JURY NULLIFICATION VOLUME II: THE SECOND AMENDMENT

Jury Nullification Thru the Initiative Process

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JURY NULLIFICATION
VOLUME II:
THE SECOND AMENDMENT

Mike Timko, Compiler Mike Timko

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Jury Nullification Thru the Initiative Process

by Mike Timko

"[Charles Dudley] Warner's observation, that 'Politics makes strange bedfellows,' was in the nature of an aside having little or nothing to do with the context, and was used in a little essay in *My Summer in a Garden* on his experiences as an amateur gardener.

. . . . .

"Warner was the author of several books and co-author with Mark Twain of *The Gilded Age.* The often quoted witticism that, although there are always many complaints about the weather, nobody ever does anything about it, which is generally credited to Mark Twain, is believed to have been Warner's."

Henry F. Woods, ed. *American Sayings: Famous Phrases, Slogans and Aphorisms.* New York: Perma Giants, 1950 rev. ed., p. 283.

By way of analogy, many people—particularly libertarians and populist conservatives—are talking about jury nullification—but few are doing anything about it. I propose to change that.

What is jury nullification? Simply stated, it is the inherent right of a juror to determine the facts *and the law* in a particular court case. It thus provides an opportunity for *a* juror, in the secrecy of the jury room, to partially undo the damage previously done by the voters in the secrecy of the voting booth.

This process of decentralization would place much more political power in the hands of the citizenry—which is where it is supposed to reside in a republic. [When—if ever—the American (*i.e.*, U.S.) Empire was a functioning republic—as opposed to a rhetorical one—is a question which need not detain us.] I proceed from the working assumption that the American Empire will follow a path similar to that of all previous empires. The possibility of a "return" to a republic is quite remote. However, for those who have this as a goal, jury nullification must surely rank high as a means towards that end.

I first remember becoming aware of jury nullification in the early 1970s when I read excerpts from Lysander Spooner's classic 1852 work, *An Essay on the Trial by Jury.* I have reprinted this book in full in the present volume. Also reprinted in full is the important 1983 analysis by Steven E. Barkan, "Jury Nullification in Political Trials."

Returning to the early 1970s: Well, I thought, jurors have the right of jury nullification but judges almost always refuse to inform them of their right or allow attorneys to do so. A massive educational campaign, aimed at prospective jurors in a jurisdiction of manageable proportions, such as, say, Santa Barbara or San Luis Obispo, California, is what came to my mind. However, I did not pursue the matter. Others have but with quite modest results.

In recent years, the "obvious" approach to publicizing the right of jury nullification has come to my mind: the initiative approach. Buy why, one might ask, go to the expense, time and effort involved in an initiative campaign "merely" to publicize an existing right!? Especially since our statist opponents, including most lawyers, will oppose us with an unparalleled ferocity—and with millions of dollars!—which will make the 1978 Jarvis-Gann property tax reduction initiative (Prop. 13) look like a Sunday school picnic in comparison! That's part of the point—they'll be, in essence, adding gasoline to a raging fire as they try to blast us with their millions! It's a case of *heads we win and tails they lose!* If passed (*i.e.*, with a vote of 50% plus one vote) then jury nullification would become a part of the law (or the State Constitution—which approach to take remains to be determined). If it is defeated at the polls, we've *still* accomplished our goal of publicizing this *inherent* right of jurors! For example, in California, 10 million plus registered voters would receive pro and con ballot arguments; radio, TV and newspapers would provide a free forum for discussion (as well as taking paid ads): etc.

As Clarence Lee Swartz has noted: "If any law is to be enforced, a jury must convict the alleged lawbreaker. If the jury is representative of the general sentiment of the community (and it will be, if fairly drawn by lot from the whole community), there will be, on an average, the same proportion of men on the jury who are opposed to the invasive law as there is among the people in general. Let it be supposed, for instance, that one-twelfth of the community is opposed to a certain invasive law. This is only a small portion of the majority necessary to repeal it by voting, and at the ballot box that one-twelfth would be powerless. But that one man, in every twelve, who is opposed to that law can, if on a jury, prevent a verdict from being rendered. Thus, if only nine per cent of the community are opposed to a bad law, they can prevent its enforcement. This is less than one-fifth of the number necessary to repeal a law through the medium of an election."

Clarence Lee Swartz. *What Is Mutualism?* In collaboration with The Mutualist Associates. New York: Vanguard Press, 1927, p. 151.

As Swartz has noted, "the jury. . .will be representative if drawn by lot from the whole community. . ." But a *biased* selection of jurors is what *attorneys* on *both* sides of a case are trying to attain! In fact, a Jury Selection Industry has arisen in recent years to aid attorneys in this endeavor. See, for example, the article by Sam Enriquez, "Trial Consultants: Experts Seek to Identify Jurors' Bias," Los Angeles *Times*, Aug. 27, 1986, pp. 1, 18.

Thus, a thorough reform of the jury system is needed to buttress the recognition of the right of jury nullification. For an extensive discussion of the former issue, see Godfrey Lehman, "The Unconstitutionality of Voir Dire, Peremptory Challenges

and Jury Books in Jury Selection," *Lincoln Law Review,* Vol. 14, No. 2, 1983, pp. 53-132. [Lincoln Law Review, 281 Masonic Ave., San Francisco 94118.] I predict that jurors' privacy will become a key political issue within a few years. It should be an integral part of an initiative to inform people of their right of jury nullification. However, some may prefer to have two separate initiatives.

Petition distribution. We would have an obvious place at which to hand out petitions: In or near court buildings where jurors or prospective jurors abound. They often have plenty of time on their hands and this will *really* give them something to talk about! And after they've been put thru the wringer by the judge and the attorneys, they'll readily sign!!

One way to save on mailing costs is to rely heavily on "piggyback" mailings with groups concerned with specific victimless "crime" laws, etc., as well as with libertarian and populist organizations. Also in order are piggyback mailings with other initiatives of a complementary nature—such as taxpayers' civil liberties, tax reduction, tuition tax credits, gunowners' rights, marijuana decriminalization, prostitution decriminalization, etc.

Getting an initiative going in one state should be our main concern. However, it is not too early to think in terms of a multi-state initiative effort!

In conclusion, jury nullification and a respect for jurors' privacy are not panaceas. After a hung jury, the prosecution can continue to harass a defendant with additional trials, etc. There is no substitute for repeal, for example, of victimless "crime" laws dealing with drugs, gambling, sex, seatbelts, etc. But jury nullification played a part in the eventual repeal of Prohibition in the 1930s and it is time to bring it "front and center" again as an integral part of a plan to roll back the rising tide of totalitarian liberalism and conservatism which is engulfing us.

Jury Nullification Thru the Initiative Process: Round Two — The Second Amendment

By Mike Timko

This is an age of specialization. Some would say, of overspecialization. And, yes, you guessed correctly: I'm going to suggest still more specialization. The market for liberty in Second Amendment freedoms is not fully served by multipartisan organizations such as the National Rifle Association (N.R.A.).

(A similar argument can be made for the 6th and 7th Amendments and the multipartisan F.I.J.A. — the Fully Informed Jury Association, P.O. Box 59, Helmville, MT 59843. But more on the 6th and 7th at another time.)

(And ditto for the whole Bill of Rights and the liberal/leftist A.C.L.U.)

By partisan I'm **not** referring to the major parties — Democratic and Republican — or to the various smaller ones. My reference is to ideological groupings.

Maddox and Lilie have discarded the traditional Liberal/Conservative/Middle-of-the-Road political division since it doesn't correspond with the polling data of the last few decades. The data indicate that there are four distinct ideological types in the U.S.: libertarian, conservative, populist and liberal. While populists and liberals are much more numerous, their voting turnouts are much lower. Thus, in terms of the actual electorate (54% in the 1980 Presidential vote) all four groups are about equal in size. (p. 108) (William S. Maddox and Stuart A. Lilie. **Beyond Liberal and Conservative: Reassessing the Political Spectrum.** Foreword by David Boaz. Washington, D.C.: Cato Institute, 1984, 203 p.)

Proposal: Formation of a Libertarian Second Amendment Association. And, presumably, persons of the other three ideological persuasions may wish to form parallel organizations. Thus, we might have the following:

Libertarian Second Amendment Association
Conservative Second Amendment Association
Populist Second Amendment Association
Liberal Second Amendment Association

Since liberals constitute a disproportionate amount of opposition to the Second Amendment, there is a critical need for the liberal association. To their credit they have — years ago (1979) — issued an excellent 237-page manifesto: Don B. Kates, Jr., editor. **Restricting Handguns: The Liberal Skeptics Speak Out.** Foreword by Senator Frank Church (D. -Idaho). [No Place]: North River Press, Inc. Distributed by Caroline House Publishers. David T. Hardy concludes his essay with a quote from the late Senator Hubert Humphrey [D. - Minn.]: "The right of citizens to bear arms is just one more guarantee against arbitrary government, one more safeguard against the tyranny which now appears remote in America, but which historically has proved to be always possible." (p. 185) Ah, yes, "remote"... "Arbitrary government" and government tyranny are two of my favorite oxymora. But I guess it depends on whose oxymoron is Gored...

Why do we need four more Second Amendment groups? Because the Second Amendment issue cannot be argued in a political vacuum. Talking about guns inevitably leads to a discussion of what to do about the No. 1 issue of the day: Crime. No.1 in the mind of the public, that is. [From my (libertarian) point of view Civil Liberty is (Civil Liberties are) now, have been and will always be the No.1 issue. All other issues — the economy, jobs, taxes, environment, foreign policy, etc. — are merely derivative.] Many people would prefer to talk about guns but not (so much) about the criminals who use the guns! A similar demonization of things occurs when it comes to asset forfeiture (confiscation) laws.

Some obvious elements of the crime issue are:

Death penalty. If used, under what circumstances?

Drug laws. For which drugs? Tobacco (nicotine): Should it be added to the Prohibitionist's list?

Asset forfeiture laws. First they came for the drug users and dealers and then...

Immigration. What should be done with criminals who are not citizens?

Prison conditions. How much more atrocious should they be allowed to become? See, for example, John Hospers, "Panopticon, U.S.A.," **Liberty**, March 1994, p. 64.

Three-strikes-and-you're-in-prison-for-life legislation. If yes, which version?

The Washington state "three strikes" legislation is one of the milder types. In contrast, the recently enacted [March 7, 1994; see, for example, Daniel M. Weintraub, " '3 Strikes' Law Goes Into Effect," **Los Angeles Times**, March 8, 1994, pp. A-1, A-21.] California law is the hardline, crackpot, election-year version. Politicians rushed to judgment on this issue in an attempt to blunt the effect of a nearly identical initiative measure which will appear on the November 1994 ballot. [In terms of the severity of (some) drug laws — which make a mockery of "equal treatment under the law" — it is also (crack)(pot) legislation.] Copies of the initiative — endorsed by the N.R.A. — were enclosed in its January 1994 issue of **American Rifleman** mailed to California members.

Understandably, many prosecutors are up in arms and openly oppose it. They give a plausible cover story: Too many defendants will demand jury trials! The already overburdened system of criminal (in)justice just might collapse. Civil trial schedules will be further snarled as court resources are reallocated to criminal trials. The real reason is their fear of jury nullification. It's a classic jurisdictional dispute: Decentralized juror political power versus Centralized political power of lawyers, prosecutors, judges, police and jailers. The latter groups are not about to give up one iota of power from their Political Fiefdoms (i.e., Thiefdoms) to any upstart amateurs acting in their capacities as short-term citizen-jurors.

It is also a classic illustration of **the** fundamental division in political economy: Those with diffuse interests (consumers, taxpayers, jurors) versus those with concentrated interests (producers, tax users, judges, police, etc.). The Concentrators (Centralizers) invariably seem to prevail. Thus, the Seamless Webb of Endless Sumer Tragedy of the Commons of American Diplomacy As We Go Marching From Here to Eternity...

Thus, under the pressure of events, "single-issue" gunowners' rights groups begin to take policy positions on a number of related issues. This can lead to dissension within the organization. It can also act to curb the rate of growth in membership. It certainly has stopped me from joining any of the groups. On the other hand, it may serve as a stimulant for some to join.

Therefore, as a supplement to existing nonpartisan (or multipartisan) groups, I have proposed — as previously noted — the formation of four partisan (ideologically-based) organizations — libertarian, conservative, populist and liberal — so as to maximize support for the Second Amendment.

The question arises: Won't our opponents respond in kind with the following:

Libertarians to Restrict (or Repeal) the Second Amendment
Conservatives to Restrict (or Repeal) the Second Amendment
Populists to Restrict (or Repeal) the Second Amendment
Liberals to Restrict (or Repeal) the Second Amendment

The first would be strictly a joke. However, a gullible media or public might take it seriously — at least initially. Two and three are certainly possible but probably with limited effect. A liberal group would be a distinct possibility. But a key element would be that people of the same overall ideology would be asked to debate each other re their differences on the Second Amendment. And there we would win.

Of course, winning debates doesn't necessarily translate into success in the legislative and executive branches of government. But then there are the courts. This is where jury nullification comes into play. [See my essay in Vol. I — reprinted in the current (Vol. II) on pages 3-4.]

My proposal remains the same: Multistate, multiple-issue initiative petition campaigns. Separate groups which work together wherever possible: This is certainly the case for jury nullification and Second Amendment initiatives. There are thousands of laws, ordinances and regulations re guns in the U.S. which are, in whole — or in part — fair game for jury nullification. Go to it, jurors!

And what standard of justice should jurors uphold in their deliberations? The libertarian standard of justice: The noninitiation of force or fraud. The alternative is much more of what we already have: An onward march of authoritarian and totalitarian democracy.

May I be permitted a realistic view of human nature as it relates to lawyers in their capacity as prosecuting attorneys for the State? (I use "State" in its generic sense for the Ruling Elite — and their underlings and hired guns — at every level of government.) The aim of many prosecuting attorneys is higher office. Perhaps a judgeship but often District Attorney, State Attorney General, Governor...

[The current occupant of 1600 Pennsylvania Avenue was once the Attorney General of his State. (As I give the final wording to this section on the 50th anniversary of the Normandy Invasion — Everyone dies in vain except those who commit suicide — the Current Occupant is being scorned in certain quarters for having been insufficiently militaristic in his college days. Indeed, he actively opposed the U.S. slaughter of hundreds of thousands of civilians in the Indochina War. But he subsequently saw the error of his ways and supported the U.S. slaughter of thousands of Iraqi civilians in 1991 — this under the cleansing camouflage of a "United Nations action" — and the slaughter of dozens of civilians at Waco in 1993 — this under the purification procedure of a "law enforcement action" by the BATF and FBI. How many more will he have to kill before the hardcore militarists get off his back...?) As to a more appropriate abode for him — and for **his** Attorney General — let's make that Inquisitor General since the Waco Massacre involved a Trial by Fire for Religious Heresy — see the current (Vol. II) essays by Cox and Bradford.]

But I digress. Back to the prosecutors. One of their primary interests is their "batting average" — the ratio of successful to total prosecutions. "Three" (or some number of) strikes and they're out of contention for higher office. Jurors can increase the strikeout rate of prosecutors by refusing to convict in gun law cases where the defendant has not initiated any force or fraud. And why should jurors restrict their nullification to gun law trials? They shouldn't...

Prosecutors, faced with a scarcity of resources (i.e., tax dollars) and a low success rate in prosecuting victimless crime law cases, will gradually shift their efforts to thoroughly investigating and prosecuting real crimes — murder, rape, robbery, burglary, etc. This entails (implicitly if not explicitly) an adoption of the highest common denominator re justice, which is the libertarian standard: The noninitiation of force or fraud. This means: Prosecute those who initiate force or fraud. And not those who merely possess a gun — or a marijuana joint — or...

Elsewhere in the current (Vol. II) I have reprinted the 1989-90 California petition of the Second Amendment Committee ("Ownership of Firearms. Initiative Constitutional Amendment"). Compared to the federal Second Amendment, it is fairly long and detailed. It has to be so in order to lessen the chances of deliberate misinterpretation by judges and prosecutors. If such a measure were enacted, some misinterpretation would still occur but the harm done to defendants could then be mitigated by well-informed jurors. They would merely have to follow through on the obvious anistatist intent of the measure and render judgment accordingly.

The current (1994) California Hemp/Marijuana Initiative includes the following provisions:

"III. No California law enforcement personnel or funds shall be used to assist enforcement of federal cannabis/marijuana laws governing acts which are no longer illegal in the state of California.

"IV. The legislature, Governor and Attorney General are hereby directed to challenge federal cannabis/marijuana prohibitions that conflict with this act."

(California Hemp Initiative, 5632 Van Nuys Blvd. #310, Van Nuys, CA 91401. I predict that the industrial use of hemp will become a major political issue across the country within a few years.)

