damage they can inflict, not in the kind of thing they are. Weapons can of course be divided into different categories (e.g. bladed, non-bladed) depending on their characteristics, but they all share the common characteristic of being a weapon. It would be special pleading to deploy this parallel to handguns but exempt other weapons. What makes handguns – but not other weapons – so heinous so as to ground a parallel to tanks and nuclear missiles? So far as I have seen, no reason has been given.

## **BEARING ARMS AND CIVIL GOVERNMENT**

RKBA is a natural right possessed by each and every person for their self-defense. The government, as an institution directed toward the protection of natural rights, is therefore obliged to recognize and protect this right. Together with the fact that handguns provide the most effective level of protection within the proportionality standard, this entails a strong presumption in favor of a civil right to keep and bear firearms. One does not have a natural right to own a gun, but he does have a natural right to keep and bear arms that is best expressed by firearm ownership. At the same time, governments may impose limitations and restrictions on certain applications of this civil right, as RKBA is a general right that does not refer to any specific weapon. These limitations may include age-restrictions, background checks, and licensing requirements. The extent to which these restrictions are justified is beyond the scope of this paper. It will suffice to say that no rational person should be denied access to guns.

What is unacceptable is a total or near total ban on gun ownership. Such a prohibition would deprive citizens of the ability

to engage in meaningful self-defense. Indeed, it would have the opposite effect of empowering criminals (who by definition do not obey the law) by weakening the defensive capabilities of law-abiding citizens. Although alternative means of self-defense will be available, none offer the level of security and success that a handgun provides. Many who previously would have stood a chance when armed with a handgun would be rendered helpless before their attacker. Criminals may even be encouraged to attack those who they know will not be able to put up a good fight.

## CONCLUSION

Every person has a right to life. In order to protect this right, they also possess the right of self-defense. But one cannot defend himself without the means to do so; hence possession of the right of self-defense entails possession of the right to keep and bear arms. Although many weapons fulfill this role, the most effective weapon for self-defense in contemporary society is a firearm – particularly, a handgun. Governments, therefore, ought to maintain favorable policies toward firearm ownership and use.

## APPENDIX: ASSAULT WEAPONS

My goal in this paper has been relatively modest: to show that ownership and use of small arms is justified on the grounds of self-defense. But one might rightly wonder if the same reasoning I used for this end can also be extrapolated into a case for assault weapons. I think that such an application is eminently reasonable, and in what follows I shall briefly outline some desiderata which may be used in a *prima facie* case for ownership of assault firearms.

- *Most “assault weapons” are not significantly different from handguns.*

As noted earlier, all weapons exist on a continuum. They differ only in degree, not in kind. There is little in terms of significant differences between assault weapons and handguns. The whole process of classifying so-called assault weapons, it turns out, is

plagued with a high degree of arbitrariness. Criteria such as magazine size, barrel length, ergonomics, and attachments have little to do with conditions of proportionality outlined earlier. What could be the difference between an AR-15 with a 25-round magazine and a handgun with three 10-round magazines in reserve that justifies banning the former but not the latter? Perhaps the difference is that the former is an automatic weapon capable of dealing a much larger amount of damage. There might be some merit to this claim, but as it turns out, most assault weapons – like handguns – are semiautomatic. With this in mind, there does not seem to be a significant difference between handguns and assault weapons.

- *“Assault weapons,” like handguns, are very useful for defending against attack.*

It is thought by many that the use of assault weapons in cases of individual self-defense would be grossly disproportionate. But two things may be said in response. First, assault weapons would prove very useful in defending against cases of mob violence. The situation that groups of Korean shopkeepers found themselves in during the Los Angeles Riots of 1992 is usually cited as an instance where assault weapons proved invaluable for self-defense. It is irrelevant to respond by arguing that situations of mob violence are rare, for the point is not one of frequency, but of safeguarding rights. One ought to have the ability to safeguard his life, even if threats against it prove to be rare. Second, there is no reason to think that it would be disproportionate to use assault weapons even in cases where mob violence is not involved. As was pointed out, there is no significant difference between assault weapons and handguns. If it would be acceptable to shoot an aggressor with a handgun, then it would also be acceptable to shoot him with an assault weapon. The only differences between the two are largely irrelevant to the proportionality condition.

- *The burden of proof is on the critic of assault weapons.*

It is not up to the proponent of assault weapons to give a justification as to why their ownership should be allowed. On the contrary, it is the critic who owes an explanation. The critic’s charge is sometimes put rhetorically: “Why do you need to own an assault

weapon?” To which we may simply respond: “What reason do you have to restrict my liberty?”

## ENDNOTES

1. David S. Oderberg, *Moral Theory: A Non-Consequentialist Approach* (Malden, MA: Blackwell, 2000): 143.2. The classic model sees self-defense as grounded in the principle of double effect. See Aquinas, *Summa Theologica* II-II q.64 a.7. A key component of Aquinas’ model is that killing must be non-intentional. For more recent models which endorse intentional killing, see Judith Jarvis Thomson, “Self-Defense” *Philosophy and Public Affairs* 20:4 (1991): 283-310; and Suzanne Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (New York, NY: Cambridge, 1996).

2. The classic model sees self-defense as grounded in the principle of double effect. See Aquinas, *Summa Theologica* II-II q.64 a.7. A key component of Aquinas’ model is that killing must be non-intentional. For more recent models which endorse intentional killing, see Judith Jarvis Thomson, “Self-Defense” *Philosophy and Public Affairs* 20:4 (1991): 283-310; and Suzanne Uniacke, *Permissible Killing: The Self-Defence Justification of Homicide* (New York, NY: Cambridge, 1996).

3. cf. William Blackstone, *Commentaries on the Laws of England*, bk.1 ch.1. “[I]n vain would these rights be declared, ascertained, and protected... if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers to protect and maintain inviolate the three great and primary rights. [...] The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law.”

4. S Even this may be questioned on both legal and philosophical grounds. cf. *Warren v. District of Columbia* (444 A.2d. 1, D.C. Ct. of Ap. 1981). Unlike special duties to family members which arise out of human nature, it is hard to see how there could exist special duties between the police/military and the citizenry, especially considering that the former are artificially created entities that do not pre-exist the state, whereas family duties are pre-political and grounded in biological relationships.

5. An object that is mistakenly perceived to be a weapon, such as a plastic gun seen under a dark streetlight, does not become a weapon simply because it is perceived as such. Rather, there must be an intention on behalf of the wielder to use it to impart force in order for it to count as a weapon.
6. Jeffrey R. Snyder, "A Nation of Cowards", *The Public Interest* 113 (Fall 1993).

**UNITED NATIONS  
INTER-AGENCY SMALL  
ARMS CONTROL STANDARDS  
DEVELOPMENT:  
A CASE STUDY IN TROUBLED  
TRANSNATIONAL  
GUN CONTROL &  
CIVIL DISARMAMENT  
POLICYMAKING?**

**By Jeff Moran\***

The Arms Trade Treaty (ATT) is recognized within the UN system as a gateway instrument for the progressive and transnational development of conventional arms control and disarmament. A valuable input to this process will likely be the United Nations' (UN) International Small Arms Control Standards (ISACS). This draft paper examines the purpose, scope, approach, history, players, process, controversy, and selected normative implications of the UN's ISACS project.

The paper makes use of various primary source documents including the initial ISACS project kick-off document, a follow-on funding proposal to the Government of Australia, draft standards on national small arms control, and interviews and public statements from the ISACS project coordinator, a contracted lead-author, influential diplomats and legal scholars, and stakeholders from non-traditional civil society groups within the United Nations context. The paper uses this material to review the execution of the ISACS project and its deliverables in light of its goal to produce internationally accepted and validated standards.



The review found evidence of the project being in systematic variance with two of the four basic principles of international standards development promoted by the International Organization of Standardization (ISO). The implications for the normative value of ISACS project deliverables are mixed. While some States may choose to adopt them in whole or part into national legal systems, specially-affected states such as the United States might not because the deliverables came from a process characterized by a favored stakeholder engagement approach and an opaque and exclusive governance model, are therefore not bona-fide standards a la the ISO method and of minimal normative validity.

A key element of the paper is an explanation of how the ISACS project and some of its deliverables on national small arms control are an example of troubled 21st century transnational gun control policy making. The paper illustrates how one draft standard in particular presents adverse implications for non-traditional segments of global civil society as represented by non-profit and charitable trade, collecting, sporting, and “pro-gun” human rights / civil rights groups in exceptional developed national jurisdictions such as the United States. Among other things the paper reports feedback on how the execution of the project has seriously eroded confidence among these specially-affected non-traditional stakeholders, stakeholders who would otherwise support the project’s admirable humanitarian aims.

The paper ends with the observation that, for all the good ISACS may do for normatively underdeveloped states, the ISACS project is instructive to developers and advocates of international law for its flaws. One lesson is perhaps that normative ambitions in UN project settings can and do compromise accepted principles of international standards development and undermine confidence among stakeholders, and that this can have predictable political consequences with potentially wide-ranging implications.

Ultimately, the apparent infidelity of the ISACS development process with respect to the ISO standards development principles, among other things, may precipitate a crisis of confidence that precipitates disruptive political blow-back that could reverse official American support for the ATT and undermine other efforts at conventional arms control and disarmament.

## INTRODUCTION

The Arms Trade Treaty (ATT) was approved by the UN General Assembly on April 2nd 2013 and since this time new energy has been coalescing internationally on how to quickly bring this treaty into force and to move towards practical implementation.<sup>1</sup>

This energy was evident on June 20th during a public briefing in Geneva aimed at taking stock of the process to date, looking at the context into which the ATT is inserted, and exploring the immediate next steps required for the Treaty to enter into force.<sup>2</sup> The presenters included Ambassador Peter Woolcott, the President of the 2013 Final Conference on the UN ATT; Ambassador Roberto Moritán, the President of the 2012 Conference on the UN ATT and Chairman of the pre-negotiations Preparatory Committee process; Sarah Parker from the Small Arms Survey;<sup>3</sup> and Dr. Paul Holtom of the Stockholm International Peace Research Institute (SIPRI).<sup>4</sup>

Ambassador Moritán spoke first and set the frame and tone for the speakers that followed. He explained, among other things, that the ATT should not be seen as a static or stand-alone treaty, like others within the traditional arms control and disarmament field (on Landmines, Cluster Munitions, etc.).<sup>5</sup> Instead, the ATT must be viewed as a continual process, a framework, and one that must be dynamic and expandable through amendments and additional protocols as States Parties see fit. Ambassador Woolcott added that while consensus seeking was and should remain a priority with respect to the ATT discussions, the treaty does provide for an “off ramp” from the road of consensus seeking. This comes in the “elaborate” form of an amendment approval process requiring a simpler three-fourths majority at meetings of States Parties no earlier than six years from when the treaty enters into force and then every third year thereafter.<sup>6</sup> To Woolcott, this formula makes the ATT “a living document.” It was in this context that Ambassador Moritán clarified that the current “scope,” “parameters,” and “criteria” within the existing ATT “need additional negotiation” and then concluded by stating:

“The ATT process has to lead to negotiations in conventional weapons. Negotiations of conventional weapons cannot continue to be a taboo in the United Nations.”<sup>7</sup>

It was understood by the room that perhaps the most important changes desired will be on the small arms and light weapons issue. Sarah Parker of the Small Arm Survey then presented a PowerPoint version of a report she published a few weeks earlier called: “The Arms Trade Treaty: A Step Forward in Small Arms Control?”

Ms. Parker made the point both in her report and her presentation that while “the ATT has contributed several missing pieces to the framework of controls governing the international transfer of small arms,” it nonetheless has “provisions that are, in many cases, weaker than existing commitments on small arms transfers agreed more than a decade ago.”<sup>8</sup> She confirmed to those present that deliverables from a separate UN project to write and promulgate International Small Arms Control Standards (ISACS) would be “of value” in future discussions to amend the ATT.<sup>9</sup>

Three take-aways from the briefing with respect to small arms: the ATT needs more work with respect to controlling and documenting international small arms transfers at the very least, and the UN ISACS are likely to be valuable tools for transforming the ATT into a more robust binding instrument of small arms control going forward.

## **WHAT ARE UN ISACS?**

The UN ISACS project has been in collaborative development since 2008 led by the UN’s Development Program (UNDP) and Office of Disarmament Affairs (ODA). A few of the ISACS were publicly released last year and the balance are to be published later this year.<sup>10</sup> According to the project’s public website, the ISACS are the goal of an “ambitious initiative”<sup>11</sup> and are designed to:

“[F]it within the global framework created by the UN Programme of Action (PoA), the International Tracing Instrument (ITI) and the UN Firearms Protocol; and build upon best practices elaborated at regional and sub-regional levels.”<sup>12</sup>

As such, ISACS are a means to develop and harden parts of the non-binding PoA as well as add normative value to the existing global framework on small arms controls. Hardening is the process of taking soft-law and making it legally binding. A major criticism of the PoA among its supporters is that it hasn't been as effective as it could be and that this was due to its political or non-legally binding nature. This framework now includes ATT. The key international instruments comprising the current global small arm controls framework, including ISACS, are illustrated in Exhibit 1.