I have been thinking along similar lines. To quote from my notes of 3/27/93:

"State Const. Amend.

"No State official may collaborate with officials of any other political (or private) jurisdiction which has a lower standard of civil liberties!

"How to be determined!?

"In advance — official signs statement **under penalty of perjury** re his (and/or his org.) standard re civil liberties!"

While applicable to many issues, I was in particular thinking of two initiative petitions: First Amendment (health freedom aspects) and the Second Amendment.

People as Sovereign

being a discussion of that most powerful safeguard against government oppression

by Godfrey Lehman

Constitutional republicanism, a philosophy emphasized by our Founding Parents two centuries ago, is based on the natural law idea that the powers and obligations of sovereignty reside inherently in the people. The people hold the supreme social power, not by grant or delegation, but by fact of birth; there is no authority above them, and there is no control over them in the day-to-day conduct of their lives as long as they do not encroach upon the rights of other persons.

The reality, of course, is that power in the hands of so numerous a sovereign is impractical; the people out of necessity live under a government apparently controlling them. The government writes the laws, sees to their administration, and adjudicates questions of transgressions of those laws. The model "good citizen" leads a "law-abiding" life. This reality appears to mock the doctrine of individual sovereignty by reducing it to mere poetry. But what seems to be contradictory is resolved within the Constitution itself: the sovereign power and the government are specifically separated from each other. They form two entities designed to act competitively so neither can seize absolute power.

Our Founding Parents had learned the ever-recurrent lesson of history: when sovereignty and government are embodied in the same entity, the inevitable result is oppression and tyranny. The government becomes monopolistic, operating without restraint; there is no court of appeal because sovereignty is that which is supreme above all others. James Madison wrote in the 47th Federalist Paper: "The accumulation of all power...in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may be justly pronounced the very definition of tyranny." That is the character of monarchy and czarism; and of caesars, or any manner of triumvirates. The greatest sin, the highest treason is disrespect for and disobedience to the sovereign/government.

But just as fire is the first essential of life, government is the first essential to a reasonably stable social order. Where there is no government, unbridled power rushes in to fill the void, and thus to establish dynasties, dictatorships, and oligarchies. Pure anarchy is an impossibility. Having before them the relatively recent debacle of the Cromwellian revolution in England, where the overthrowers of one tyrant assumed the trappings of the overthrown, our Founding Parents understood that both fire and government--a metaphor employed by George Washington--make excellent servants but horrendous masters. The solution for one as well as the other is control, restraint, the setting of limits: natural forces keeping sun and Earth at a proper distance; the fireplace, the furnace, the oven burner. As to government, safety is found in instituting it so as to

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derive its "just powers from the consent of the governed"; limiting it to the powers delegated while allowing reasonable flexibility for changing conditions.

A government so limited would be representative: selected by the people-as-sovereigns to govern in their interests, and

It is ever the character of government to creep around and beyond the fireplace screen.

consensual in restraining them and the government from imposing upon the rights of others. If the people-as-sovereigns were without formal organization, the result would be the consolidation of power into the hands of those few strong enough to keep it within their group (as did Caesar, William the Conqueror, Napoleon, Mussolini, Castro). The resulting oligarchy could be a tyranny worse than any other, for the oligarchs would be sovereign/people and government in one. Fearful both of leaving a void and of a government too strong, our Founding Parents first established a weak central power: a Congress that, under the Articles of Confederation, could not control the subdivisions. Within eleven years the Federation showed signs of breaking apart, perhaps even into separate nations.

The Constitution that succeeded intended to overcome this weakness through a stronger central government, while still within proscribed limits. It is ever the character of government--of power--to resist restraint; to creep around and beyond the fireplace screen, eventually to explode into a holocaust. The simple placing of the screen--the writing down of limitations--is not sufficient to contain government as it might be with fire. There must be an entity, distinct and separate, ever vigilant, to clamp down, to hold government in check. The only authority that can do this is the only authority above the government: the sovereign power. That is the reason for separation and competition. The sovereign stands apart to oversee the government; to intervene when it will to restrain; to serve as the ultimate court of appeal for the people endangered by oppression.

When the people are recognized to be sovereigns, we have the people-governed asking the people-as-sovereigns to audit the behavior of their representatives. It is the essential function and obligation of the responsible sovereign to exercise "eternal vigilance." But it is the unfortunate character of the people to become so deeply involved in the problems of their daily existences that they neglect this obligation of sovereignty; they look away, allowing government to expand until it becomes oppressive. They yield their sovereignty bit by miniscule bit, until what is supposed to be representative has become de facto sovereign. It is the character of government to encourage this negligence with, among other things, diversions and distractions harmless of themselves but overblown until they eclipse more fundamental issues. Some distractions are terroristic to force subjugation to usurping governmental authority.

To protect against this, and showing miraculous insight, our Founding Parents built into the Constitutional system a safeguard proven for centuries to be the most effectual and perhaps only direct control of the people over the government; and so effectual as to have been many times the only obstacle to absolute sovereignty. Not only was it built in once, but three times by direct references and several more by indirect; to be effectual, the safeguard must be acknowledged and implemented by the people. That safeguard is trial by jury. Abused, neglected, disregarded, trial by jury is nonetheless the one and only power the sovereign people can exercise to prevent their oppression.

"Abused, neglected, disregarded, trial by jury is nonetheless the one and only power the sovereign people can exercise to prevent their oppression."

And it is here that government introduces some of its diversion, distraction, and intimidation. Government, and in particular the judicial branch, realizes this inherent power of the jury and would denigrate, ridicule, and weaken it to deny its sovereignty. If we are uninformed, we are intimidated into yielding our direct power of sovereignty to a usurping judiciary elevated to an oligarchic sovereignty not authorized by any constitution. We contribute to the destruction of this chief bulwark against oppression, and thereby to our own destruction.

We are told that the function of the jury is to determine the facts in a dispute, and then to apply the law as "interpreted" for us

by the judge. We are "instructed" that the judge is the authority to be obeyed and we, as jurors, are subordinate to that authority. What we all too often fail to understand is that the judge is a creature of government, operating under the Constitution (not above it); his role is to serve his sovereign, the people, by protecting their rights. While a function of the jury is to determine the facts, its greater responsibility is to audit the government in the matter before it; to review the law in question as it relates to the facts and to evaluate the law itself. The "law" has been written by the people's representatives; the principal function of the people, through the jury, is to determine if the law implements the will of the people. If it does not, it is the obligation of the sovereign people/jury to veto the law: to nullify. This power of "jury nullification" has advanced liberty over oppressive government.

It is difficult to conceive that there exists a single judge not aware of the power to veto bad law. Deceptively, judges play upon the ignorance of the people, not only by withholding knowledge (a Constitutional violation in itself), but by indoctrinating us into accepting their "interpretation" of the law. They do this by imposing what they call "jury instructions," "demanding" that we comply with these instructions. Yet in their role as judicial servants, it is their sworn Constitutional function only to counsel and advise the sovereigns in the jury box, to whom they owe obeisance.

The practice of giving "instructions," while ancient, is not quite as old as trial by jury itself. The juries of antiquity were protected in several ways from judicial domination; the courts were, for example, prohibited from commenting on law or evidence. But since an independent jury challenges absolutism, no government can tolerate it. To defeat such a challenge, the would-be sovereign/judiciary tries to extend its control over the Constitutional sovereign by "instructing" or even "dictating" the law. The Constitutionally illiterate jury yields its sovereignty to the usurping court. If liberty, which depends upon a vigorous competition, is to survive, the jurors must understand their fundamental power.

"If liberty, which depends upon a vigorous competition, is to survive, the jurors must understand their fundamental power."

The constitutions of all 50 states, as well as the federal Constitution, mandate jury nullification. It was declared as existent on July 4, 1776, because governments derive "their just powers from the consent of the governed," who retain "the right...to alter or abolish it." It follows logically that they have the right to alter any part of it by peaceable means through Constitutionally established procedures. If this were not so, pressure would build until the people would feel compelled to catalogue "a long train of abuses and usurpations" from which they could be freed only by violence--even revolution.

The Tenth Amendment codifies this declaration by acknowledging that all powers not delegated to the government "are reserved... to the people."

All of the 50 state constitutions reiterate the Tenth Amendment, or are more succinct:

"All political power is inherent in the people." This is usually followed by an acknowledgment of the right to "alter or abolish," except in Florida. When Florida ratified its constitution in the 1960s, this sentence was omitted on the ground of redundancy. Since the people retain "all political power," it follows that they have the right to alter or abolish. The states also include a declaration such as this, from the California state constitution (Article I, Section 26): "The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." There is no declaration in any constitution authorizing any judge to "instruct" or "dictate" to the people, who retain "all political power." There are no "express words."

The greatest responsibility of the jury is to audit the government in the matter before them.

That the judiciary today assumes so dominant a power arises not from any constitutional authority, but from ignorance of the people--neglect, even laziness or fear. The black robe can be very intimidating and often is, but the basic fact remains--and every judge knows this--that when the jury knows, or senses by exercising its sovereign power, there is absolutely nothing the judiciary can legally do. It doesn't even take an entire jury, but only a single man or woman acting on conscience alone.

History is rife with examples of juries (or a single juror) blocking the tyranny of the government or its court. Neither the Declaration of Independence nor the Constitution itself could have been written without juries who understood the basic Constitutional philosophy that all persons "are endowed by their Creator" with unalienable rights. Juries have done this primarily by acquitting defendants brought to trial for violating "laws" that restricted liberty.

The jury actually created itself by imposing its will upon otherwise tyrannical government, and in doing so has demonstrated it is stronger than the judicial, legislative, and administrative branches--even when operating under otherwise absolute monarchy.

Government, well aware of the challenge posed by knowledgeable jurors, conspires to strip the jury of its power. Intending to preclude this, our prescient Founding Parents devoted greater length in the Constitution to ensuring trial by jury than to any other right. Despite the conciseness and clarity of Article

III, Section 2, Clause 3 ("The trial of all crimes, except in cases of impeachment, shall be by jury"), patriots like Patrick Henry found this "too vague and equivocal." They demanded both the Sixth and Seventh Amendments, along with indirect references such as the "due process of law" clauses in the Fifth and Fourteenth.

"When sovereignty and government are embodied in the same entity, the inevitable result is oppression and tyranny."

If the people would retain their role as sovereigns and audit a government that would be sovereign, they must understand their Constitutional mandate: the judge has no legal authority of any kind to "instruct," but is limited to "counsel and advice." The decision whether to follow such counsel and advice rests entirely and exclusively with the jurors, individually and collectively. Together with the law, such counsel can be accepted or rejected in part or in whole, at the sole discretion of the jury.

All litigants are entitled, as an inviolate right guaranteed forever, to trials by jury at their election. All jurors have only a single obligation. That obligation is to their individual and collective consciences: to follow their own wills, without regard to any outside influence and least of all to the judge or the law. Each juror must forever afterward live with his conscience. He need act only to satisfy that conscience; he has no other obligation and must not even consider any other.

When the jury exercises such ultimate power, it assumes its true role as supervising sovereign. It is competitive, not docile; it confines the government behind the fireplace screen; it becomes truly "the grand bulwark of every citizen's liberties" and "the great glory of law," as defined in the eighteenth century by William Blackstone, Thomas Jefferson, James Madison, and other lovers of liberty. Consciously or otherwise, the jury fills the role assigned to it by Abraham Lincoln: "The people of the United States are the rightful masters of both Congress and Courts, not to overthrow the Constitution, but to overthrow the men who would pervert the Constitution."

Judges imposing their dictatorial "I am the Law" edicts would replace the people as masters of the courts to become masters over them. The tyranny that threatens the United States is not of the Sinclair Lewis "it can't happen here" style. It is a judicial oligarchy bluffed by black-robed intimidators by slow degrees upon the Constitutionally illiterate. □

[Documents — Second Amendment Initiative Petition]

[Compiler's note, April 17, 1994: The following documents have been supplied by the Second Amendment Committee, P.O. Box 1776, Hanford, CA 93232. This 1989-90 initiative did not qualify for the ballot. Contact the Committee re their current efforts.]

THIS IS WHAT THE MEASURE DOES:

- **Reaffirmation of the Second Amendment of the United States Constitution:**
  The first paragraph reaffirms our right which does exist as an individual right. The common law, the Second Amendment of the Bill of Rights in the U.S. Constitution, and the state's Act of Admission to the Union -- all three, confirm our individual right. All necessary activity, such as gun shows, practicing, sporting and hunting clubs, safety courses, etc. etc. are also protected so that expertness in the use of firearms is achievable.

- **Declaration of Interpretation of Right:**
  This forces the courts and government officials to go back to the spirit in which the founding fathers wrote the Second Amendment. The history books and records will be reviewed for the true intent and purpose of the Second Amendment. This is a "declaration" to require adherence to the common law to and the true meaning of the Second Amendment and to reaffirm and clarify this historical barricade erected against tyranny and infringements. The denial by government that individuals have a constitutional protection for their firearms is a prime example of the type of tyranny the founders meant to stop by drafting the amendment.

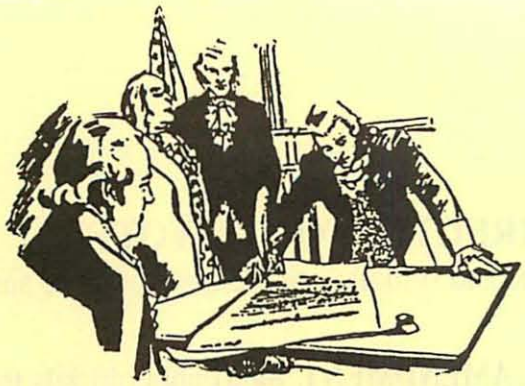
- **Intent of Section:**
  The intent must cover a comprehensive delineation of all aspects of the right since, as of necessity, we are forced to be prolix. Therefore, we have listed the purposes (reaffirm, clarify, and protect) in the section; the coverages (purchase, own, possess, advertise, sell, lease, loan, manufacture, transport, or use); and the objectives (defense of person, family, home, property, liberty, defense and safety of the state, sport and recreation); while we also list exclusions of those who have been proven to be a menace with firearms. We must end the brainwashing techniques designed to make us lose by default.

- **Restraints on Various Branches of Government, their Public Officials, Servants or Employees:**
  The right of an individual (or collective rights) can not be denied, curtailed, prohibited or taxed away! Registration and confiscation are forbidden. What is called "assault weapons" is redefined as "weapons of defense -- well-suited to protect us in an invasion".
  Other restraints are place against any branch of government. It bars and proscribes local ordinances, state acts, and various other legislation which includes federal legislation, treaties, executive orders, and martial rule, etc. (The last three are the hidden threats of which the public is unaware.)

- **Repeal of Conflicting Provisions:**
  This measure has the power to roll back bad laws which infringe upon the people's right to keep and bear arms. The measure needs no other action as it is self-executing.

- **Severability:**
  This is a protective clause which would not be needed if the courts were enforcing the Constitution instead of deliberately misconstruing it. The severability clause will isolate further attempts to misconstrue and only those parts of the measure that are directly involved in a challenge by the courts could be held up. The clause prevents the courts from throwing out the whole measure because they have arguments in regard to a particular issue. The people are the ultimate authority. (James Madison)

BE AS GENEROUS AS YOU CAN WITH YOUR DONATIONS TO HELP PUT THE HANFORD MEASURE ON THE BALLOT.



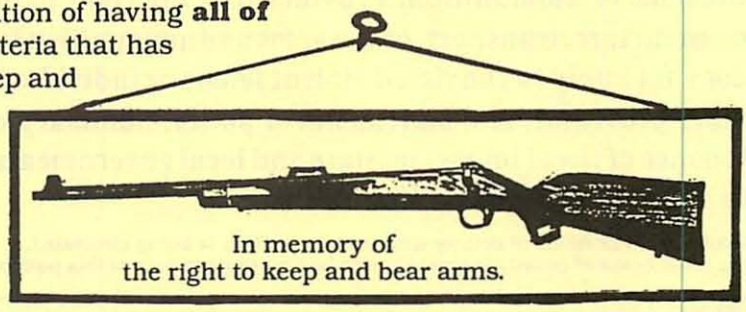
Second Amendment Committee

P.O. Box 1776 • Hanford, CA 93232 • (209) 584-5209

December 28, 1989

Dear California Gun Owner and
Supporter of the Right to Keep and Bear Arms:

In order for the law-abiding to avoid the degradation of having **all of their firearms taken away from them** in the hysteria that has been created by **both:** the **abuse of the right** to keep and bear arms by the criminal element of our society, and the **deliberate engineering** to create an environment wherein the right to firearms would be **villified, devalued, misunderstood,** and **unappreciated,** it is now immediately necessary for the people to get as many qualified signatures on the enclosed petitions as they possibly can. It will be a sad day in the history of the United States if all we have left of our firearms is just a picture on the wall. *A memory on the wall won't stop a burglar in your hall!*



In memory of
the right to keep and bear arms.