## **WHAT IS THE COALITION AND MOTIVATION BEHIND THE UN ISACS?**

The ISACS project has been coordinated by Dr. Patrick McCarthy since kicking-off in 2008. His duties have been to work with the UNDP and ODA, and coordinate with what is now a coalition of 23 UN agencies. This coalition of supporting agencies is known as the Coordinating Activity on Small Arms (CASA).<sup>13</sup> CASA agencies are part of the growing ISACS partner list.

The ISACS partners list includes these CASA members, plus 19 member states, 17 other international organizations, and over 30 humanitarian civil society groups.<sup>14</sup> None of the permanent UN Security Council member states are partners with ISACS, but Australia is. See Exhibit 2 for a table of the ISACS partners. Of note, the Australian Department of Foreign Affairs is a listed ISACS partner and was the employer of the 2013 UN ATT Conference President Ambassador Woolcott, and sponsored the services of the Small Arms Survey's Sarah Parker, an Australian herself, as an ATT delegation advisor. Ms. Parker, incidentally, is also a lead author of one ISACS on national controls of small arms manufacturing.

Also technically part of the partnership base has been a small but shrinking number of non-voting and non-traditional representatives of global civil society: non-profit and charitable trade, collecting, sporting, and "pro-gun" human rights / civil rights groups from developed national jurisdictions. These groups have been involved as members of an expert reference group with giving advice and feedback on certain standards where permitted, but their input does

not have to be considered or reflected if the lead author or ISAC project coordinator so decide.

According to the original ISACS project kick-off document, the reason to launch the ISACS project was because the UN agencies sponsoring it believe “the time has come to develop a set of internationally accepted and validated standards providing comprehensive guidance on [Small Arms and Light Weapons] control to practitioners and policy makers.”<sup>15</sup> According to another project document, a main benefit of ISACS is to “provide a basis for the development of national small arms control standards.”<sup>16</sup>

## **HOW HAS THE CASA AND ISACS WORKED**

Dr. McCarthy, who has been on contracts to the UNDP for a project cost of approximately \$229,781/year,<sup>17</sup> has relied heavily on subcontracted consultant lead authors and voluntary input from a growing non-voting expert reference group to help flesh out standards based on various existing instruments. He has managed the project in a virtual and distributed manner using specialized groupware technologies and UN video conferences with occasional physical meetings.

According to a 2010 phase 2 project proposal to the Government of Australia, the ISACS development reportedly involves eleven steps:<sup>18</sup>

1. First draft by Consultant
2. Draft reviewed by Expert Reference Group
3. Draft revised by Consultant
4. Draft edited by Coordinator
5. Draft reviewed by CASA working group
6. Draft cleared by CASA as ‘consultation draft’
7. Second round of consultations
8. Draft revised by Coordinator (& Consultant)
9. Draft reviewed by CASA

10. Draft finalized by Coordinator

11. Draft formally adopted by CASA principals as an official ISACS

Steps three through eleven have excluded partnering non-traditional civil society groups and these steps have not even been fully defined or explained, and the individuals responsible for voting decisions have not been identified to them. What's more, the nature of the relationship with these groups is formally a subordinate and exclusive one, where Dr. McCarthy, as "Coordinator," has a one-way or directive or "management" relationship but no formal reporting and communication relationship. In essence the ISACS project was envisioned from the beginning so that Dr. McCarthy would not report information to those that provide input to him. See the illustration in Exhibit 3 to better understand the ISACS project structure and key relationships among the Consultant, Expert Reference Group, CASA, UNDP, and the UN's Office of Disarmament Affairs.<sup>19</sup>

What little is publicly known about lead authors/consultants to the ISACS project is that it includes international small arms control advocates or researchers like Dr. Ed Laurance,<sup>20</sup> a former strategic planner for IANSA. IANSA stands for the International Action Network on Small Arms, which, according to page three of its foundation document, is committed to "reducing the availability of weapons to civilians in all societies."<sup>21</sup>

## **WHAT IS MEANT BY "INTERNATIONAL STANDARD"**

The ISACS project document borrows its definition of international standard from the International Organization for Standardization (ISO), defining a standard to be a:

"document, established by consensus and approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context."<sup>22</sup>

The ISACS project document also suggest the project has also followed "to the extent possible, the Rules for the Structure and

Drafting of International Standards developed by the [ISO].” What is not mentioned in the project document are the fundamental principles of international standards development that must underpin any ISO standards development initiative. According to the ISO itself, there are four principles of international standards development:<sup>23</sup>

1. ISO standards respond to a need in the market
2. ISO standards are based on global expert opinion
3. ISO standards are developed through a multi-stakeholder process
4. ISO standards are based on a consensus

### **WHAT IS THE POTENTIAL NORMATIVE IMPACT OF ISACS?**

According to the ISACS website, the purpose of all the standards modules “is to provide clear, practical and comprehensive guidance to practitioners and policymakers on fundamental aspects of small arms and light weapons control.” However, in reality, ISACS is much more than about providing practical guidance...it is about international or, more accurately, transnational lawmaking by other means. To understand this, one need only refer to the 2012 speech titled “Twenty-first Century International Lawmaking” by former U.S. State Department Legal Advisor Harold Koh. Formerly the Dean and now a returning Professor at Yale Law School, Professor Koh, says twenty-first century international lawmaking is better called “transnational legal process.” He elaborates in his speech:

...International law is primarily enforced not by coercion, but by a process of internalized compliance. Nations tend to obey international law, because their government bureaucracies adopt standard operating procedures and other internal mechanisms that foster default patterns of habitual compliance with international legal rules...

...[W]e now develop international law more and more through “diplomatic law talk” — dialogue within epistemic communities of international lawyers working for diverse governments and nongovernmental institutions. Perhaps someday these norms

will crystallize and, if necessary and advisable, become a basis for a multilateral treaty negotiation...

... [But even if a treaty negotiation doesn't formally materialize, "diplomatic law talk" ] creates a record of state practice and builds a process of generating *opinio juris*, the notion that states engage in those practices out of a sense of legal obligation. So even when their meetings don't involve drafting and concluding agreement language, government lawyers find themselves contributing to the development and application of international law [customary law in particular].

...[In the end] twenty-first century international lawmaking has become a swirling interactive process whereby norms get "uploaded" [from one country or international organization] into the international system, and then "downloaded" elsewhere into another country's laws or even a private actor's internal rules.<sup>24</sup>

Professor Koh's views are consistent with the writings and teachings of other legal scholars such as Dr. José Alvarez of the New York Law School. According to Dr. Alvarez' 2005 research thesis, international organizations, like the ones sponsoring the UN ISACS project, have been increasingly taking on delegated authority by member states. What's more, they are increasingly assuming lawmaking and regulatory roles on matters traditionally thought to be within the exclusive jurisdiction of national legislatures and executive regulatory agencies.<sup>25</sup> In his view, international organizations are now international lawmakers in many domains. In a 2008 lecture posted online through the UN's library, Dr. Alvarez explains why it is important to all stakeholders to get serious about the phenomena of international organizations as lawmakers.<sup>26</sup>

Clearly the UNDP and ODA took this lesson to heart with their ISACS initiative starting up about the same time at Dr. Alvarez's ideas were published through the UN library online. Privately, Geneva-based small arms process legal specialists and researchers acknowledge that international lawmaking is a valid description for what ISACS is all about, even if it is only non-binding standards or soft law at this early point.<sup>27</sup>



The legal aspiration by many in the UN “small arms process”<sup>28</sup> is that ISACS harden into legally binding international law. And that this could be made reality if they were translated into future amendments or additional protocols to the ATT. This could also be made reality on a slower track to the extent they crystallize as or are seen as reflecting customary international law, which would make them globally legally binding on all States whether or not a state ratified or acceded to the ATT.

## **WHAT DOES ISACS ENTAIL?**

ISACS covers a full range of topic areas related to small arms and the policy challenges they present from the point of view of UN agencies, a relatively small group of “angelic” developed states and small arms afflicted developing states, and a range of other humanitarian civil society groups that have been also pushing the hardest for the ATT.

The ISACS are framed as a six-part series and further organized into 24 sub modules. The six series to the ISACS are summarized below, with the corresponding 24 modules listed in Exhibit 4:<sup>29</sup>

Series 1 is basically an introduction to the ISACS framework.

Series 2 entails controls designed for various contexts like for preventing armed violence.

Series 3 is about national controls over things such as civilian access to small arms.

Series 4 is about designing and managing national plans to implement ISACS.

Series 5 is about standards that relate to operational support to the UN in the field.

Series 6 is about standards pertaining to cross-cutting women’s and children’s issues

In reviewing the six series above and the various modules listed in Exhibit 4, some of the ISACS modules could be most helpful where basic national rules are grossly deficient or non-existent. For example, ISACS probably would do much good in fragile and post-

conflict states like Burundi, where humanitarian advocacy groups have made the case a hand grenade can cost less than a pint of beer, and government and civil society still struggle with stocks of government weapons in the hands of civilians and criminals the aftermath of two genocidal conflicts since 1972.<sup>30</sup>

This being said, ISACS will likely present serious democratic sovereignty and civil if not natural human rights challenges to the extent some ISACS “uploaded” to the international system are at variance with constitutional and governing norms where “downloaded.” The prospect of such normative dissonance has already become a source of elevated political concern among American stakeholders in particular. The outputs of this project would be troublesome in that they will initially conflict with but may become persuasive if not controlling within in domestic judicial and regulatory contexts over time, even if the ISACS are rejected formally as ATT amendments by the United States.

## **WHAT ISACS COULD BE PARTICULARLY PROBLEMATIC**

For American non-profit and charitable groups representing trade, collecting, sporting, and pro-gun human / civil rights groups, perhaps the most controversial national control standard now in final review is the one authored by Dr. Ed. Laurance, mentioned above. He was the lead author for ISACS module 03.30 addressing national civilian access controls to firearms. The full title for this standard is “National Controls Over the Access of Civilians to Small Arms and Light Weapons.”<sup>31</sup> This particular ISACS is one of several that are controversial because its central purpose clearly crosses the United States’ previous red line about no language on civilian possession during the ATT negotiations process and could be seen as a back-door domestic gun control that dangerously encroaches on Federal and state constitutional arrangements there. Here are 10 problematic provisions included in his draft standard which have been variously validated by former American ATT conference delegates and others representing non-traditional segments of civil society:

1. Prohibitions on civilians owning weapons manufactured and configured according to specifications set by a military armed service of a State
2. National registration of all firearms
3. National individual possession and purchasing licenses for single firearms based on specific, demonstrated, and “legitimate” need
4. Licenses that specify where a given firearm is stored
5. License restrictions by category, for example:
  - Category 1:* Rimfire rifles (not semi-automatic); shotguns (not pump-action or semi-automatic)
  - Category 2:* Centerfire rifles (not semi-automatic)
  - Category 3:* Rimfire rifles (semi-automatic); shotguns (pump-action or semi-automatic capable of holding up to 5 rounds of ammunition)
  - Category 4:* Centerfire rifles (semi-automatic); shotguns (pump-action or semi-automatic capable of holding more than 5 rounds of ammunition)
  - Category 5:* Handguns (semi-automatic, e.g. revolvers and pistols)
6. Limits on the number of firearms one may possess
7. Mandatory 7 day waiting periods
8. Mandatory use of gun safes or locks
9. Periodic home inspections for compliance with safe storage requirements
10. Minimum age for licensed possession and use set to 18 years old.

## **WHY HAVE SO FEW TRADE, COLLECTING, SPORTING, AND PRO-GUN RIGHTS GROUPS BEEN ENGAGED?**

In short, they report a lack of confidence because ISACS standards and the process producing them appear biased, arbitrary, and capricious. For American groups, many ISACS are viewed as extremely more restrictive than existing federal and state arrangements permit. This mainly is because these groups have been kept at a distance, basically on the outside of the standards development process.

The perception to these groups is that the process and people involved in ISACS decision making are not open nor transparent and have a Eurocentric policy bias. These groups report their ISACS experiences convince them the UNDP and ODA are not serious about their commitment to the ISO standards development as much as they are normatively ambitious since the ISACS development process has excluded them even though they are specially affected stakeholders. The result: conflict, protests, and withdrawal.