This measure will tear down the **Berlin-type wall** that has in recent times separated the gun owners from their **ordained constitutional security** in the people's **Bill of Rights.** It is essential that we get the necessary 595,485 signatures of registered voters to reaffirm this **ordained right** since it is the **highest law possible** to protect the individual's right to keep and bear arms. Neither state, federal or treaty law can supersede the people's Second Amendment in the Bill of Rights, the right to keep and bear arms.

This measure will repeal the Roos-Roberti bill! Make no mistake about it—the Roos-Roberti bill is open-ended, and was written to support those in the legislature who intend to confiscate ALL of our civilian-owned firearms! The anti-gun nuts have gone so far as to empower a police commissioner in the city of Boston to enter homes and businesses and conduct a search for prohibited firearms. Such behavior, as well as the passing of the Roos-Roberti bill, is AGAINST THE LAW! **Firearms are a necessary tool** for the protection of ourselves and the security of our country!

Taking away our guns is not going to "stop crime" which is the reason given for the actions by the gun control group. **Taking away the guns will increase the pool of unarmed victims!** The real reason for taking away all the guns is to satisfy the objective in Public Law 87-297. That law is federal legislation, the objective of which is to achieve a totally disarmed nation.* That would leave us with a police state and a despotic form of government against which we would be helpless and defenseless.

We have a tremendous job to do in counteracting the propaganda that has been presented to the people via the media, villifying our firearms, and making them synonymous with crime. **This is our last chance to save our firearms!!** If we fail, the state will say the people do not want firearms and will feel quite confident as they proceed to search for all of our guns, **including hunting rifles!**

Even though we are underfunded, our committee realized that we **had to file** our enclosed initiative measure (for which there is no substitute and no equal). If we had not, **you would have blamed us** for not holding the door open, knowing that this is **the last chance!** THEREFORE, WE DID FILE! **Now we need your help with as generous a donation as you can afford and as many signatures that you can obtain on the petitions. Our deadline is coming early**—March 15, 1990. We cannot win this battle without paid assistance. Each individual must give his utmost in order to bring in a paid manager to handle the campaign. **Remember, you cannot expect to reap a harvest unless you are willing to plow the ground! Please go into action now!**

Sincerely, *Second Amendment Committee*

Bernadine Smith Gerald G. Hurt

Bernadine Smith Gerald G. Hurt

*Documented in Public Law 87-297
and in State Dept. Publication 7277

INITIATIVE MEASURE TO BE SUBMITTED DIRECTLY TO THE VOTERS

The Attorney General of California has prepared the following title and summary of the chief purpose and points of the proposed measure:

OWNERSHIP OF FIREARMS. INITIATIVE CONSTITUTIONAL AMENDMENT. Bars public officials, the Legislature or any public body from denying, curtailing, prohibiting, or taxing the right to bear arms and enacting laws or ordinances constituting registration of firearms or ammunition. Prohibits confiscation of firearms or ammunition. Provides that the right to purchase, own, possess, advertise, sell, lease, loan, manufacture, transport, or use arms and ammunition for defense, sport, recreation or associated activities, does not apply to convicted violent felons or individuals legally declared mentally incompetent. Includes other provisions and statements of policy. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local governments: The fiscal impact on state and local governments by this measure is unknown.

Circulator: Enter name of county wherein this petition is being circulated.
Also enter name of county in grey-shaded box on reverse side of this petition.

_____
(County)

This column for official use only

ERS ONLY

1.	PRINT YOUR NAME / RESIDENCE ADDRESS ONLY YOUR SIGNATURE AS REGISTERED TO VOTE / CITY / ZIP	
2.	PRINT YOUR NAME / RESIDENCE ADDRESS ONLY YOUR SIGNATURE AS REGISTERED TO VOTE / CITY / ZIP	
3.	PRINT YOUR NAME / RESIDENCE ADDRESS ONLY YOUR SIGNATURE AS REGISTERED TO VOTE / CITY / ZIP	
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REGISTERED VOT

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	PRINT YOUR NAME	RESIDENCE ADDRESS ONLY	
	YOUR SIGNATURE AS REGISTERED TO VOTE	CITY ZIP	

DECLARATION OF CIRCULATOR

(to be completed *after* above signatures have been obtained)

I, _____ (Print name), am registered to vote in the County (or City and County) of _____ (County). My residence address is _____ (Address, city, state, zip).

I circulated this section of the petition and saw each of the appended signatures being written. Each signature on this petition is, to the best of my information and belief, the genuine signature of the person whose name it purports to be. All signatures on this document were obtained between the dates of _____ (Month, day, year) and _____ (Month, day, year).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.*

Executed on _____ (Month, day, year), 19 ____ at _____ (Place of signing)

_____ (Complete Signature of circulator)

ALL SIGNATURES ARE INVALID IF THE DECLARATION OF CIRCULATOR IS NOT COMPLETE AND SIGNED.

** An affidavit may be sworn under oath instead of certified by declaration under penalty of perjury.*

READ IMPORTANT INSTRUCTIONS ON REVERSE SIDE

INITIATIVE MEASURE TO BE SUBMITTED DIRECTLY TO THE VOTERS

The Attorney General of California has prepared the following title and summary of the chief purpose and points of the proposed measure:

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To The Honorable Secretary of State:

We, the undersigned, registered, qualified voters of California, residents of _____ County (or City and County), hereby propose an amendment to the Constitution of California and petition the Secretary of State to submit the same to the voters of California for their adoption or rejection at the next succeeding general election or at any special statewide election held prior to the general election or otherwise provided by law. The proposed constitutional amendment reads as follows:

FULL TEXT Article I Section 1.5 California State Constitution

[Reaffirmation of the Second Amendment of the United States Constitution]

Section 1.5. The right of the people to keep and bear arms, individually and collectively, is an inalienable, inherent, and natural right, acknowledged in the common law, confirmed by the Second Amendment of the United States Constitution, and secured by California's Act of Admission into the Union. The full and necessary exercise, affiliated activity, and benefits of this right are herein reaffirmed, guaranteed, and protected hereby from all infringements.

[Declaration of Interpretation of Right]

For purposes of clarification, and to prevent misconstruing, the right shall be interpreted so as to coincide and adhere to the reasonings and discourses made in behalf of the Second Amendment by the nation's founders who authored or otherwise contributed to the formation of that amendment, and so as to conform to the definitions in use at that time.

[Intent of Section]
The intent of this section is to reaffirm, to clarify, and to protect the right of the people of this state to, but not limited to, purchase, own, possess, advertise, sell, lease, loan, manufacture, transport, or use arms and ammunition for purposes of defense of person, family, home, property, liberty, defense and safety of the state, sport and recreation. This section shall not apply to convicted violent felons, or to an individual who has been adjudicated by a court to be a danger to others as a result of mental disorder or mental illness.

[Restraints on Various Branches of Government, their Public Officials, Servants or Employees]
No public official, whether an elected or non-elected person, in this state, or its subdivisions, nor the legislature, nor any other public body, shall deny, curtail, prohibit, or tax the right of the people to keep and bear arms; nor enact any law which in any style, form, or manner constitutes the registration of the people's firearms or ammunition; nor take any action to promote, or to engage in, confiscation of firearms, which includes weapons of defense, well-suited to fend off invasion.

The right to keep and bear arms and ammunition is not subject to infringement or revocation by any branch of government, or from any other source, by reason of, but not limited to, ordinances, or other acts of local government, state acts, or any other legislation which subverts the intent of this section. The restraints in this section shall also apply to treaties and related legislation, to executive orders, and to martial rule.

[Repeal of Conflicting Provisions, State Laws, and Local Ordinances]
All constitutional provisions, state laws, and local government ordinances, which are inconsistent with the provisions hereof are hereby repealed. The provisions of this section shall be self-executing.

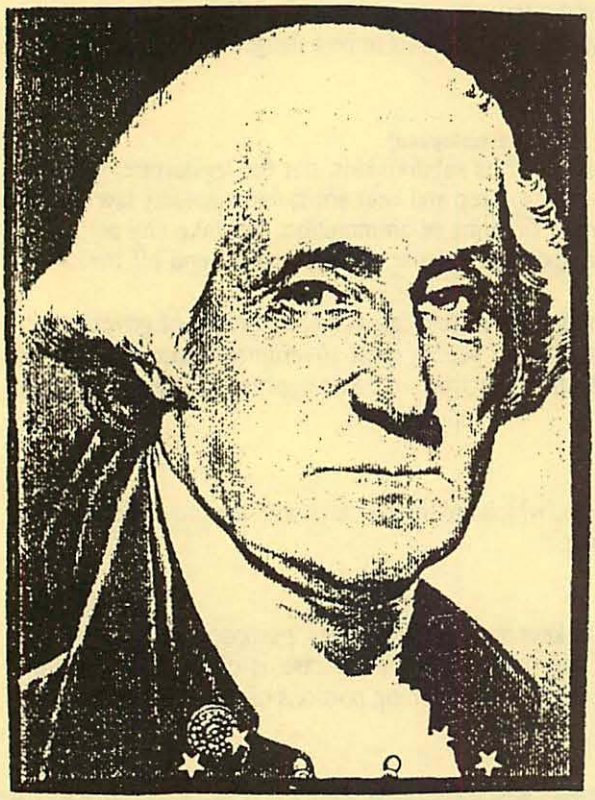
[Severability]
No part of this section is unconstitutional, in view of the fact that it is in keeping with the intents, purposes, laws, historical records of the nation's founders, and subsequent laws; however, if any part, clause, or phrase is charged with being unconstitutional by any branch of the judicial system, or by any other source, the remaining portions of this section shall not be affected but shall remain in full force and effect.

Circulator: Follow these important instructions carefully.

1. Write the name of the county on the top of <u>both sides</u> of this petition in the grey-shaded boxes provided.
2. Only registered voters qualify as circulators. A circulator may collect signatures in any county of the state.
3. All signers to a petition must be registered voters, residing within the same county. Do not cross mix voters from different counties on the same petition.
4. Use ball point pens. (No felt tip pens, no ditto marks, no abbreviations) Use middle initial or middle name if so registered.
5. Do not hold up completed petitions. Mail in promptly so we may have ample processing time.

SECOND AMENDMENT COMMITTEE • P.O. BOX 1776 • HANFORD, CA 93232 • (209) 584-5209

SHOULD LAW-ABIDING CIVILIANS BE ALLOWED THE USE OF MILITARY WEAPONS?



YES! Of course!

George Washington, commander of the Revolutionary War Forces which fought for our national independence, participant in the drafting of the American Constitutional form of government, and first president of the United States made the following statement in his First Annual Presidential Address on January 8, 1790, declaring:

"Among the many interesting objects which will engage your attention, that of providing for the common defense will merit particular regard.

To be prepared for war is one of the most effectual means of preserving peace.

A free people ought not only to be armed, but disciplined; to which end a uniform and well-digested plan is requisite; and their safety and interest require that they should promote such manufactories as tend to render them independent of others for essential, particularly military, supplies."

....George Washington

The Revolutionary War was fought by civilians. Those who owned guns had military firearms. When the war first began, the people at large were not "well disciplined". As president, George Washington, seeking to permanently remedy this situation, developed the 1790 Plan for the Militia in which he called for "the great body of the people", "every man of proper age and ability of body being bound by the social compact to perform, personally, some degree of military duty " so that the people themselves would be a "perpetual barrier" against interference into their liberties. "All men" were held thus responsible, whether uniformed and enlisted in the Army, or whether not uniformed and not a member of the Army. This plan became a law in 1792. For a copy of the Plan and the Law, send $3.00 to: Second Amendment Committee P.O. Box 1776 Hanford, Ca. 93232

AMERICAN GESTAPO

How the BATF is riding roughshod over civil liberties.

By John D. Lewis, Jr.

• Silver Spring, Maryland, June 1971: Four government agents in plain clothes broke down the back door of the apartment of Ken Ballew, who was in the bathtub at the time. Ballew armed himself with a pistol and prepared to defend himself. He was shot by the agents and suffered permanent brain damage and paralysis as a result.

• San Jose, California, June 1978: Twenty armed government agents raided a collectors' show, for two hours allowing no one to leave. The agents photographed exhibitors and bystanders and forced everyone present to sign "warning forms."

• Charleston, South Carolina, January 20, 1977: Agents entered the home of Patrick Mulcahey and confiscated all his collectors' items, valued at $15,000. Included were a gift from his grandfather when he was 11, the first item he purchased for his collection when he was 15, and an engraved piece worth more than $1,000.

• Kirkland, Washington, October 1978: In a paramilitary-style operation, government agents invaded the neighborhood of Mr. and Mrs. Elmer Tungren. A four-block area was sealed off, the neighborhood evacuated, and the Tungren home surrounded. Some of the agents ransacked their home, while others stood over the Tungrens with automatic rifles.

Hardened criminals? Not quite. Armed? Well, it's true that the government agents were after firearms—but consider what kind, and the circumstances. The firearms of Ken Ballew, who assumed the intruders were criminals and so armed himself, were found to be properly registered and owned legally. The San Jose raid was at a gun collectors' show, where enthusiasts display and trade antique and choice firearms—not the kind used by criminals. Patrick Mulcahey was charged by the government with illegal possession of firearms but was acquitted in court. (Yet the government still has not returned his collection, appropriated without compensation.) The agents found a few rifles and a .22-caliber target pistol in the Tungrens' home—all properly registered. Yet those agents had come in "like a bunch of storm troopers," as Mr. Tungren described it afterwards to the press.

And the agents involved? They belong to the federal government's Bureau of Alcohol, Tobacco, and Firearms. A part of the Internal Revenue Service, BATF has existed in various forms for many years. After passage of the Gun Control Act of 1968, the IRS's Alcohol and Tobacco Division was given, along with bureau status, responsibility for enforcing firearms laws.

Some of the Bureau of Alcohol, Tobacco, and Firearms' zealous pursuit of gun owners can no doubt be laid at the feet of gun-control sentiments in the United States. Many people appear willing to put aside constitutional protection of the citizen's right to bear arms because of worry about crime statistics showing that some 50 percent of homicides are committed with handguns.

But consider 1976, for example. In that year, according to FBI Uniform Crime Reports, 9,202 illegal homicides (49 percent of the total) were committed with handguns. Yet, of the estimated 40 million in private hands, 9,202 is only *.023 percent.* (And gun-control advocates who put that estimate even higher, sometimes as high as 100 million, should note that the percentage of homicides committed with handguns is then even lower.) Moreover, BATF itself has repeatedly pointed to cheap handguns—valued under $50, caliber .32 or less, barrel 3 inches or less—as the weapon most often used by criminals. So why is it pursuing gun collectors and dealers, rather than individuals who have used firearms in a criminal manner?

A good part of the explanation may well be that the Bureau has been placed in a very awkward position by a decline in moonshining. With sugar prices escalating rapidly since 1972, illegal brewing has fallen off dramatically. In 1972 BATF raided nearly 3,000 stills; by 1978 the number had fallen to a mere 381. Clearly, the public—and Congress—

would not find its alcohol-controlling functions very important any more. But if BATF could build up an impressive arrest record in the area of firearms... And it looks like that is exactly what this government agency proceeded to do during the 1970s, often using questionable and outright illegal tactics, often to carry out lengthy investigations, appropriate the property, and make highly publicized numbers of arrests—not of criminals or even would-be criminals, but of law-abiding citizens.

Creating Crime

Entrapment is but one of the methmethods used by the Bureau in these operations. TV cop shows have made this technique familiar to millions of Americans. Kojak's right-hand officer hits the streets as a lonely man in search of the attention of a street-walker or as a desperate junkie after a fix; man/junkie meets prostitute/pusher and suggests transaction; the nod is given and a police badge quickly produced, followed by handcuffs; and so a law-breaker is caught in the act.

Entrapment is in fact a centuries-old law-enforcement tactic and is also used to trip up criminals involved in the exchange of stolen property, con artist schemes, and so on. In theory, it is a useful means of cornering people who are already engaging in or intending to engage in criminal activity. In practice, it treads a thin line between offering the opportunity for a person to commit a crime and actually *encouraging* him to do so.

Over the years, various forms of entrapment have been held legal by the courts. But the crucial test, the Supreme Court has declared, is the object of the ruse. "The first duties of the officers of the law are to prevent, not to punish, crime," said the Court in the case of *Sorrels* v. *the United States* in 1932. "It is not their duty to incite crime.... Decoys may be used to entrap criminals, and to present opportunity to one intending to commit crime. But decoys are not permissible to ensnare the innocent and the law-abiding into the commission of a crime."

Yet a look at the record of the Bureau of Alcohol, Tobacco, and Firearms leads to the inescapable conclusion that it is making an art out of just such entrapment of innocent and law-abiding citizens. It was handed the opportunity to do so by the Gun Control Act of 1968, which is the major piece of control legislation on the books and is rife with vague language. It is left to the Bureau to come up with regulations to implement the intent of Congress. In doing so, BATF has exploited the very vagueness of the Gun Control Act. It is clear that the Bureau has purposely created and perpetuated ambiguities, allowing for citizens to be misled into violations of the law. And that's where entrapment, of both licensed dealers and private citizens, enters the picture.

In entrapment of dealers, BATF makes use of a scheme known as a "straw-man sale." This sale hinges upon the fact that dealers may not sell to certain "prohibited persons"—nonresidents of their state, persons under a certain age, felons, and some others. At the same time, it is common for one individual legally to buy for another who might himself be prohibited from purchase. An adult, for example, purchases for a juvenile, or an out-of-state dealer makes a purchase so that a resident of his state may then purchase from him.

BATF has often recognized the legality of such transactions. In its publication *Gun Control Questions and Answers*, the Bureau presents a dialogue for guidance on these matters:

> *(34) Can a licensed dealer send or sell a gun to anyone?*
>
> No, except for rifles and shotguns in contiguous State sales, a licensee may not make direct sales to a nonresident. What the dealer can do is ship the firearm to a licensed dealer of the purchaser's choice whose business is in the purchaser's state of residence. The individual could then pick up the

firearms after completing form 4473 [the federal registration form].

(54) Since persons under 18 years of age cannot buy long guns or ammunition from dealers, how can they obtain them?

A parent or guardian may purchase firearms and ammunition for a juvenile. [Gun Control Act] age restrictions are intended only to prevent juveniles from acting without their parents' or guardians' knowledge.

These are the Bureau's only public statements on this subject. BATF has avoided ever stating conditions under which such purchases may make the dealer subject to a felony prosecution.

The straw-man case, however, makes it clear that just such transfers may indeed bring one face-to-face with the law. In this form of entrapment an agent or informant who is a prohibited person approaches a dealer to buy a firearm. The agent then produces out-of-state identification or indicates that he cannot sign the registration form (which contains a statement that he is not a prohibited person). The dealer invariably refuses to sell.

The "prohibited person" then suggests that perhaps someone else (usually a local relative or friend) could purchase the gun for him. If the dealer takes the bait, he will respond that he can sell to a local person, provided that person can produce valid local identification and can legally fill out the purchase forms.

The "prohibited person" then returns with a second agent, the "straw man." The straw man produces the required identification and signs the appropriate forms. The "prohibited person," however, is the one who comes up with the money; at the end of the transaction, the straw man steps back and the "prohibited person" quickly steps in to pick up the firearm. And that's it for the dealer, who is arrested by BATF agents for selling to a prohibited person.

(It is possible to sidestep the trap. In two reported cases, the dealer refused to go through with the transaction unless the money was offered by the straw man; likewise, he handed the firearm to the straw man, in one case having to snatch it from the hands of the quickly grabbing "prohibited person." Although the Bureau nevertheless arrested both dealers, it prosecuted without success.)

When BATF goes after dealers engaging in straw-man sales, is it merely implementing the Gun Control Act? To permit wide open sales of this type, under any conditions, would allow for extensive evasion of the act. Even so, if the intent of the law is to prohibit the transfer of firearms to certain persons, why should enforcement be aimed at the dealer, who nominally sells to the straw man, rather than the straw man himself, who makes the transfer to the "prohibited person"? In at least one case where a straw-man sale occurred—*without* BATF inducement—the Bureau prosecuted the woman who served as the straw man and did not bring charges against the dealer.

A look at the record shows that BATF is making an art out of entrapment of innocent and law-abiding citizens.

If BATF believes that a straw-man sale constitutes violation of the law, it could easily prevent most future violations by simply informing dealers that it is a violation. This has obviously not been its intent. It is far easier to build up its status with Congress by creating felons of those who are disinclined to crime than by taking the time and risk to seek out real criminals.

Dealers are not the only ones to have been caught in the Bureau's entrapment snare. A second scheme, equally dependent on BATF's calculated ambiguities, involves the "implied dealership." It is used exclusively against those who do not hold federal firearms licenses.

The law requires that a license be obtained by anyone "engaged in the business" of dealing in firearms. The statute, however, does not define dealing, and BATF regulations make no attempt to do so, except to say that persons who sell but "four to six" guns a year—mostly collectors—do not need a license. In fact, such persons are actively *discouraged from* obtaining licenses. Yet, when nondealers sell weapons, fully complying with the standards set out by the Bureau, they are in danger of being arrested for dealing without a license.

Entrapment proceeds in this way: One or two agents approach a collector at a gun show and make a purchase. The same happens at the next gun show, and so on, until the "implied dealer" has made four to six sales. At this point, the collector is booked on felony charges of dealing without a license. Legal defense costs can run as high as $20,000 (with the person's gun collection usually having been seized by BATF). If convicted of a felony, the collector loses all right to possess any firearms in the United States.

And the conviction is not difficult for BATF to come up with. In spite of its public position that sales of "four to six" guns a year do not require a license, in *court* it has consistently been successful with an argument that conviction may be based on very few sales by a private individual, for no financial profit. The Bureau thus appears to interpret "dealing" in any way that seems likely to ensure the most arrests and then, on the opposite interpretation, the most convictions. It has uniformly failed to inform collectors or anyone else of its position, leaving its actual policy on dealing beyond the ascertainment of citizens interested in obeying the law.

Why this two-handed BATF campaign to prosecute those selling only a few firearms a year, while at the same time insisting that one must make a significant quantity of sales per year to qualify for a license? It not only serves to make people more vulnerable to charges of dealing without a license; it also cuts down on the workload of the Bureau in regulating licensees, leaving it free to pursue more impressive tasks.

Bureau officials have made no secret of their policies toward the small businessmen who make up the majority of the nation's gun dealerships. Speaking to a police convention in Buffalo, New York, in 1979, former BATF director Rex Davis told the group that he planned to "tighten BATF's regulation of licensed firearms dealers," effectively reducing their number "from the present 159,000 to about 30,000. . . .The reduction will make their regulation more manageable

for BATF's outnumbered forces." The implication is clear: since it is difficult for BATF to regulate these businesses as relentlessly as it wishes to, it has undertaken to drive large numbers of them out of business. Is *that* the intent of Congress?

Disregard for Property

Entrapment of the law-abiding, however, is only one appalling feature of BATF's new campaign against gun owners. Its behavior during and after trial is curious for a supposedly law-enforcing agency of the government.

The Bureau confiscates many firearms. According to a BATF press release, total confiscations for the years 1976-78 numbered 25,936. The value of the nearly 9,000 firearms confiscated in 1978 is conservatively estimated at $1.05 million. And the odds of citizen getting his guns back are not good, even in the case of an acquittal. In a few reported cases, firearms have been seized but no arrest made. One gun collector provided documentation of a chilling scenario:

- BATF's move against him, as documented from the prosecution's files, began with a 14-month investigation commencing in early 1976.
- Firearms were seized—without arrest or indictment—in March 1977.
- Nearly a year passed as the Bureau made offers to forgo prosecution if the collector would permit BATF to keep his weapons (apparently a common BATF position).
- On January 20, 1978, the collector sued for return of his collection.
- On February 1, 1978, less than two weeks after filing suit, the collector was indicted and was subsequently convicted.

Gun collections are often the product of years of devoted effort, valued in tens of thousands of dollars. In virtually all cases, government confiscation represents a major loss to the collector.

In a number of cases, there is clear evidence of what can only appear to be vindictiveness in the treatment of firearms in the Bureau's custody, both at the time of arrest and later. Gus Cargyle is but one example. A collector in Corpus Christi, Texas, he had firearms valued at $55,000 confiscated by BATF agents. According to the local newspaper, the *Corpus Christi Caller,* agents deliberately dropped the guns on the concrete floor and stacked them outside "like cordwood." Cargyle sucessfully sued for return of the weapons (no charges were ever filed) but discovered upon their return that they had been stored in a damp warehouse and allowed to rust during the Bureau's custody.

The history of BATF since the demise of its liquor enforcement functions is a classic tale of bureaucracy in search of a job.

Not only does BATF seize weapons without making any arrest; it also continues to withhold collections even after *acquittal* of the defendant. As a tax agency, BATF argues, it is entitled to retain seized weapons (and the vehicles from which they were confiscated, if applicable) to compensate the government for lost revenue. But in an implied dealership entrapment, the only lost revenue is the license fee—$10—which in many cases would have been paid to the government if the government had allowed the implied dealer to obtain a license in the first place.

In fact, many of the firearms confiscated by the Bureau—about one-third, according to records obtained under the Freedom of Information Act—are not kept because of any "lost revenue" but are appropriated, without compensation, "for official use" or for the "reference collection" at BATF national headquarters. One firearm so retained was an Ingram M10 submachinegun with silencer. The Ingram with silencer is familiar to moviegoers as the weapon used by the contract killer in *Three Days of the Condor,* and the Bureau's listing of it as "desired for official use by this office" is surely ironic. Other weapons retained for official use include derringers, antiques, and deer-hunting rifles, weapons that would seem to be of little use to a law-enforcement agency.

Disregard for Crime

Since the Bureau of Alcohol, Tobacco, and Firearms is a law-enforcement agency, one might expect that the guns it is taking out of circulation would be the types most often used in crime. But this is not the case at all.

Freedom of Information requests for BATF data yielded an 18-inch-high stack of Reports of Property Subject to Judicial Forfeiture. The record shows that rifles and shotguns are confiscated more often than handguns—nearly 60 percent long arms, compared to 40 percent handguns. Guns that are used rather rarely in street crime, such as a $10,000 silver-inlaid shotgun, were not only confiscated but "retained for official use," according to the property reports. "Saturday Night Specials"—the ubiquitous weapon of crime, according to the Bureau—account for only *four percent* of the confiscated guns listed in those reports. Compare all these facts to a December 1973 BATF press release claiming that small, concealable handguns accounted for 71 percent of the crime in four major US cities, and it becomes clear that *if* BATF is making any attempt to curtail the use of firearms in crime, it is failing dismally.

Other BATF data make it highly questionable whether the Bureau is even expending much effort in that direction. Its own published breakdown of prosecutions by city show that in Washington, D.C., for example, the Bureau conducted 1,603 investigations during the period reported, and only 206 of them dealt with felon in possession of firearms, only 58 with stolen firearms, and only 20 with use of firearms in commission of a felony. Since numerous studies have shown that 25 percent of the handguns used in crime are stolen, it is shocking that less than four percent of BATF's Washington investigations zeroed in on firearms theft.

The situation has moved some police officers to speak up, noting that in their experience BATF has shown not only neglect but a distinct lack of interest in pursuing those actually committing firearms crimes. A. H. Pickles, chief of police of Leavenworth, Kansas, reports that "on a few occasions I did call [BATF] on cases that were serious violations of federal law. One was a criminal who com-

pletely forged a federal form to purchase a pistol, and the other was a case of an illegal alien who bought a pistol with which she shot her male companion.... There was never any action taken against these real criminals by [BATF]." Chief Pickles issued an order to his department that they would henceforth not participate in any joint operation with BATF unless no other federal agency could provide assistance.

Of course, catching thieves and murderers is far more dangerous and difficult than entrapping citizens who are likely to abide by clearly stated laws and, believing themselves to be law-abiding, are unlikely to resist confiscation or arrest with violence. Evidence does indicate that in some cases individuals are picked out for criminal investigtion on the basis of the ease and safety with which they may be arrested or because of some special grudge.

One Illinois dealer who regularly spoke out publicly against BATF was pursued by the Bureau for years. Attempting to build a case through the use of informants and entrapment, BATF had amassed a file, obtained under Freedom of Information, in excess of 5,500 pages. The dealer's attorney related that there had been eleven separate attempts to entrap the dealer. One BATF agent had kept a notebook detailing these attempts, and the attorney estimated that the agent had spent over 1,000 hours in his efforts against the dealer.

Yet for several years Bureau administrators have been appearing before Congress complaining that they have neither the funds nor the manpower to do an adequate job of enforcing federal gun law. It is especially ironic that they emphasize not having the resources to begin to move against gun thefts.

The point of the investigations it does specialize in—and the resultant seizures and arrests—seems clear: to generate enough publicity to impress Congress and the public with the Bureau's enforcement record. Accordingly, BATF has developed an extensive press relations program, which includes using the press to increase its conviction rate.

In his introduction to the BATF manual *Public Affairs Guidelines,* former director Rex Davis noted that an "effective public affairs program... has a favorable impact on the attitudes of the court, *jurors* and prosecutors" (emphasis added). What goes under the name of press relations might therefore be more accurately characterized as indirect jury tampering. "Trial by press" is a popular method for those defendants against whom the Bureau has a weak case.

The press is also used to create "newsworthy material." The strategy is to generate interest by escalating the most mundane record-keeping and administrative inspections into full-scale raids.

In July 1974, for example, a number of BATF and customs agents surrounded Jensen Custom Ammunition, a large-scale gun dealer in Tucson, Arizona. Agents entered the store, leaving one agent, armed with an automatic weapon, to maintain order in the parking lot. Employees were frisked, and all customers had to show identification before they were allowed to leave. Administrative records and a few guns were taken. No charges were ever filed.

Catching thieves and murderers is far more dangerous and difficult than entrapping citizens who are likely to abide by clearly stated laws.

An operation in June 1978, for the mundane purpose of handing out information on federal firearms laws at a gun show in San Jose, California, became notorious after agents made what amounted to a mass arrest of all attendees. The result is a $2.1 million lawsuit, which the Bureau has unsuccessfully attempted to settle out of court. Although its "educational" activity could have been quietly accomplished by two agents before the show was even open to the public, BATF insisted upon escalating it into a paramilitary operation, apparently for the benefit of the press.

Civil Rights Abuses

Even if BATF's raids never resulted in tragedies—and the case of Ken Ballew, paralyzed by BATF agents, confirms that tragedies *do* occur—it should be obvious that there is considerable danger to the public inherent in such operations. The Bureau has given us enough examples of what is known in law enforcement as a strike-force mentality to suggest either a general policy or an attitude among individual agents favoring overutilization of force and misdirection of resources. An examination of BATF publications, obtained through Freedom of Information requests and lawsuits, indicates that policy is as much to blame as any excesses on the part of individuals.

Quite revealing, for example, is a Bureau manual entitled *Raids and Searches.* In spite of hearings in federal courts, this manual is only available in a censored form.

David Caplan, a New York attorney long active in opposing gun control, filed suit in the Southern District of New York, asking Judge Whitman Knapp to compel BATF to release portions of the manual withheld when Caplan obtained it under the Freedom of Information Act. Judge Knapp chose the middle of the road, ruling that certain portions would have to be disclosed but others could remain secret. While the court agreed with the Bureau's arguments that disclosure of some sections could hinder investigations or enable violators to avoid detection, it expressed reservations about some of the information it had discovered during its inspection of the manual.

"Some withheld sections describe enforcement techniques which are of dubious legality under the Fourth Amendment," Knapp wrote. "Although we do not decide whether any techniques are unconstitutional, we do note our grave doubts with respect to some of them."

Armed with the knowledge that the censored sections would probably show that many of BATF's civil rights abuses are matters of official policy, Caplan turned to a higher court. In October 1978 the appeals court affirmed Judge Knapp's ruling, arguing that Caplan had "no standing to question the constitutionality of any of the regulations simply because he is writing a book on the subject.... Our jurisdiction is constitutionally limited to 'cases and controversies' and there is none presented here which would permit a review in the abstract of the constitutionality of procedures described in the BATF manual."

Despite the apparent impossibility of seeing an intact copy of *Raids and Searches,* the portions that have been released reveal a mentality that is hardly appropriate to the administrative regulation of law-abiding citizens. On the contrary, the term *raid* is defined as "the sudden appearance by officers for the purpose of arresting law violators and seizing contraband." These are obviously not the situations the Bureau has been focusing on, and the courts have declined to let the public see how it handles such cases when they do arise.

(*Continued on p. 44.*)

Lewis

(*Continued from p. 28.*)

Another questionable BATF technique *has* been criticized by the courts. The use of informants is a legally vague area of which the Bureau has taken liberal advantage. But in the words of one judge, informants are often "totally lacking in scruples of any kind." Given the slightest reason to do so, they have no compunction about lying to judge and jury.

More importantly, BATF often presents them with a motive to lie: payment for their information only if it results in arrest or conviction. While the American Bar Association holds it unethical for an attorney to acquiesce in such contingency-witness payments because they encourage frame-ups and are a substantial inducement to perjury, this is what BATF resorts to in attempt to boost its conviction rate.