For example, the Small Arms and Ammunition Manufacturer's Institute (SAAMI), a bona fide American Nation Standards Institute affiliated organization, actually withdrew from ISACS in March 2012 in protest. They assert there is a clear anti-firearms bias build into the ISACS process.<sup>32</sup> They explained their views in a nine page minority report of protest and withdrawal.<sup>33</sup>

SAAMI's minority report explains that while participating in the ISACS process, its representatives had witnessed, objected to, and seen "significant breaches in standard-setting protocols." The statement proceeded to list various examples to evidence each of the five specific types of breaches below (listed verbatim):

1. Unwillingness to credit all input equally, resulting in refusal to consider opposing views.
2. Stating universal rules for the inclusion of input but failing to employ those rules on an even-handed (namely, if the result did not support the small arms control stipulation being sought) basis.

3. Revealing unsubstantiated and provocative editorial bias during the drafting process that impairs the integrity of the process and is thus likely to hinder serious, balanced discussion.
4. Where objections were made that were accommodated by changes in text, such a change was often made by simply converting a mandatory requirement into a discretionary one without rescinding the unjustified or false premise upon which the original stipulation was based.
5. The comment periods provided after release of each complex, extensive and multi-page Module were often so time-constrained as to appear to have been staged purposefully in order to avoid careful analysis and input. In all, 22 ISACS modules totaling more than 791 pages have been released (sometimes in multiple versions per draft) in the past year and a half for comment in this manner.

Independent interviews with other industry group representatives still connected to the ISACS process revealed the voting and approval processes are essentially closed and undefined, and the individuals responsible for approving standards unknown. What's more, the clear perception is that the key reason for this that non-traditional civil society groups happen to have more positive assumptions about the value of firearms in civil society than those drafting the ISACS and championing the overall process.

To this day, the ISACS approval process, according to trade, collecting, sporting, and pro-gun civil/human rights groups is a mystery, unless you are aligned with groups like IANSA, the Small Arms Survey, or are on a contract or salary with a UN organization sponsoring the ISACS project. This has resulted in a growing sense that ISACS and the exclusive UN inter-agency process that produced them could become reason enough to mobilize against the United States becoming a party to the ATT and to even push for the United States to withdraw from the PoA altogether.

## **SO, ARE ISACS CREDIBLE AS TRUE ISO STANDARDS?**

It would not appear so. This probably will not limit their normative value to those states partnering with ISACS however, since some states view the ISACS process as a way to outsource their national policy-making and will likely adopt the standards wholesale in some fashion or another. Knight from participating in this felony that led to murder. This said, if the ISACS project follows any kind of consensus decision making, it seems clearly limited to consensus-seeking within the exclusive UN CASA community. So as a result, some ISACS may be dismissed completely and encounter serious implementation issues and political consequences in other national jurisdictions. The reason for this, among others, is the project's apparent exclusionary approach seems clearly at variance with the third and fourth principles of ISO standards development.

The ISO principles call for what is essentially an inclusive multi-stakeholder negotiation process by consensus decision rules. But what the ISACS project appears to have done is clearly exclude entire segments of civil society in developed states on account of their neutral if not positive assumptions about the value of small arms in their domestic civil society context.

So instead of the ISACS standards development process being an ideal demonstration of transparent consensus seeking among all affected stakeholders globally, evidence suggest ISACS is more accurately seen as a case example of overtly biased and secretive consensus seeking among Eurocentric like minds. Such deficiencies of the ISACS standards development process will likely lead to further controversy in future ATT implementation talks and most certainly to the extent any problematic ISACS are proposed as amendments or additional protocols within the ATT's binding legal framework.

## **WHAT OTHER ISACS MIGHT BE PROBLEMATIC?**

Generally, for American trade, collecting, sporting, and pro-gun civil rights / human rights groups, the most controversial standards being finalized this year relate to national controls and regulations

in general, those found under Series three of the ISACS framework. The concern fundamentally is that these could become persuasive if not controlling in domestic federal and state judicial and regulatory contexts even if they are rejected formally by the United States as amendments to the ATT. National small arms controls standards under series three of the ISACS framework are as follows:

03.10 National controls over the manufacture of small arms and light weapons. *Lead Author: Ms. Sarah Parker of Small Arms Survey.*<sup>34</sup>

03.20 National controls over the international transfer of small arms and light weapons.<sup>35</sup> *Lead Author: Stockholm International Peace Research Institute.*<sup>36</sup>

03.21 National controls over the end-user and end-use of internationally transferred small arms and light weapons.<sup>37</sup> *Lead Author: Group on Research and Information on Peace and Security - Belgium.*<sup>38</sup>

03.30 National controls over the access of civilians to small arms and light weapons.<sup>39</sup> *Lead Author: Dr. Ed Laurance of the Monterrey Institute of International Studies.*<sup>37</sup>

03.40 National coordinating mechanisms on small arms and light weapons control.<sup>40</sup> *Lead Author: Institute of Security Studies in South Africa.*<sup>41</sup>

03.50 International legal cooperation, criminal offences and investigations. *Lead Author: Unknown.*

## INITIAL CONCLUSIONS & LESSONS LEARNED

The ATT is, among other things, a gateway instrument for the progressive development of binding international small arms controls. And the UN's ISACS are expected by its lead authors and diplomats to serve as valuable inputs to the ATT amendment and implementation processes. Within context, the development of the ISACS exhibits unambiguous indicators of transnational gun control policy development and the broader pursuit of global governance.

On the one hand the formula of ATT + ISACS could result in enormously favorable impacts for civil society in developing

states grappling post-conflict realities such as lack of rule of law, corruption, poor controls over official inventories of small arms.<sup>42</sup> Obviously, some degree of standardized small arms controls are appropriate for comparably deficient legal jurisdictions such as fragile or post-conflict states without effective control over stocks of military weapons. Introducing small arms control standards in these legal contexts would surely make the work of post-conflict disarmament, demobilization, reintegration, and peace-monitoring easier and safer for UN agencies, in addition to making civil society better off in general.

But on the other hand the ATT + ISACS formula will certainly present trouble for large segments of civil society in states with well-developed legal protections respecting professional and hobby collecting, modern competitive shooting, and firearms hunting. This trouble would be most acute in the exceptional case of the United States, which is a federal system with national and subnational constitutional and other legal protections providing for not only a citizen's civil if not natural human right to armed self-defense with arms suitable for such purposes, but also the right to carry arms concealed in public, and also the right to collect and lawfully use, with appropriately approved federal transfer application, of arms and other destructive devices normally restricted to military and law enforcement organizations in other countries.