In one instance in 1978, a New York judge threw the case of *United States* v. *Brown* out of court because of BATF practices: "BATF used an informer who was a wholly immoral individual; BATF provided him with an economic motive for producing arrests; BATF failed to take steps to insure the reliability of the informant's version of the events." Concluded the judge, "We believe that the criminal defendant is needlessly exposed to unacceptable risk of a serious miscarriage of justice and this trial should not be permitted to continue." In another case, the court noted that such contingency fees are "essentially revolting to an ordered society."

BATF's use of informants—not unusual in law enforcement—is particularly disturbing when considered against the background of its record concerning the selection of individuals for criminal investigation or prosecution. The evidence indicates that BATF does not focus its arsenal of law-enforcement tactics on those who have used firearms in violation of other citizens' rights or those who have obtained firearms in violation of others' rights. Instead, the objects of the Bureau's dubious practices are more often citizens whose only "crime" has been a failure to be wary of BATF and its deliberately misleading regulations.

To broaden Judge Knapp's comment about BATF's manual on raids, grave doubt should be expressed toward all facets of the Bureau and its activities. The history of BATF since the demise of its liquor enforcement functions has been a classic tale of bureaucracy in search of a job. Piling up arrests could only help at budget time. The victims of this legal fallout became statistics, proudly paraded before congressonal appropriations committees.

The unethical and unconstitutional activities of the Bureau are not the aberrations of individual, overzealous agents. The evidence is that they are a clearly laid out matter of BATF policy. But as one of its victims said to the press—after BATF agents had descended on his neighborhood and home "like a bunch of storm troopers"—"We don't need this in our country." ◻

John D. Lewis, Jr., is public affairs director of the Second Amendment Foundation. Some of the material for this article is derived from the SAF study The BATF's War on Civil Liberties.

Darkness at Noon

by Stephen Cox

The Clinton era is christened with blood. There is plenty of blame to go around.

I am writing on the forty-fifth day of the siege of the Branch Davidian sect by agents of the federal government. *Liberty* is going to press, and I have no idea about how to wrap this story up. Things seem to have slipped out of my control.

I hope, however, that by the time you read these words, everyone will know exactly why the government summoned to Waco, Texas, the largest invasion force of little tin soldiers since the Trojan war — scores of plump ladies and gentlemen wearing quasi-military uniforms and brandishing enormous guns, *three* helicopters flapping around, tanks (naturally), and the large number of television cameras that a secret invasion usually requires, at least if it is expected to result in promotions for its organizers.

Oh, we were informed that the Branch Davidians had guns (which the government "feared" were purchased legally). We were informed that the Branch Davidians therefore constituted a threat to the nation, or at least to Waco. They constituted so large a threat, in fact, that the government was very concerned about what they *might* do — during the *several years* that passed while various government agencies plotted busily against them. And we were informed that the leader of the sect might have "abused" "children," which meant, apparently, that he might have married a number of underage women.

When these arguments didn't arouse the expected degree of public enthusiasm, we were darkly informed that certain Australians were living with the sect *in violation of immigration laws*. All of this, doubtless, provides good and sufficient reasons for a bloody assault.

The government's difficulty, at this stage, is that its half-completed assault allows time for questions to be asked about the ethics, or at least the prudence, of some of its approaches to the problem of — guns, or sex, or cults, or illegal immigrants, or whatever is supposed to be the problem. The media may start asking questions, at long last, about the government's purpose, as well as about its tactics. I look forward to seeing who will still be alive when the questions get interesting.

Judgment Day

This is the 52nd day, and they are dead, burned to death: 17 children; 70 men and women. The flames washed over their bodies; poisonous air flattened their lungs; if they were lucky, they died before their eyes melted in their sockets and their skin dropped off like worthless newsprint. They are dead, slaughtered by a false and repulsive religion and by the vicious banality of officials sworn to protect the liberty even of people so lost and hopeless as to embrace such a religion. I mean:

Officials of the Alcohol, Tobacco, and Firearms Bureau

— who invaded the compound at Waco on February 28 to serve a search warrant alleging the possession of guns, later "feared" to be legally purchased, and advancing second-hand reports of "child abuse," an offense that the ATF was not legally empowered even to investigate;

— who used massive force to "surprise" the compound, even though they knew that the inhabitants were aware of this coming "surprise" and could be expected to resist;

— who invaded the compound, even though they knew that their search warrant could have been peacefully delivered on the many occasions when the leader of the Branch Davidians went out jogging or visited the

local Pizza Hut.

Officials of the Federal Bureau of Investigation

— who for seven weeks prosecuted the sadistic business of the ATF, after the ATF had proved to be incompetent as well as sadistic;

— who claimed that their own climactic invasion, on April 19, was motivated by "intelligence reports" about the intentions of the compound's inhabitants, but who, even after the death of their enemies, arrogantly rejected all requests to reveal the secret contents of this supposed "intelligence";

The FBI claimed, simultaneously, (1) that they were not trying to end the siege, but merely trying to "ratchet it up," and (2) that they were trying to end the siege.

— who relied on "intelligence" that did not even include a consultation with officials of the local government that had (unsuccessfully) prosecuted the Branch Davidian leader on a previous occasion, and who apparently paid no heed to the first-hand observations of lawyers who spent over thirty hours inside the compound;

— who intimated that they (1) attacked the compound in a way designed to prevent mass suicide, and (2) were shocked that the people in the compound committed mass suicide;

— who asserted that they were prepared for all eventualities, but who made no preparations for any humane response to any eventuality, including the summoning of fire engines in anticipation of the possibility that fire might break out in the compound when it was assaulted by tanks; who, 15 or 20 minutes after a fire did break out, summoned two fire engines from a neighboring town, but stopped those engines a mile or more from the scene, alleging danger of attack from a building that was already totally engulfed in flames; who shut off water from the compound, and kept it shut off, and then made light of the notion that the fire could have been fought with water drawn from a nearby pond;

— who imagined that the proper function of government was to send a tank cruising gaily around the outskirts of a residence, crushing the playthings of the children inside, thus undermining their morale, and then to knock down the walls of their house and deluge them with tear gas from dawn until noon;

— who announced to a wondering public that snipers, appointed to watch the Branch Davidian compound from a mile and a half away and to shoot anyone who appeared in a window, observed a man crawling out of the compound, kneeling down, and cupping his hands, from within which a fire blossomed, which then burned down the compound;

— who angrily rejected any suggestion by survivors that a fire could possibly have been started by a tank punching holes in the walls of a dwelling in which there were stockpiles of fuel and ammunition;

— who claimed, simultaneously, (1) that they were not trying to end the siege, but merely trying to "ratchet it up," and (2) that they were trying to end the siege;

— whose unflagging self-righteousness stands as a lesson to all officials everywhere.

The Attorney General of the United States

— who "took full responsibility" for the invasion of April 19 but denied responsibility for anything that might conceivably have gone wrong;

— who claimed that the siege had to be ended on April 19 because of reports of "child abuse" made months before;

— who claimed that the siege had to be ended on April 19 because of reports of "unsanitary conditions" within the compound;

— who claimed that there was no intention of ending the siege on April 19;

— who, like officials of the FBI, claimed that "all eventualities and options were considered," but who, like officials of the FBI, claimed to be astonished by what actually eventuated;

— who, after these pathetic attempts at analysis of her own actions, agreed with sympathetic interviewer Larry King that government control of "hand guns" would help to avert "tragedies" similar to the one she had helped to engineer.

The President of the United States

— who on April 19 said that he took responsibility for the government's actions — by giving full responsibility to the Attorney General;

— who on April 20 magnanimously took full responsibility — meanwhile transferring this same full responsibility to the leader of the Branch Davidians, who had conveniently died on the preceding day.

All these are guilty. Sharing in their guilt are two groups of co-conspirators:

First, the national media, who on April 20 started asking intelligent questions about the events of the previous seven weeks, having thus far assiduously avoided any serious inquiry into the origin and justice of the government's action, biding their time until blood flowed and jerked them into a semblance of consciousness;

And second, the silly, the willfully ignorant, the unthinking members of the voting public, who happily acquiesce in every lie their government tells them, even when they know it is a lie; who care nothing for their heritage of freedom and could not say, if their lives depended on it (which they do), what the glorious First Amendment or the precious Second Amendment or any other sublime provision of liberty says or means; who make up the "83%," the "78%," and every other conscientiously surveyed portion of the American heart and mind that accepts as gospel any explanation of life that a "leader" may choose to give, so long as the explanation fails to threaten anybody's weekend fun.

Bill Clinton magnanimously took full responsibility — meanwhile transferring this same full responsibility to the leader of the Branch Davidians, who had conveniently died on the preceding day.

But now let's come to some real explanations. Look at your hands. Can you see it? That's blood on your hands. ❑

Exposé

Mass Murder, American-Style

by R.W. Bradford

This isn't just business as usual. The government is not just lying. The government is murdering its citizens.

Janet Reno, the nation's top law enforcement agent, is a mass murderer. We know this because she confessed to it on national television on April 19, 1993.

On April 18, by her own statement, she ordered the FBI to take what it characterized as "the next logical step in a series of actions to bring this episode [the standoff between the FBI and the Branch Davidian community] to a conclusion." That "logical step" was to send a Bradley M-728s "combat engineering vehicles" (i.e. tanks) to punch holes in the walls of the buildings in which the Davidians lived, and to pump poisonous tear gas into their homes at 15 second intervals, while FBI loudspeakers proclaimed, "This is not an assault."

"I made the decision," Reno told reporters that afternoon. "I'm accountable. The buck stops with me and nobody ever accused me of running from a decision that I made based on the best information that I had. The buck stops with me."

That evening, in an interview with Ted Koppel, she elaborated:

> This was a judgment I made. I investigated it completely. I did all the — I asked the questions, I talked to the experts when I had questions, and I think the responsibility lies with me . . . I made the best judgment I could based on all the information that we had after inquiry, after talking with experts, after trying to weigh all the terrible possibilities that could take place now or later. I've made the judgment, it's my judgment, I stand by it.

What information did Ms Reno get from the experts in her Federal Bureau of Investigation? According to statements from the FBI and from Ms Reno, the FBI believed the following:

1. That David Koresh, leader of the Branch Davidians, had been placed under serious stress by the events of the previous seven weeks. He had been shot during the armed confrontation of February 28 and his infant daughter had been killed. He was in a terrible situation, his home surrounded by heavily armed men intent on capturing or killing him and destroying the religious community he headed.

2. That the stress on Koresh had gotten worse during the standoff, thanks to the deliberate policy of the FBI, which had blasted him and the other members of his community with ear-shattering noise and aimed powerful electric spotlights into their windows at night to prevent them from sleeping, and turned off the community's water supply and cut off its sewers. Apparently, their logic was to drive the already crazy Koresh even crazier, to "ratchet up the pressure," in the words of FBI spokesman Bob Ricks.

3. That Koresh had publicly said that in the event of a confrontation, the standoff would "end with people devoured by fire."

4. That the Davidians were likely to attempt mass suicide if confronted. Even President Clinton was informed in advance of the high risk of mass suicide, if we are to believe what he said at his Tuesday morning press conference, he said they chose the tank-and-tear-gas assault as, "the best way to get people out of the compound quickly before they could kill themselves."

5. That the wooden buildings in the compound, filled with baled hay, inflammable liquids, and explosive and incendiary ammunition, were a terrible fire hazard, especially once the FBI punched huge holes in their walls though which wind could blow and spread any fire quickly.

6. That there were 30 mile per hour winds in the area on the day of the assault, which would quickly spread any fire very quickly.

It is not difficult to predict the effect of the "logical next step" of an assault on the compound: if several hours of tanks firing poisonous gas into the compound did not ignite the structures, the ammunition or the fuel stored there, then the unstable leader of the Davidians, made more unstable by the FBI's "psychological" campaign to deny him sleep or peace or quiet, who had predicted the standoff would end with "people devoured by fire"

and perhaps discussed and even planned a "mass suicide" in the event of an assault, would ignite the place himself. Given the high winds, the flammability of the buildings, the incendiary and explosive contents of the buildings, the fact that the FBI had cut off water to the area but not brought in fire-fighting equipment made the deaths of the nearly 100 people a virtual certainty.

By her own admission, Janet Reno had "asked the questions and investigated it completely," so she knew all this. She had weighed "all the terrible possibilities that could take place," including the virtual certainty that the Davidians — including the dozens of children present — would be burned to death.

Knowing all this, she ordered the assault. "I've made the judgment," Janet Reno said. "It's my judgment. I stand by it. The responsibility lies with me." The assault she ordered could only end with the deaths of nearly one hundred people, including a substantial number of people she knew to be innocent.

There is a term for what Janet Reno did. That term is mass murder.

Janet Reno and the FBI offered excuses for their action. The assault, they claimed, was intended "to increase the pressure to bring about serious negotiations." But early that morning, the FBI told neighbors "that it would end today," and telephoned the compound, "At this point, we're not negotiating. We say, come on out, come out with your hand's up. This matter is over."

Janet Reno told Ted Koppel the night of the assault that she had ordered the assault in order to protect the children from abuse. President Clinton backed up her claim the following morning at his informal press conference: "I talked to her [Janet Reno] on Sunday, I said, now, I want you to tell me once more why *you* believe, not why *they* believe, why *you* believe, we should move now rather than wait some more. And she said it's because of the children — they have evidence that those children are still being abused and that they're in increasingly unsafe conditions and that they don't think it will get any easier with time, with the passage of time."

But when Ted Koppell confronted her with testimony from a witness who had been in the compound and seen no signs of abuse (and who had reported the same to the FBI), Janet Reno admitted that they had no recent evidence of abuse. But, she added, "The sanitation situation within the compound we were told was beginning to deteriorate."

This theme was reiterated by Bill Clinton ("The children . . . being forced to live in unsanitary and unsafe conditions") and FBI spokesman Jeff Jamar, who told reporters, "How would the federal government look, when we finally get in the compound, there are children dying of hunger or children dying of disease because of the conditions? That was one of the overriding concerns." So the abuse that the FBI and Attorney General accuse the Davidians of consisted denying them proper food, water, and sanitary conditions. Who cut off the water supply to the compound? Who cut it off from sewers? Who controlled the access of the compound to food? The answer to all three questions is the same: the Federal Bureau of Investigation. To the extent that the children were so abused, the abuser was the FBI itself.

Curiously, a week before the assault, the FBI said that it would not use tear gas on the compound, because it feared for the safety of the children. It had evidence that the adults had gas masks, but the children did not. Yet their operational plan was to pump in gas until

Who Started the Fires?

There are three plausible possibilities.

1. It was mass suicide.

Supporting evidence: The FBI says that Koresh planned a mass suicide from the start. FBI spokesman Jeff Jamar said, "This was his plan from the beginning. It's clear to us it would have happened 30 days ago if we had gone in there." The day of the assault, FBI spokesman Bob Ricks said, "an FBI hostage rescue team member observed a subject through a window in the second floor wearing a black uniform and a gas mask undergoing a throwing motion the person was knelt down with his hands cupped from which a flame erupted."*

The FBI said that those who escaped the flames said that Koresh and other Davidians had started the fire. When asked what that "very specific evidence" was, Jeff Jamar replied:

> At least three people observed a person spreading something out in this motion. [bends over and holds his hands together] This was reported yesterday, bent down with a cupped hand, and then was a flash of fire. We have aerial observations of multiple fires. So the person saying that there was one instance of where the CEVs may have bopped something. This is not so. We have another person telling us the [inaudible] was reported to you yesterday that the fire was started with lantern fuel. There has been fuel containers found at the scene. There's no question in our mind that that's how the fire started.

Evidence against: Immediately after the conflagration, FBI spokesmen said that the fire was a complete surprise to them, and they had no indication that Koresh or the Davidians might commit mass suicide. The escapees all denied having said that Koresh or other Davidians started the fire, and all claimed the FBI had started it by knocking over lanterns within the compound.

Other information: In addition, a team headed by Paul Gray, an arson investigator from Houston, concluded that the fires were set in "at least two different locations." Gray said that all the investigators "were independent of any federal law enforcement agency." However, the Bureau of Alcohol, Tobacco and Firearms, confirmed that Gray had worked as part of a federal task force with ATF and that Gray's wife was an employee of ATF.

2. The fire started by accident, when the FBI knocked over lanterns inside the compound.

Evidence for: The survivors of the fire have stated at every opportunity that this is how the fire was ignited, and that it spread quickly, thanks to the flammability of the building and its contents, the high winds, and the fact that the FBI had knocked holes in the walls.This hypothesis is consistent with the fact that the buildings were illuminated with lanterns, since the FBI had turned off electric power to the compound.

* The "hostage rescue team member" was in fact an FBI sniper viewing the compound through the telescopic sight of a high powered rifle. Although the FBI called its squad of agents a "Hostage Rescue Team," all available evidence is that the compound held neither "hostages" nor anyone who wanted to be "rescued," except possibly from the threat posed by the FBI.

the masks failed — which would require *eight hours of continuous gassing*. What did they think would be happening to the people *without* masks (i.e., the children)?