Rightly understood, the essence of the ISACS project is about international lawmaking by other means and its execution may serve as a contemporary case study in fraught transnational legal process within the UN inter-agency system. Four reasons would make this case clear:

1. There appears to be strong evidence of favored stakeholder engagement.
2. The process and deliverables produced exhibit signs of exclusionary and biased practice among like-minds.
3. The governance process and selected deliverables do not demonstrate any obvious margin of appreciation for the constitutional, political, and cultural sensitivities of the United States or of non-traditional segments civil society as



represented by trade, collecting, sporting, and pro-gun civil / human rights groups there and elsewhere.

4. The ISACS development process has compromised on the core ISO principles of truly inclusive multi-stakeholder engagement and consensus decision making.

Perhaps more importantly, the apparent consequence ISACS project scope, approach, and stakeholder engagement strategy has created a profound lack of confidence among non-traditional civil society stakeholders within the ongoing UN small arms and ATT related processes. For them, there doesn't seem to be much if any reason to trust that what lies ahead is going to be anything other than a zero-sum game of humanitarian normative chauvinism and transnational global governance. And this may catalyze a new era of more direct and intensive transnational activism and advocacy.

This being said, if the ISACS project can teach a lesson for students and practitioners of international law, it may be about the importance of confidence-building within UN inter-agency project settings. While the importance of confidence building measures in treaty making is well established, the ISACS experience suggests appreciation for confidence building in UN inter-agency projects with transnational legal implications can be quite seriously lacking.

Ultimately, the execution of the ISACS project could be seen as both an example of troubled transnational gun control and policy making and an example of UN inter-agency normative ambition trumping accepted principles of international standards development. As such, it may lead to an erosion of American support for the UN's PoA and undermine other efforts at conventional arms control and disarmament. Perhaps it may even put in jeopardy the United States signature on the ATT or eventually prompt an "unsigning" of the treaty as happened with the Rome Statue on the International Criminal Court.<sup>43</sup>

## EXHIBIT 1: EXISTING GLOBAL SMALL ARMS CONTROL FRAMEWORK

GLOBAL SMALL ARMS CONTROL FRAMEWORK							
International Instrument	Date Adopted	Legally Binding	Scope				
			Small Arms	Light Weapons	Ammunition	Parts	Components
Firearms Protocol	2-Jun-01	X	X	X	X	X	X
PoA	20-Jul-01		X	X			
ITI	8-Dec-05		X	X			
ATT	2-Apr-13	X	X	X	X*	X*	X*
ISACS	Rolling **	***	X	X	X	X	X

Notes: Prepared by Jeff Moran. Adapted from a framework published in the Small Arms Survey Research Note 30, June 2013.

\* The ATT as adopted 2 April 2013 contains provisions for ammunition, parts, and components, but these are not consistently addressed within the treaty. These provisions can be changed through amendment.

\*\* There are plans to adopt 24 standards, 8 were published in 2012, with the remainder expected by 2013 year-end.

\*\*\*When published by UNDP and ODA, ISACS are a non-binding but of normative value. If provisions from an ISACS are amended to the ATT, the provision becomes legally binding on State Parties. Rules put forward in any ISACS could become binding on all countries (including non-signatories to the ATT) if and when a given rule becomes recognized as reflecting customary international law.

## EXHIBIT 3: ISACS PROJECT STRUCTURE AND RELATIONSHIPS

INTERNATIONAL SMALL ARMS CONTROL STANDARDS PROJECT PARTNERS, 2013	
<b>Governments</b>	<b>Civil Society</b>
Australia	Action on Armed Violence
Canada	Action Sécurité Ethique Républicaine (ASEE), France
Colombia	African Strategic and Peace Research Group (ASPRAG)
Costarica	Bonn International Centre for Conversion (BICC)
Germany	British Shooting Sports Council
Guyatemala	Burkin Faso Parliamentary Network on SALW
Hungary	Canadian Coalition for Gun Control
Iraq	Centre for the Study of Violence and Reconciliation (CSVRI)
Ireland	Dis Church Aid
Jamaica	Danish Demining Group
Kenya	Eastern African Sub-regional Support Initiative for the Advancement of Women (EASIS)
Mexico	Foundation for Security and Development in Africa (FOSDA)
New Zealand	Geneva Forum
Norway	Groupe de recherche et d'information sur la paix et la sécurité (GRIP)
Papua New Guinea	Halo Trust
Romania	Handicap International
Senegal	Institute for Security Studies (ISS)
Switzerland	International Action Network on Small Arms (IANSA)
Trinidad and Tobago	International Coalition for Women in Shooting and Hunting (ICWH)
	Mines Advisory Group (MAG)
	Monterey Institute of International Studies
	National Firearms Association of Canada
	Nonviolence International
	Oxfam
	Pacific Forum for the Advancement of Women
	People with Disabilities, Uganda
	Project Ploughshares
	Safaricom
	Small Arms Survey
	Stockholm International Peace Research Institute (SIPRI)
	United Foundation, Turkey
	University of Calgary, Canada
	West African Action Network on Small Arms
	Women in Alternative Action, Cameroon
	<b>Private Sector</b>
	Defense Small Arms Advisory Council (DSAA/C)
	EPES Mandala Consulting
	Explosive Capabilities, Ltd.
	MAB Consulting
	National Association of Sporting Firearms and Ammunition Manufacturers, Italy (ANFAM)
	Tisney Jacobs – Independent Technical Expert
	Traceability Solutions
	<b>International, Regional and Sub-Regional Organizations</b>
	Central American Project on the Control of Small Arms and Light Weapons (CAPAC)
	Economic Community of West African States (ECOWAS)
	Geneva International Centre for Humanitarian Demining (GICHD)
	International Committee of Museums of Arms and Military History (ICOMAH)
	International Committee of the Red Cross (ICRC)
	International Criminal Police Organization (INTERPOL)
	Kofi Annan International Peacekeeping Training Centre, Ghana
	League of Arab States
	NATO Support Agency (NSRA)
	Organization for Security and Co-operation in Europe (OSCE)
	Organization of American States (OAS)
	Pacific Islands Forum
	Parliamentary Forum on Small Arms and Light Weapons
	Regional Centre on Small Arms in the Great Lakes Region, the Horn of Africa and Bordering States (RECSA)
	South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons (SEECSAC)
	Wissensarrangement on Export Control for Conventional Arms and Dual-Use Goods and Technologies
	World Customs Organization

EXHIBIT 2: ISACS PARTNERS

INTERNATIONAL SMALL ARMS CONTROL STANDARDS PROJECT PARTNERS, 7/13	
<b>Governments</b>	<b>Civil Society</b>
Australia	Action on Armed Violence
Canada	Action Sécurité Éthique Républicaine (ASER), France
Colombia	African Strategic and Peace Research Group (ASTIRAG)
Ecuador	Bonn International Centre for Conversion (BICC)
Germany	British Shooting Sports Council
Guatemala	Burkina Faso Parliamentary Network on SALW
Hungary	Canadian Coalition for Gun Control
Iraq	Centre for the Study of Violence and Reconciliation (CSVr)
Ireland	Dan Church Aid
Jamaica	Danish Demining Group
Kenya	Eastern African sub-regional Support Initiative for the Advancement of Women (EASSI)
Mexico	Foundation for Security and Development in Africa (FOSDA)
New Zealand	Geneva Forum
Papua New Guinea	Groupe de recherche et d'information sur la paix et la sécurité (GRIP)
Romania	Halo Trust
Serbia	Handicap International
Switzerland	Institute for Security Studies (ISS)
Trinidad and Tobago	International Action Network on Small Arms (IANSA)
	International Coalition for Women in Shooting and Hunting (WISH)
	Mines Advisory Group (MAG)
	Monterey Institute of International Studies
	National Firearms Association of Canada
	Nonviolence International
	Oxfam
	Pacific Forum for the Advancement of Women
	People with Disabilities, Uganda
	Project Ploeghishares
	Safenworld
	Small Arms Survey
	Stockholm International Peace Research Institute (SIPRI)
	Unut Foundation, Turkey
	University of Calgary, Canada
	West African Action Network on Small Arms
	Women in Alternative Action, Cameroon
	<b>Private Sector</b>
	Défense Small Arms Advisory Council (DSAAC)
	EPES Mandela Consulting
	Explosive Capabilities, Ltd.
	MAB Consulting
	National Association of Sporting Firearms and Ammunition Manufacturers, Italy (ANPAM)
	Thierry Jacobs — Independent Technical Expert
	Traceability Solutions
	<b>International, Regional and Sub-Regional Organizations</b>
	Central American Project on the Control of Small Arms and Light Weapons (CASAC)
	Economic Community of West African States (ECOWAS)
	Geneva International Centre for Humanitarian Demining (GICHD)
	International Committee of Museums of Arms and Military History (ICOMAH)
	International Committee of the Red Cross (ICRC)
	International Criminal Police Organization (INTERPOL)
	Kofi Annan International Peacekeeping Training Centre, Ghana
	League of Arab States
	NATO Support Agency (NSPA)
	Organisation for Security and Co-operation in Europe (OSCE)
	Organization of American States (OAS)
	Pacific Islands Forum
	Parliamentary Forum on Small Arms and Light Weapons
	Regional Centre on Small Arms in the Great Lakes Region, the Horn of Africa and Bordering States (RECSA)
	South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons (SEESAC)
	Wasenaar Arrangement on Export Control for Conventional Arms and Dual-Use Goods and Technologies
	World Customs Organization

## EXHIBIT 4: THE SIX SERIES AND 24 MODULES OF THE CURRENT ISACS FRAMEWORK

### SERIES 01 - Introduction to ISACS

01.10	Guide to the application of ISACS	Draft
01.20	Glossary of terms, definitions and abbreviations	Published

### SERIES 02 - Small arms and light weapons control in context

02.10	Small arms and light weapons control in the context of preventing armed violence	Draft
02.20	Small arms and light weapons control in the context of Security Sector Reform	Draft
02.30	Small arms and light weapons control in the context of Disarmament, Demobilization and Reintegration	Draft

### SERIES 03 - Legislative and regulatory

03.10	National controls over the manufacture of small arms and light weapons	Draft
03.20	National controls over the international transfer of small arms and light weapons	Draft
03.21	National controls over the end-user and end-use of internationally transferred small arms and light weapons	Draft
03.30	National controls over the access of civilians to small arms and light weapons	Draft
03.40	National coordinating mechanisms on small arms and light weapons control	Draft
03.50	International legal cooperation, criminal offences and investigations	Draft

### SERIES 04 - Design and Management

04.10	Designing and implementing National Action Plans	Draft
04.20	Designing and implementing community safety programming	Draft
04.30	Raising awareness of the need for small arms and light weapons control	Draft
04.40	Monitoring, evaluation and reporting	Draft

### SERIES 05 - Operational Support

05.10	Conducting small arms and light weapons surveys	Published
05.20	Stockpile management: Weapons	Published
05.30	Marking and recordkeeping	Published
05.31	Tracing illicit small arms and light weapons	Published
05.40	Collection of illicit and unwanted small arms and light weapons	Published
05.50	Destruction: Weapons	Published
05.60	Border controls and law enforcement cooperation	Published

### SERIES 06 - Crosscutting Issues

06.10	Women, gender and small arms and light weapons	Draft
06.20	Children, adolescents, youth and small arms and light weapons	Draft

## ENDNOTES

\* Jeff Moran studies international humanitarian law and human rights at The Geneva Academy in Switzerland. He plans to complete his executive LL.M. focused on international weapons law and lawmaking process in 2014. Mr. Moran is formerly a military diplomat, strategic marketing leader for a leading global aerospace/defense firm, and independent consultant to firearms and accessories manufactures, distributors and retailers. Currently Mr. Moran is a consultant specializing in the ethical and responsible development of the international defense, security, and shooting sports industries at TSM Worldwide LLC. Mr. Moran has a Bachelor of Science in Foreign Service from Georgetown University, an MBA from Emory University, and an Executive Master in International Negotiations & Policy Making from The Graduate Institute of International and Development Studies in Geneva. 1. The final and preceding drafts of the Arms Trade Treaty are available here: <http://tsmworldwide.com/?p=1434>

2. The author attended this public meeting. The agenda for this program is here: [http://tsmworldwide.com/wp-content/uploads/2013/06/Agenda\\_June20\\_Geneva.pdf](http://tsmworldwide.com/wp-content/uploads/2013/06/Agenda_June20_Geneva.pdf). A audio file for the first part of the briefing is available here: [http://tsmworldwide.com/?attachment\\_id=1807](http://tsmworldwide.com/?attachment_id=1807)

3. <http://smallarmssurvey.org/>

4. <http://www.sipri.org/>

5. One example of a treaty with many additional protocols is the 1980 Convention on Certain Conventional Weapons. For more on this treaty see: [http://www.unog.ch/80256EE600585943/\(httpPages\)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument)

6. Amendments are specifically addressed in Article 20 of the ATT text. Amendments are not automatically binding on all signatories to the ATT, a State must sign and ratify amendments to be bound by them. To listen to Amb. Woolcot's remarks listen here: [http://tsmworldwide.com/?attachment\\_id=1807](http://tsmworldwide.com/?attachment_id=1807).