Furthermore, child abuse is not a violation of federal law, let alone violation of any law that falls under the jurisdiction of the ATF, the FBI or Justice Department. And the charges of child abuse had been thoroughly investigated a year earlier by state authorities, under whose jurisdiction child abuse lies, and the Branch Davidians were exonerated. It is apparent that the whole "child abuse" issue was brought up only to persuade the judge who issued the warrant and to gain the sympathy and complicity of the American people.

The grinding of political axes may prevent any sort of fair-minded, open investigation. The Waco holocaust is widely perceived as a threat to the Clinton presidency, and many partisan Democrats are rallying to his side. And many on the political right see the episode as a threat to the credibility and prestige of their old communist-hunter friends in the FBI. Congressman Henry Hyde has already opined that the episode illustrates why we need to give more money and power to the FBI.

Lost in all the commotion is the fact that the cause of the standoff, the February 28 invasion of the Davidian compound by the ATF, was unjustified. In the aftermath of the holocaust in Waco, the secret search warrant that the ATF served with its army of 100 heavily armed men was made public. There were two charges brought to the judge who had issued that warrant: that the group had abused children and that the group possessed weapons without the required license.

The child abuse charge, as I have already pointed out, is an obvious red herring. It is also manifest that the second charge lacked any factual basis. The ATF accused the Davidians of possessing fully automatic weapons, that they had altered from semi-automatic rifles, without obtaining the appropriate government licenses. Yet in two pitched battles, one with the ATF on February 28 the other with the FBI on April 19, there has not been a single report of the use of automatic weapons by the Davidians. Nor have there been any reports that the Davidians used "rockets" or any of the other illegal weapons that the FBI alleged they had in their attempt to defend themselves from the FBI's tank assault on April 19.

Almost certainly, what upset federal authorities was the fact that the Davidians "resisted arrest" on February 28. Leaving aside the fact that the ATF was not attempting arrest, but to serve a search warrant to gather evidence for a violation of a licensing law, and the common-law right to resist unlawful arrest, it is certainly true that the Davidians acted imprudently. Federal agents have a long history of going ballistic when met with resistance.

But whether the Davidians had any choice in the matter is dubious. The search warrant was served by a virtual army of more than 100 heavily armed men clad in body armor, breaking windows and kicking down doors. This Gestapo-like approach to serving a search warrant was likely to trigger a defensive response, even if the agents were wearing shirts that said "ATF."

There is considerable evidence that the ATF (which Ronald Reagan denounced as a "rogue agency," when he called for its abolition a decade ago) hoped to provoke a violent response from inside the compound. It could have served the warrant to Koresh when he was away from the compound,

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Evidence against: The FBI claimed shortly after the arrest of the suvivors that the survivors stated that the fires were ignited by members of the group.

3. The FBI started the fire, intentionally or quasi-intentionally.

Evidence for: The FBI took numerous actions that insured that a fire would spread very quickly and could not be stopped once it started. It chose a dry day with high winds for its attack — conditions that are terrible for flushing out people with tear gas but excellent for burning down a building. It cut off water that might be used to put out fires. It did not have fire-fighting equipment on hand. If kept fire fighters away from the scene, and delayed their arrival once they had been called: "The reason the fire trucks were not allowed to go in immediately was the fireman's safety. It's that simple. There were people there with automatic weapons ready to fire." Jamar did not explain why, despite ample opportunity, the Davidians never used the automatic weapons whose possession rendered the situation too dangerous for fire fighters. Nor did he explain why the FBI allowed the press within 1.5 miles of the assault, but kept fire fighters and their equipment miles away in Waco. Nor did he explain why the sophisticated aerial fire-fighting techniques of the military were neither employed nor ready for use, or why the FBI intercepted and halted fire fighters and equipment who were coming to the scene.

The FBI was frustrated at the inability to flush out the members of the community with tear gas. FBI spokesman Jeff Jamar told reporters the next day that at the time of the fire, "We were of the opinion that deep inside the compound — you've seen your pictures where there's a concrete structure standing there — we were of the opinion that they were inside that structure and that they were able to survive in there even with the gas because maybe it would protect them from the gas maybe it was sealed." Presumably, if the FBI's tank and tear gas assault failed, the FBI would be even more embarrassed.

Furthermore, the mass annihilation of the Davidians could serve as an object lesson to other individuals and groups who might attempt to defy the federal authorities. As President Clinton said during his press conference on April 23, "I hope very much that others who will be tempted to join cults and to become involved with people like David Koresh will be deterred by the horrible scenes they have seen."

Evidence against: The FBI are good guys, who would never do anything bad.

But whether the truth will ever come out is dubious. There will certainly be investigations. Even President Clinton has sanctioned them: "That's up to the Congress, they can do whatever they want . . . if any congressional committees want to look in it we will fully cooperate. There's nothing to hide here, uh, this was probably the most well-covered operation of its kind in the history of the country." Of course, the superb coverage the president spoke about took place from a mile and a half away, and consisted mostly of news spoon-fed by FBI spokepeople, substantial portions of whose statements were obviously contradictory and patently false.

—*R.W. Bradford*

perhaps while he visited his favorite hangout, the local Pizza Hut, but it chose a military assault instead. Although ATF maintained from the start that the response to their assault came as a complete surprise to them, an ATF agent filed an affidavit saying that those inside the compound were aware of it in advance, which is hardly surprising, since the ATF had leaked the story to local television stations, who the ATF invited to videotape its original assault.

Of course, the ATF did not intend to lose the pitched battle they started, or to kill some of its own agents in the crossfire. Presumably, ATF's plan was to kill a large number of Davidians, thereby providing the "deterrence" against people joining the Davidians or similar groups that President Clinton had hoped for. ("I hope very much that others who will be tempted to join cults and to become involved with people like David Koresh will be deterred by the horrible scenes they have seen.")

Although it is impossible to know for sure, the hypothesis that the Branch Davidians violated no laws at all is entirely consistent with what is known.

Given the extent of the conflagration, and the fact that press sources are being kept away from the scene before, during and after the assault, we may never know how the fire was set. But even if Koresh or a disciple lit the fire, the FBI and the Attorney General cannot escape blame for the deaths — especially the deaths of the children — any more than the Nazis could escape blame for the deaths of the poor souls they brutalized and tortured in concentration camps until they took their own lives, or the Communists could escape culpability for the brutalized prisoners in their POW camps who died by their own hand.

"The State is the coldest of all cold monsters," Nietzsche told us. Whether Bill Clinton, Janet Reno, the FBI, and the ATF murdered the Branch Davidians directly or by driving them to suicide, the case illustrates just how right Nietzsche was. ❑

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The Ideological Origins of the Second Amendment

Robert E. Shalhope

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Since its ratification in 1791 the Second Amendment has remained in relative obscurity. Virtually ignored by the Supreme Court, the amendment has been termed "obsolete," "defunct," and an "unused provision" with no meaning for the twentieth century by scholars dealing with the Bill of Rights.[1] And yet, many Americans consider this amendment as vital to their liberties today as did the founders nearly two hundred years ago. Their sense of urgency arises from the current debate over gun control.

Disagreements over gun legislation reveal disparate perceptions of American society that rest upon, or inspire, dissimilar interpretations of the Second Amendment. Opponents of restrictive measures emphasize the free individual's rights and privileges and adamantly contend that the "right to bear arms" phrase constitutes the essence of the amendment. Their bumper stickers—modern day cockades—declare: "When guns are outlawed only outlaws will have guns," or "Hitler got his start registering guns." These simplistic ideas, symbolic of much deeper and more complex ideological beliefs, gain sustenance from a wide variety of popular sources. It is the National Rifle Association (NRA), however, that transforms this popular impulse into one of the most powerful and active lobbies in Washington. Its magazine, *The American Rifleman*, clearly states the issue: "The NRA, the foremost guardian of the traditional American right to 'keep and bear arms,' believes that every law-abiding citizen is entitled to the ownership and legal use of firearms."[2]

For their part, advocates of restrictive gun legislation emphasize collective rights and communal responsibilities. In order to protect society from the violence they associate with armed individuals, these people stress the "well reg-

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[1] Edward Dumbauld, *The Bill of Rights: And What It Means Today* (Norman, Okla., 1957), 60, 62; Robert Allen Rutland, *The Birth of the Bill of Rights, 1776–1791* (Chapel Hill, 1955), 229.

[2] This message appears on the title page of each issue of the magazine.

ulated Militia" phrase within the Second Amendment. Irving Brant's *The Bill of Rights* typifies their position. Claiming that the Second Amendment, "popularly misread, comes to life chiefly on the parade floats of rifle associations," Brant contends that the amendment's true purpose was "to forbid Congress to prohibit the maintenance of a state militia." Therefore, by its very nature, "that amendment cannot be transformed into a personal right to bear arms, enforceable by federal compulsion upon the states."[3] The President's Commission on Law Enforcement and Administration of Justice (1967) reiterated this belief even more forcefully: "The U.S. Supreme Court and lower Federal courts have consistently interpreted this Amendment only as a prohibition against Federal interference with State militia and not as a guarantee of an individual's right to keep or carry firearms." Therefore, the commission concluded: "The argument that the Second Amendment prohibits State or Federal regulation of citizen ownership of firearms has no validity whatsoever."[4]

This bifurcation of the Second Amendment into its two separate phrases invariably rests upon appeals to history. Advocates of both sides draw upon the same historical data but interpret them differently in light of their present-day beliefs.[5] Opponents of gun control keep emphasizing the individualistic character of the founders whereas supporters of restrictive legislation keep insisting that these men were far more concerned with the collective behavior of Americans. Given this impasse, an attempt to understand the origins of the amendment within the perspective of the late eighteenth, rather than that of the late twentieth, century should provide useful insights into both the beliefs of the founders and the intent of the amendment.

[3] Irving Brant, *The Bill of Rights: Its Origin and Meaning* (Indianapolis, 1965), 486–87.

[4] *The Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice* (Washington, 1967), 242. Sen. Edward Kennedy, too, claims that the "Supreme Court has repeatedly said that this amendment has nothing to do with the right to personal ownership of guns but only with the right of a state to establish a militia." Edward M. Kennedy, "The Need for Gun Control Legislation," *Current History*, 71 (July/Aug. 1976), 27. These observations state the case more definitively than the evidence warrants. The Supreme Court has touched upon the Second Amendment in four cases: *United States* v. *Cruikshank* (1876); *Presser* v. *Illinois* (1886); *Miller* v. *Texas* (1894); and *United States* v. *Miller* (1939). In only one of these cases, *United States* v. *Miller*, did the court relate gun ownership to the militia. Lower federal court and state court decisions regarding the Second Amendment are simply a labyrinth of judicial interpretation. For detailed analyses of these cases, see Robert A. Sprecher, "The Lost Amendment," *American Bar Association Journal*, 51 (June 1965), 554–57; *ibid.* (July, 1965), 665–69; Stuart R. Hays, "The Right to Bear Arms, a Study in Judicial Misinterpretation," *William and Mary Law Review*, 2 (no. 2, 1960), 381–406; Ronald B. Levine and David B. Saxe, "The Second Amendment: The Right to Bear Arms," *Houston Law Review*, 7 (Sept. 1969), 1–19; and Ralph J. Rohner, "The Right to Bear Arms: A Phenomenon of Constitutional History," *Catholic University of America Law Review*, 16 (Sept. 1966), 53–84.

[5] The following essays deal with identical material (English Bill of Rights, Sir William Blackstone, colonial declarations, and state bills of rights) and yet reach diametrically opposed conclusions. Peter Buck Feller and Karl L. Gotting, "The Second Amendment: A Second Look," *Northwestern University Law Review*, 61 (March-April 1966), 46–70; Lucilius A. Emery, "The Constitutional Right to Keep and Bear Arms," *Harvard Law Review*, 28 (March 1915), 473–77; and Rohner, "Right to Bear Arms," argue that the amendment supports the collective right of state militias to bear arms. However, Sprecher, "Lost Amendment"; Hays, "Right to Bear Arms"; Levine and Saxe, "Second Amendment"; and Nicholas Olds, "The Second Amendment and the Right to Keep and Bear Arms," *Michigan State Bar Journal*, 46 (Oct. 1967), 15–25, contend that it protects individual rights to keep arms.

During the last several decades many scholars dealing with the Revolution have labored to reconstruct the participants' view of their era as a primary means of understanding the period.[6] As a result we now recognize the importance of "republicanism," a distinctive universe of ideas and beliefs, in shaping contemporary perceptions of late-eighteenth-century American society. Within such a political culture thoughts regarding government were integrated into a much larger configuration of beliefs about human behavior and the social process. Drawing heavily upon the libertarian thought of the English commonwealthmen, colonial Americans believed that a republic's very existence depended upon the character and spirit of its citizens. A people noted for their frugality, industry, independence, and courage were good republican stock. Those intent upon luxury lost first their desire and then their ability to protect and maintain a republican society. Republics survived only through the constant protection of the realm of Liberty from the ceaselessly aggressive forces of Power. America would remain a bastion of Liberty, in stark contrast to the decadent and corrupt societies of Europe, only so long as its people retained their virility and their virtue.

The historical literature devoted to explicating American republicanism has grown immense. Among the strands of thought most commonly discussed as central to this persuasion two are immediately relevant to understanding the Second Amendment. These are the fear of standing armies and the exaltation of militias composed of ordinary citizens. There is, however, an equally vital theme contained in libertarian literature which, except in the work of J. G. A. Pocock, has been largely ignored in the recent literature dealing with republicanism. This is the dynamic relationship that libertarian writers believed existed between arms, the individual, and society. To gain a fuller comprehension of the origins of the Second Amendment it is essential therefore to understand the place of the armed citizen in libertarian thought and the manner in which this theme became an integral part of American republicanism.

In order to delineate libertarian beliefs regarding the relationship between arms and society it is necessary to start with the Florentine tradition upon which republican thought drew so heavily.[7] This tradition, articulated most clearly by Niccolò Machiavelli, idealized the citizen-warrior as the staunchest bulwark of a republic. For Machiavelli the most dependable protection against corruption was the economic independence of the citizen and his ability and willingness to become a warrior. From this developed a sociology of liberty that rested upon the role of arms in society: political conditions must allow the arming of all citizens; moral conditions must be such that all citizens would willingly fight for the republic; and economic conditions must provide the citizen-soldier a home and occupation outside the army. This theme,

[6] This literature is reviewed in Robert E. Shalhope, "Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography," *William and Mary Quarterly*, 29 (Jan. 1972), 49–80, and Robert E. Shalhope, "Republicanism and Early American Historiography," *ibid.*, 39 (April 1982), 334–56.

[7] The following discussion of Niccolò Machiavelli is drawn from J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, 1975), esp. 199–213, 290–92.

relating arms and civic virtue, runs throughout Machiavelli, and from it emerged the belief that arms and a full array of civic rights were inseparable. To deny arms to some men while allowing them to others was an intolerable denial of freedom. Machiavelli's belief that arms were essential to liberty—in order for the individual citizen to protect himself, to hunt, to defend his state against foreign invasion, to keep his rulers honest, and to maintain his republican character—provided an important foundation upon which subsequent republican writers could build.

With the passage of time the essential character of Florentine thought, which emphasized a connection between the distribution of arms within a society and the prevalence of aristocracy or republicanism, liberty or corruption, remained vital to many writers. Both Sir Walter Raleigh and Jean Bodin stressed the relationship between arms and the form of government and society that emerged within a nation. Indeed Raleigh enunciated several "sophisms" of the tyrant. Among these were: "To unarm his people of weapons, money, and all means whereby they may resist his power." The more subtle tyrant followed this rule: "To unarm his people, and store up their weapons, under pretence of keeping them safe, and having them ready when service requireth, and then to arm them with such, and as many as he shall think meet, and to commit them to such as are sure men."[8] For his part, Bodin, philosopher of the French monarchy, emphasized the essential difference between democratic societies and monarchies regarding arms. He believed that monarchs courted disaster by arming the common people for "it is to be feared they will attempt to change the state, to have a part in the government." In a monarchy "the most usuall way to prevent sedition, is to take away the subjects armes." Where democracy was the rule the general populace could be and should be armed.[9]

The English libertarian writers in the latter half of the seventeenth century amplified and shaped the Florentine tradition in response to changing circumstances. Marchamont Nedham declared that a republican society and government rested upon the popular possession of arms as well as on the regular election of magistrates and representatives. Convinced that free states could survive and remain virtuous only if their citizens were familiar with the use of arms, Nedham claimed that arms should not, however, be "in the hands of any, but such as had an Interest in the Publick."[10] The idea that only freemen—responsible citizens—should bear arms soon became a standard theme among libertarians.

Of all the commonwealthmen James Harrington made the most significant contribution to English libertarian attitudes toward arms, the individual, and society.[11] Harrington offered a crucial innovation to Machiavellian theory

[8] *The Works of Sir Walter Ralegh, Kt., Now First Collected: To Which Are Prefixed the Lives of the Author, by Oldys and Birch* (8 vols., Oxford, Eng., 1829), VIII, 22, 25.

[9] Jean Bodin, *The Six Bookes of a Commonwealth*, ed. Kenneth Douglas McRae (Cambridge, Mass., 1962), 605, 542, 599–614.

[10] *Mercurius Politicus*, 103 (May 20 to May 27, 1652), 1609–13.

[11] The following discussion of James Harrington draws upon Pocock, *Machiavellian Moment*, 383–400.

(perhaps *the* crucial innovation in light of later American attitudes). Accepting entirely the Machiavellian theory of the possession of arms as necessary to political personality, he grounded this basic idea upon the ownership of land. Like Machiavelli, Harrington considered the bearing of arms to be the primary means by which individuals affirmed their social power and political participation as responsible moral agents. But now landownership became the essential basis for the bearing of arms. Civic virtue came to be defined as the freeholder bearing arms in defense of his property and of his state.

Harrington's work provided an intellectual foundation for subsequent writers who linked the subject of arms to the basic themes of power and oppression which permeated libertarian thought. Andrew Fletcher's warning, "he that is armed, is always master of the purse of him that is unarmed," blended nicely with the libertarian's deep suspicion of authority.[12] The individual's need to protect himself from vicious fellow citizens and corrupt authorities—both banes of any republican society—also became clear. To accomplish this the responsible citizen must be armed.

John Trenchard and Thomas Gordon also integrated the idea of the armed citizen with the constant struggle libertarians perceived between Power and Liberty. Their *Cato's Letters* exclaimed: "The Exercise of despotick Power is the unrelenting War of an armed Tyrant upon his unarmed Subjects: It is a War of one Side, and in it there is neither Peace nor Truce." Rulers must always be restrained. An unarmed populace merely encouraged their natural tendency toward oppression: "Men that are above all Fear, soon grow above all Shame."[13]

Trenchard also collaborated with Walter Moyle in an attack upon standing armies which elaborated on the theme that citizens must jealously guard their liberties. Nations that remained free, warned Trenchard and Moyle, never maintained "any Souldiers in constant Pay within their Cities, or ever suffered any of their Subjects to make War their Profession." Those nations knew "that the Sword and Sovareignty always march hand in hand, and therefore they trained their own Citizens and the Territories about them perpetually in Arms, and their whole Commonwealths by this means became so many several formed Militias." Further, "a general Exercise of the best of their People in the use of Arms, was the only Bulwark of their Liberties; this was reckon'd the surest way to preserve them both at home and abroad, the People being secured thereby as well against the Domestick Affronts of any of their own Citizens, as against the Foreign Invasions of ambitious and unruly Neighbours." Arms were, however, "never lodg'd in the hands of any who had not an Interest in preserving the publick Peace. . . . In those days there was no difference between the Citizen, the Souldier, and the Husbandman."[14]

Throughout their essay Trenchard and Moyle reiterated the idea that citizens must be able to defend themselves against their rulers or they would

[12] Andrew Fletcher, *The Political Works of Andrew Fletcher, Esq.* (London, 1737), 9.

[13] [John Trenchard and Thomas Gordon], *Cato's Letters: Or, Essays on Liberty, Civil and Religious, and Other Important Subjects* (4 vols., London, 1755), I, 189, 255.

[14] [John Trenchard and Walter Moyle], *An Argument Shewing, That a Standing Army Is Inconsistent with a Free Government, and Absolutely Destructive to the Constitution of the English Monarchy* (London, 1697), 7.

lose their liberties and live in tyranny. "It's the misfortune of all Countries, that they sometimes lie under a unhappy necessity to defend themselves by Arms against the Ambition of their Governours, and to fight for what's their own." If those in government were heedless of reason, the people "must patiently submit to [their] Bondage, or stand upon [their] own Defence; which if [they] are enabled to do, [they] shall never be put upon it, but [their] Swords may grow rusty in [their] hands; for that Nation is surest to live in Peace, that is most capable of making War; and a Man that hath a Sword by his side, shall have least occasion to make use of it."[15]

The essays of Trenchard, Gordon, and Moyle subtly blended several distinct, yet related, ideas: opposition to standing armies, dependence upon militias, and support of the armed citizen. Thus, while the concept of the armed citizen was sometimes linked with that of the militia, libertarians just as often stressed this idea as an independent theme or joined it to other issues.

This latter tendency is evident in the writing of James Burgh, the libertarian most attractive to Americans. His *Political Disquisitions* provided a grab bag of ideas which Americans integrated into their vision of republicanism. Stressing the relationship between arms and power in a society, Burgh declared: "Those, who have the command of the arms in a country, says *Aristotle*, are masters of the state, and have it in their power to make what revolutions they please." Thus, "there is no end to observations on the difference between the measures likely to be pursued by a minister backed by a standing *army*, and those of a court awed by the fear of an *armed people*." For Burgh the very nature of society was related to whether or not its citizens had arms and were vigorous in their use. "No kingdom can be secured otherwise than by arming the people. The possession of arms is the distinction between a freeman and a slave. He, who has nothing, and who himself belongs to another, must be defended by him, whose property he is, and needs no arms. But he, who thinks he is his own master, and has what he can call his own, ought to have arms to defend himself, and what he possesses; else he lives precariously, and at discretion."[16]

A number of significant ideas came together in Burgh's *Disquisitions*. Like all libertarians he opposed a standing army and praised the militia as the bulwark of liberty. Then, going beyond these stock ideas, he clearly articulated the idea that the very character of the people—the cornerstone and strength of a republican society—was related to the individual's ability and desire to arm and defend himself against threats to his person, his property, and his state. An integral relationship existed between the possession of arms and the spirit and character of the people. For this reason Burgh lamented the state to which English society had fallen. Having become a people interested only in luxury and commerce, Englishmen had surrendered their arms. Lauding the Scots ("bred up in hardy, active, and abstemious courses of life, they were always

[15] *Ibid.*, 12.

[16] [James Burgh], *Political Disquisitions: Or, an Enquiry into Public Errors, Defects, and Abuses* (3 vols., London, 1774–1775), II, 345, 476, 390.

prepared to march") Burgh lamented that "the common people of *England*, on the other hand, having been long used to pay an army for fighting for them, had at this time forgot all the military virtues of their ancestors."[17]

Burgh's distress over the loss of virility and virtue in English society echoed that of his fellow libertarians since Harrington. These men related the downfall of English society to an increasingly luxury-loving people who freely chose to yield their military responsibilities to a professional army. Once armies were paid for by taxes, taxes were collected by armies, and the liberties of the English were at an end. True virtue sprang from the agrarian world of self-sufficient warriors. This was gone from England and with it all opportunity for a virtuous republic. There was, however, still some hope in the libertarians' minds: America was an agrarian society of self-sufficient husbandmen trained in arms. There the lamp of liberty might still burn brightly.

Richard Price drew the clearest contrast between the perceived decadence of England and the virtuous strength of America in his *Observations on the Importance of the American Revolution*. In that pamphlet he extolled the virtues of republican America, including the prevalence of the armed citizen, which he considered an integral part of America's strength. "Free States ought to be bodies of armed *citizens*, well regulated, and well disciplined, and always ready to turn out, when properly called upon, to execute the laws, to quell riots, and to keep the peace. Such, if I am rightly informed, are the citizens of America." In his view, "The happiest state of man is the middle state between the *savage* and the *refined*, or between the wild and the luxurious state. Such is the state of society in CONNECTICUT, and in some others of the *American* provinces; where the inhabitants consist, if I am rightly informed, of an independent and hardy YEOMANRY, all nearly on a level—trained to arms,—instructed in their rights—cloathed in home-spun—of simple manners—strangers to luxury—drawing plenty from the ground—and that plenty, gathered easily by the hand of industry." By contrast, "Britain, indeed, consisting as it does of *unarmed* inhabitants, and threatened as it is by ambitious and powerful neigh[b]ours, cannot hope to maintain its existence long after becoming open to invasion by losing its naval superiority."[18]

The conviction that Americans were a virtuous republican people—particularly when contrasted with decadent European populations—became a common theme in pamphlet literature on both sides of the Atlantic. George Mason boasted that "North America is the only great nursery of freemen now left upon the face of the earth." Matthew Robinson-Morris Rokeby, too, contended that while the flame of liberty in England was little more than "the last snuff of an expiring lamp," Americans were a "new and uncorrupted people." In addition, however, Rokeby linked the libertarian belief in a dynamic relationship between arms and a free society to his observations. Arguing that monarchs purposely kept their people unarmed, Rokeby exclaimed that the American

[17] *Ibid.*, 415.

[18] Richard Price, *Observations on the Importance of the American Revolution, and the Means of Making It a Benefit to the World* (London, 1784), 16, 69, 76.

colonies were "all democratical governments, where the power is in the hands of the people and where there is not the least difficulty or jealousy about putting arms into the hands of every man in the country." Europeans should be aware of the consequences of this and not "be ignorant of the strength and the force of such a form of government and how strenuously and almost wonderfully people living under one have sometimes exerted themselves in defence of their rights and liberties and how fatally it has ended with many a man and many a state who have entered into quarrels, war and contests with them."[19]

The vision of their nation as a virile and uncorrupted society permeated the writings of Americans during and after the Revolution. And, like Machiavelli and Harrington before them, these American writers perceived a vital relationship between vigorous republican husbandmen and the possession of arms. Under the pseudonym "A British Bostonian," the Baptist preacher John Allen warned the British what would happen if they attempted "to make the Americans subject to their *slavery*." "This bloody scene can never be executed but at the expence of the destruction of England, and you will find, my Lord, that the Americans will not submit *to be* SLAVES, they know the use of the gun, and the military art, as well as any of his Majesty's troops at St. James's, and where his Majesty has one soldier, who art in general the refuse of the earth, America can produce fifty, free men, and all volunteers, and raise a more potent army of men in three weeks, than England can in three years."[20] Even Charles Lee, a British military man, observed in a widely circulated pamphlet that "the Yeomanry of America . . . are accustomed from their infancy to fire arms; they are expert in the use of them:—Whereas the lower and middle people of England are, by the tyranny of certain laws almost as ignorant in the use of a musket, as they are of the ancient Catepulta."[21] The Continental Congress echoed this theme in its declaration of July 1775. "On the sword, therefore, we are compelled to rely for protection. Should victory declare in your favour, yet men trained to arms from their infancy, and animated by the love of liberty, will afford neither a cheap or easy conquest." Further, "in Britain, where the maxims of freedom were still known, but where luxury and dissipation had diminished the wonted reverence for them, the attack [of tyranny] has been carried on in a more secret and indirect manner: Corruption has been employed to undermine them. The Americans are not enervated by effeminacy, like the inhabitants of India; nor debauched by luxury, like those of Great-Britain."[22] In writing the *Federalist Papers* James Madison drew a similar contrast. Noting "the advantage of being armed, which the Americans possess over the people

[19] George Mason, "Remarks on Annual Elections for the Fairfax Independent Company," in *The Papers of George Mason, 1725–1792*, ed. Robert A. Rutland (3 vols., Chapel Hill, 1970), I, 231; Matthew Robinson-Morris Rokeby, *Considerations on the Measures Carrying on with Respect to the British Colonies in North America* (London, 1774), 133–35, 57.

[20] [John Allen], *An Oration, upon the Beauties of Liberty, or the Essential Rights of the Americans* (Boston, 1773), xiii–xiv.

[21] [Charles Lee], *Strictures on a Pamphlet Entitled, a "Friendly Address to All Reasonable Americans, on the Subject of Our Political Confusions." Addressed to the People of America* (Philadelphia, 1774), 12.

[22] *Journals of Congress* (13 vols., Philadelphia, 1800–1801), I, 148, 163.

of almost every other nation," he observed that in Europe "the governments are afraid to trust the people with arms."[23] Years later Timothy Dwight testified to the strength and durability of this belief when he wrote that "to trust arms in the hands of the people at large has, in Europe, been believed . . . to be an experiment fraught only with danger. Here by a long trial it has been proved to be perfectly harmless. . . . If the government be equitable; if it be reasonable in its exactions; if proper attention be paid to the education of children in knowledge and religion, few men will be disposed to use arms, unless for their amusement, and for the defence of themselves and their country."[24]

It was Joel Barlow, however, who most eloquently articulated the vital role of arms in American republican thought. Barlow firmly believed that one of America's greatest strengths rested in "making every citizen a soldier, and every soldier a citizen; not only *permitting* every man to arm, but *obliging* him to arm." Whereas in Europe this "would have gained little credit; or at least it would have been regarded as a mark of an uncivilized people, extremely dangerous to a well ordered society," Barlow insisted that in America "it is *because the people are civilized, that they are with safety armed.*" He exulted that it was because of "their conscious dignity, as citizens enjoying equal rights, that they wish not to invade the rights of others. The danger (where there is any) from armed citizens, is only to the *government*, not to the *society*; and as long as they have nothing to revenge in the government (which they cannot have while it is in their own hands) there are many advantages in their being accustomed to the use of arms, and no possible disadvantage." In contrast, Barlow continued, European societies employed professional soldiers "who know no other God but their king; who lose all ideas of themselves, in contemplating their officers; and who forget the duties of a man, to practise those of a soldier,—this is but half the operation: an essential part of the military system is to disarm the people, to hold all the functions of war, as well the arm that executes, as the will that declares it, equally above their reach." Then, by integrating libertarian orthodoxy with Adam Smith's more recent observation that a people who lost their martial spirit suffered "that sort of mental mutilation, deformity and wretchedness which cowardice necessarily involves in it," Barlow revealed the essence of the role of arms in American republican thought: Any government that disarmed its people "palsies the hand and brutalizes the mind: an habitual disuse of physical forces totally destroys the moral; and men lose at once the power of protecting themselves, and of discerning the cause of their oppression." A man capable of defending himself with arms if necessary was prerequisite for maintaining the moral character to be a good republican. Barlow then deduced that in a democratic society with equal representation "the people will be universally armed: they will assume those weapons for security, which the art of war has

[23] James Madison, "The Federalist No. 46 [45]," in *The Federalist*, ed. Jacob E. Cooke (Middletown, Conn., 1961), 321–22. This essay, originally published as number 45, appears as number 46 in the Cooke edition. For an explanation, see *ibid.*, xviii–xix.

[24] Timothy Dwight, *Travels in New-England and New-York* (4 vols., London, 1823), I, xiv.

invented for destruction." Only tyrannical governments disarmed their people. A republican society needed armed citizens and might remain vigorous and uncorrupted only so long as it had them.[25]

When Madison wrote the amendments to the Constitution that formed the basis of the Bill of Rights, he did not do so within a vacuum. Instead, he composed them in an environment permeated by the emergent republican ideology and with the aid of innumerable suggestions from his countrymen. These came most commonly from the state bills of rights and the hundreds of amendments suggested by the state conventions that ratified the Constitution. These sources continually reiterated four beliefs relative to the issues eventually incorporated into the Second Amendment: the right of the individual to possess arms, the fear of a professional army, the reliance on militias controlled by the individual states, and the subordination of the military to civilian control.

The various state bills of rights dealt with these four issues in different ways. Some considered them as separate rights, others combined them. New Hampshire, for example, included four distinct articles to deal with the militia, standing armies, military subordination, and individual bearing of arms. For its part, Pennsylvania offered a single inclusive article: "That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power." Virginia, too, presented an inclusive statement: "That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power."[26]

The amendments suggested by the various state ratifying conventions were of a similar nature.[27] Examples include New Hampshire, which did not mention the militia but did state "that no standing Army shall be Kept up in time of Peace unless with the consent of three fourths of the Members of each branch of Congress, nor shall Soldiers in Time of Peace be quartered upon private Houses without the consent of the Owners." Then in a separate amendment: "Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion."[28] Maryland's convention offered five separate amendments dealing with these issues while Virginia's integrated them by

[25] Joel Barlow, *Advice to the Privileged Orders in the Several States of Europe: Resulting from the Necessity and Propriety of a General Revolution in the Principle of Government* (Ithaca, N.Y., 1956) 16–17, 45–46; Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (2 vols., London, 1776), II, 373. For an excellent discussion of Adam Smith's attitudes toward the relationship between martial spirit and the public character, see Donald Winch, *Adam Smith's Politics: An Essay in Historiographic Revision* (Cambridge, Eng., 1978), esp. 103–20.

[26] Francis Newton Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies Now or Heretofore Forming the United States of America* (7 vols., Washington, 1909), IV, 2455–56, V, 3083, VII, 3814. All of the state bills of rights appear in this collection.