7. For this and the other quoted comments above, see note 2 for audio.

8. See <http://tsmworldwide.com/wp-content/uploads/2013/06/SAS-Research-Note-30.pdf>

9. Author asked about this question in particular during the question period that followed. The response was noted in the author's personal briefing notes but was not recorded at the prior request of Ms. Parker.

10. This was confirmed to the author by ISACS Project Coordinator Patrick McCarthy in May 2013.

11. The ISACS website in June 2012 used the word “ambitious” to describe what the ISACS program goals were. For this see [http://tsmworldwide.com/wp-content/uploads/2013/07/ISACS\\_Website\\_06\\_2012.pdf](http://tsmworldwide.com/wp-content/uploads/2013/07/ISACS_Website_06_2012.pdf)

12. The official website is <http://smallarmsstandards.org/>. More information on the PoA here: <http://www.poa-iss.org/poa/poa.aspx>. More information on the ITI here: <http://www.poa-iss.org/InternationalTracing/InternationalTracing.aspx>. More information on the Firearms Protocol here: <http://www.poa-iss.org/FirearmsProtocol/FirearmsProtocol.aspx>.

13. See more on CASA here: <http://www.poa-iss.org/CASA/CASA.aspx>

14. See ISAC partners here: <http://smallarmsstandards.org/partners.html>.

15. See ISAC Project Document here: <http://tsmworldwide.com/wp-content/uploads/2013/06/ISACS-Project-Doc.pdf>

16. International Small Arms Control Standards Phase 2 Proposal, page 2. See here: <http://tsmworldwide.com/wp-content/uploads/2013/07/isacs-phase-2-prop.pdf>

17. Ibid, page 10.

18. Ibid, page 5.

19. See note 15page 14 for as source graphic for Exhibit 3.

20. See academic profile here: <http://tsmworldwide.com/wp-content/uploads/2013/06/Edward-J.pdf>

21. The IANSA website is here: <http://www.iansa.org/>. The foundation document is here: [http://tsmworldwide.com/wp-content/uploads/2013/06/IANSA\\_Founding\\_Document.pdf](http://tsmworldwide.com/wp-content/uploads/2013/06/IANSA_Founding_Document.pdf)

22. See note 15, page 5.

23. The ISO principles are here: [http://www.iso.org/iso/home/standards\\_development.htm](http://www.iso.org/iso/home/standards_development.htm)

24 Professor Koh’s speech may be read in its entirety here:

<http://tsmworldwide.com/wp-content/uploads/2013/06/Twenty-First-Century-International-Lawmaking.pdf>

25. The book may be bought at <http://www.amazon.com/International-Organizations-Law-makers-Jos%C3%A9-Alvarez/dp/0198765630>.

26 See lecture here along with downloadable handouts: [http://untreaty.un.org/cod/avl/ls/Alvarez\\_IO.html](http://untreaty.un.org/cod/avl/ls/Alvarez_IO.html)

27. Multiple interviews on a not for attribution basis, May and June 2013.
28. For more on what the UN small arms process is see: <http://tsmworldwide.com/wp-content/uploads/2013/06/SAS-HB2-Diplomats-Guide.pdf>
29. The full breakdown of the ISACS framework is here: <http://smallarmsstandards.org/isacs/>
30. Burundi was featured in an award winning promoted by Oxfam International call “Bang for Your Buck,” which reported that grenades costs less than a pint of beer. See a review of this firm here: <http://tsmworldwide.com/now-showing-misguided-humanitarianism/>
31. See this draft ISACS module here: <http://tsmworldwide.com/wp-content/uploads/2013/06/module-3.3.pdf>
32. See the minority report related to SAAMI’s withdrawal from ISACS here: <http://tsmworldwide.com/wp-content/uploads/2013/07/SAA-MIMinorityReportISACSFinal.pdf>
33. See SAAMI “Minority Report Submitted By The Sporting Arms And Ammunition Manufacturers’ Institute In Response To Draft International Small Arms Control Standards Promulgated By The United Nations Coordinating Action In Small Arms.” March 2012. <http://tsmworldwide.com/wp-content/uploads/2013/07/SAAMIMinorityReportISACSFinal.pdf>
34. See draft standard here: <http://tsmworldwide.com/wp-content/uploads/2013/06/module-3.10.pdf>
35. See draft standard here: <http://tsmworldwide.com/wp-content/uploads/2013/06/module-3.20.pdf>
36. More on Dr. Paul Holtom: [http://tsmworldwide.com/wp-content/uploads/2013/07/Dr-Paul-Holtom—www.sipri\\_.pdf](http://tsmworldwide.com/wp-content/uploads/2013/07/Dr-Paul-Holtom—www.sipri_.pdf)
37. See draft standard here: <http://tsmworldwide.com/wp-content/uploads/2013/06/module-3.21.pdf>
38. See GRIP website here: <http://archive.grip.org/en/siteweb/default.asp.html>
39. See draft standard here: <http://tsmworldwide.com/wp-content/uploads/2013/06/module-3.3.pdf>
40. See draft standard here: <http://tsmworldwide.com/wp-content/uploads/2013/06/module-3.40.pdf>
41. See website here: <http://www.issafrica.org/>

42. Settled research shows that these specific problems of small arms and light weapons are most acute for fragile or failed states. Owen Greene and Nicholas Marsh, eds. *Small Arms, Crime and Conflict: Global Governance and the Threat of Armed Violence*. Routledge: 2012. P. 90-91

43. President Bill Clinton signed the Rome Statue establishing the International Criminal Court on his last day in office in January 2001. His successor, President George Bush, effectively unsigned the treaty months shortly before the treaty came into force in July 2002 with a note delivered to the UN Secretary General.