[27] These amendments are conveniently grouped together in Dumbauld, *Bill of Rights*, 173–205.

[28] *Ibid.*, 182.

stating: "That the people have a right to keep and bear arms; that a well regulated Militia composed of the body of the people trained to arms is the proper, natural and safe defence of a free State. That standing armies in time of peace are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the Community will admit; and that in all cases the military should be under strict subordination to and governed by the Civil power."[29] The New York convention, which offered over fifty amendments, observed: "That the People have a right to keep and bear Arms; that a well regulated Militia, including the body of the People *capable of bearing Arms*, is the proper, natural and safe defence of a free state."[30] The minority report of the Pennsylvania convention, which became a widely publicized Anti-federalist tract, was the most specific: "That the people have a right to bear arms for the defence of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military shall be kept under strict subordination to and be governed by the civil power."[31]

On the specific right of individuals to keep arms, Madison could also draw upon the observations of Samuel Adams, then governor of Massachusetts, and his close friend and confidant Thomas Jefferson. For his part, Adams offered an amendment in the Massachusetts convention that read: "And that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press or the rights of conscience; or to prevent the people of the United States who are peaceable citizens from keeping their own arms; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them."[32] In his initial draft of a proposed constitution for the state of Virginia Jefferson did not mention a militia but did state that no standing army should exist except in time of actual war. Then, in a separate phrase, he wrote: "No freeman shall ever be debarred the use of arms." He amended this statement in his next two drafts to read: "No freeman shall be debarred the use of arms within his own lands or tenements."[33]

Madison and his colleagues on the select committee charged with creating a bill of rights were anxious to capture the essence of the rights demanded by so many Americans in so many different forms. To do this they eliminated many suggestions, reworded others, and consolidated as many as possible in order to

[29] *Ibid.*, 178–79, 185. The Maryland amendments include minority proposals.

[30] *Ibid.*, 189. New York's was the only state amendment to distinguish between *keeping* and *bearing* arms. It allowed all citizens to possess arms, but only those with the capability to bear them were asked to do so.

[31] *Ibid.*, 174. For an excellent analysis of this report, see Merrill Jensen, ed., *The Documentary History of the Ratification of the Constitution* (3 vols., Madison, 1976–1978), II, 617–40.

[32] William V. Wells, *Life and Public Services of Samuel Adams, Being a Narrative of His Acts and Opinions, and of His Agency in Producing and Forwarding the American Revolution* (3 vols., Boston, 1865), III, 267.

[33] *The Papers of Thomas Jefferson*, ed. Julian P. Boyd et al. (19 vols., Princeton, 1950–1974), I, 344, 353, 363.

come up with a reasonable number of amendments.[34] What became the Second Amendment resulted from this last process. The committee took the two distinct, yet related rights—the individual possession of arms and the need for a militia made up of ordinary citizens—and merged them into a single amendment. As with other amendments that combined various essential rights, it was the intent of the committee neither to subordinate one right to the other nor to have one clause serve as subordinate to the other.[35] This became obvious in the discussion of the amendment that took place on the floor of Congress.

Although brief, the discussion occasioned by the Second Amendment is instructive for its indication of congressional intent to protect two separate rights: the individual's right to possess arms and the right of the states to form their own militia. Elbridge Gerry made this clear when he attacked the phrase dealing with conscientious objectors, those "scrupulous of bearing arms," that appeared in the original amendment. Manifesting the standard libertarian distrust of government, Gerry claimed that the amendment under discussion "was intended to secure the people against the mal-administration of the Government; if we could suppose that, in all cases, the rights of the people would be attended to, the occasion for guards of this kind would be removed." However, Gerry was suspicious that the federal government might employ this phrase "to destroy the constitution itself. They can declare who are those religiously scrupulous, and prevent them from bearing arms."[36] This would be a return to European-style governments in which those in authority systematically disarmed the populace. Thomas Scott of Pennsylvania also objected to this phrase for fear that it "would lead to the violation of another article in the constitution, which secures to the people the right of keeping arms."[37] The entire thrust of this discussion, as well as one related to a militia bill also under consideration, was that congressmen distinguished not only between the militia and the right of the individual to possess arms but between the individual's *possession* of arms and his *bearing* of them. That is, they believed that all should have the right to possess arms but that all should not necessarily be responsible for bearing them in defense of the state. In the discussion over the militia bill, for example, one representative declared: "As far as the whole body of the people are necessary to the general defence, they ought to be armed; but the law ought not to require more than is necessary; for that would be a just cause of complaint." Another believed that "the people of America

[34] For an excellent analysis of this process, see Bernard Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights* (New York, 1977), 160–91.

[35] In their interpretations of the Second Amendment various authors have stressed the wording of the amendment. (See note 5 above.) It is clear, however, that James Madison and the committee worked toward succinctness. Indeed, Madison's original suggestion read: "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person." Dumbauld, *Bill of Rights*, 207.

[36] *Ibid.*; *Annals of the Congress*, 1 Cong., 1 sess., Aug. 17, 1789, p. 778.

[37] *Annals of the Congress*, 1 Cong., 1 sess., Aug. 20, 1789, p. 796.

would never consent to be deprived of the privilege of carrying arms." Others even argued that those Americans who did not possess arms should have them supplied by the states.[38] This discussion clearly indicated that the problem perceived by the representatives was how to get arms into the hands of all American males between the ages of eighteen and forty-five, not how to restrict such possession to those in militia service.[39]

It is apparent from such discussions that Americans of the Revolutionary generation distinguished between the individual's right to *keep* arms and the need for a militia in which to *bear* them. Yet it is equally clear that more often than not they considered these rights inseparable. This raises the question of why so many Americans so often fused these rights as to make it logical to combine them in the Second Amendment. Here comments by Madison, George Washington, Dwight, and Joseph Story provide excellent insight.

In his forty-fifth number of the *Federalist Papers* Madison drew the usual contrast between the American states, where citizens were armed, and European nations, where governments feared to trust their citizens with arms. Then he observed that "it is not certain that with this aid alone [possession of arms], they would not be able to shake off their yokes. But were the people to possess the additional advantages of local governments chosen by themselves, who could collect the national will, and direct the national force; and of officers appointed out of the militia, by these governments and attached both to them and to the militia, it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned, in spite of the legions which surround it."[40] Washington, in his first substantive speech to Congress, declared: "To be prepared for war, is one of the most effectual means of preserving peace. A free people ought not only to be armed, but disciplined; to which end, a uniform and well digested plan is requisite."[41] Writing early in the nineteenth century, Dwight celebrated the right of individuals to possess arms as the hallmark of a democratic society. Then, he concluded: "The difficulty here has been to persuade the citizens to keep arms, not to prevent them from being employed for violent purposes."[42] This same lament

[38] *Ibid.*, 1 Cong., 3 sess., Dec. 16, 1790, pp. 1806–07.

[39] This is the opinion of St. George Tucker, one of the leading jurists of the day. When he edited *Blackstone's Commentaries*, Tucker noted the master's observation that the right of the people to bear arms constituted one of the essential rights necessary to protect life, liberty, and property. His footnote to this section read: "The right of the people to keep and bear arms shall not be infringed. Amendments to C.U.S. [Constitution of the United States] Art. 4, and this without any qualification as to their condition or degree as is the case in the British government." In another note Tucker observed that "whosoever examines the forest, and game laws in the British code, will readily perceive that the right of keeping arms is effectually taken away from the people of England." Blackstone himself informs us "that the prevention of popular insurrections and resistance to government by disarming the bulk of the people, is a reason oftener meant than avowed by the makers of the forest and game laws." St. George Tucker, ed., *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* (5 vols., Philadelphia, 1803), I, 144, II, 412.

[40] Madison, "Federalist No. 46 [45]," 321–22.

[41] *Annals of the Congress*, 1 Cong., 2 sess., Jan. 8, 1790, p. 969.

[42] Dwight, *Travels in New-England*, I, xiv–xv.

coursed through the observations of Story, whose *Commentaries* summed up the relationship between armed citizens and the militia as clearly as it was ever stated. In his discussion of the Second Amendment, Story wrote:

> The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. And yet, though this truth would seem so clear, and the importance of a well regulated militia would seem so undeniable, it cannot be disguised, that among the American people there is a growing indifference to any system of militia discipline, and a strong disposition, from a sense of its burthens, to be rid of all regulations. How it is practicable to keep the people duly armed without some organization, it is difficult to see. There is certainly no small danger, that indifference may lead to disgust, and disgust to contempt; and thus gradually undermine all the protection intended by this clause of our national bill of rights.[43]

The observations of Madison, Washington, Dwight, and Story reveal an interesting relationship between the armed citizen and the militia. These men firmly believed that the character and spirit of the republic rested on the freeman's possession of arms as well as his ability and willingness to defend himself and his society. This was the bedrock, the "palladium," of republican liberty. The militia was equally important in their minds. Militia laws insured that freemen would remain armed, and thus vigorous republican citizens. In addition the militia served as the means whereby the collective force of individually armed citizens became effective. It was this that would cause those in power to respect the liberties of the people and would eliminate the need to create professional armies, that greatest single threat to a republican society. Thus, the armed citizen and the militia existed as distinct, yet interrelated, elements within American republican thought.

With the passage of time, however, American republicanism placed an increasing emphasis upon the image of the armed citizen. Caught up within a dialectic between virtue and commerce, Americans struggled to preserve their Revolutionary commitment to escape from corruption. Following Harrington's reasoning that commerce could not corrupt so long as it did not overwhelm agrarian interests, Americans believed that in order to accommodate both virtue and commerce a republic must be as energetic in its search for land as it was in its search for commerce. A vast supply of land, to be occupied by an armed and self-directing yeomanry, might nurture an endless reservoir of virtue. If American virtue was threatened by the increase in commercial activity following the Constitution of 1787, it could revitalize itself on the frontier by means of the armed husbandman.[44]

[43] Joseph Story, *Commentaries on the Constitution of the United States; With a Preliminary Review of the Constitutional History of the Colonies and States before the Adoption of the Constitution* (3 vols., Boston, 1833), III, 746–47.

[44] This theme is developed in a wide range of literature. Outstanding examples include: Richard Slotkin, *Regeneration through Violence: The Mythology of the American Frontier, 1600–1860* (Middletown, Conn., 1973); Henry Nash Smith, *Virgin Land: The American West as Symbol and Myth* (Cambridge, Mass., 1950); John William Ward, *Andrew Jackson: Symbol for an Age* (New

This belief is what gave point to Jefferson's observation that "our governments will remain virtuous for many centuries; as long as they are chiefly agricultural; and this will be as long as there shall be vacant lands in any part of America." Coupled with this, however, was Jefferson's libertarian inheritance: "What country can preserve it's liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance. Let them take arms."[45]

In the nearly two hundred years since the ratification of the Bill of Rights American society has undergone great transformations. As a consequence the number of people enjoying expanded civic rights and responsibilities, including the ownership of firearms, which Jefferson and others felt should be restricted to "freemen," has vastly increased. This has become the source of much controversy. Speaking for those alarmed by the presence of so many armed citizens, Sen. Edward Kennedy believes that "our complex society requires a rethinking of the proper role of firearms in modern America. Our forefathers used firearms as an integral part of their struggle for survival. But today firearms are not appropriate for daily life in the United States."[46] For his part, Edward Abbey, eloquent spokesman for individualism, fears that the measures suggested by Senator Kennedy to cope with today's "complex society" may be taking America in the direction of a worldwide drift toward totalitarianism. In his mind, throughout history whenever tyrannical governments existed and where the few ruled the many, citizens have been disarmed. "The tank, the B-52, the fighter-bomber, the state-controlled police and military are the weapons of dictatorship. The rifle is the weapon of democracy." Then, "If guns are outlawed, only the government will have guns. Only the police, the secret police, the military. The hired servants of our rulers. Only the government—and a few outlaws. I intend to be among the outlaws."[47]

Whether the armed citizen is relevant to late-twentieth-century American life is something that only the American people—through the Supreme Court, their state legislatures, and Congress—can decide. Those who advocate some measure of gun control are not without powerful arguments to advance on behalf of their position. The appalling and unforeseen destructive capability of modern weapons, the dissolving of the connection between an armed citizenry and the agrarian setting that figured so importantly in the thought of the revolutionary generation, the distinction between the right to keep arms and such measures as "registration," the general recognition of the responsibility of

York, 1955); and Pocock, *Machiavellian Moment*, esp. 506–52. For an excellent analysis of the changing attitudes toward the militia and professional armies, see Charles Royster, *A Revolutionary People at War: The Continental Army and American Character, 1775–1783* (Chapel Hill, 1979).

[45] Thomas Jefferson to James Madison, Dec. 20, 1787, in *Papers of Jefferson*, ed. Boyd et al., XII, 442; Jefferson to William Stephens Smith, Nov. 13, 1787, *ibid.*, XII, 356.

[46] Kennedy, "Need for Gun Control Legislation," 26.

[47] For Edward Abbey's thoughts regarding the drift toward totalitarianism, see Edward Abbey, *Desert Solitaire: A Season in the Wilderness* (New York, 1968), 149–51. The quotations are drawn from Edward Abbey, "The Right to Arms," Edward Abbey, *Abbey's Road* (New York, 1979), 130–32.

succeeding generations to modify the constitutional inheritance to meet new conditions—all will be serviceable in the ongoing debate. But advocates of the control of firearms should not argue that the Second Amendment did not intend for Americans of the late eighteenth century to possess arms for their own personal defense, for the defense of their states and their nation, and for the purpose of keeping their rulers sensitive to the rights of the people.

THE SECOND AMENDMENT AND THE IDEOLOGY OF SELF-PROTECTION

*Don B. Kates, Jr.**

From the enactment of the Bill of Rights through most of the twentieth century, the second amendment seems to have been understood to guarantee to every law-abiding responsible adult the right to possess most ordinary firearms. Until the mid-twentieth century courts and commentaries (the two earliest having been before Congress when it voted on the second amendment) deemed that the amendment "confirmed [the people] in their right to keep and bear their private arms," or "their own arms."[1] In a 1939 case which is its only full treatment, the Supreme Court accepted that private persons may invoke the second amendment, but held that it confines their freedom of choice to militia-type weapons, i.e., high quality handguns and rifles, but not "gangster weapons" such as sawed-off shotguns, switchblade knives and (arguably) "Saturday Night Specials."[2]

In the 1960s this individual right view was challenged by scholars who argued that the second amendment guarantee extends only to the states' right to arm formal military units.[3] This states' right view attained predominance, and was endorsed by the ABA, the ACLU and such texts as Lawrence Tribe's *American Constitutional Law*. During the 1980s, however, a large literature on the amend-

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1. In addition to the cases and earlier commentaries quoted and discussed in Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 224, 241-51 (1983), see John N. Pomeroy, *An Introduction to the Constitutional Law of the United States* 152-3 (Hurd and Houghton, 1868); Hermann E. von Holst, 5 *The Constitutional and Political History of the United States* 307 (John J. Lalor, trans., Callaghan & Co., 1885); Henry C. Black, *Handbook of American Constitutional Law* 543 (West, 3d ed. 1910); James Schouler, *Constitutional Studies: State and Federal* (Dodd, Mead, & Co., 1897); John Randolph Tucker, 2 *The Constitution of the United States* 671 (Henry Tucker, ed., Callaghan & Co., 1899); Albert H. Putney, *United States Constitutional History and Law* 363 (Illinois Book Exch., 1908); Comment, *Is the Pistol Responsible for Crime?*, 1 J. of Crim. L., Crimin. & Pol. Sci. 793, 794 (1911).

2. *United States v. Miller*, 307 U.S. 174 (1939).

3. See, e.g., John Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 Chi-Kent L. Rev. 148 (1971); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hast. Const. L.Q. 961 (1975).

ment appeared, much of it rejecting the states' right view as inconsistent with the text and with new research findings on the legislative history, the attitudes of the authors, the meaning of the right to bear arms in antecedent American and English legal thought, and the role that an armed citizenry played in classical liberal political philosophy from Aristotle through Machiavelli and Harrington to Sidney, Locke, Rousseau and their various disciples.[4] Indicative of the current Supreme Court's probable view is a 1990 decision which, though focussing on the fourth amendment, cites the first and second as well in concluding that the phrase "right of the people" is a term of art used throughout the Bill of Rights to designate rights pertaining to individual citizens (rather than to the states).[5]

Sanford Levinson speculates that the indifference of academics, and the legal profession generally, to the second amendment reflects

> a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even "winning," interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation.[6]

But Levinson and others who reluctantly embrace the individual right view are not always sympathetic to gun ownership, and certainly not to the gun lobby's obnoxious pretension that the amendment bars any gun control it happens to oppose, however moderate or rational.[7] This may help account for the fact that, though the availability of guns for self-defense is of great import to the gun lobby, that issue plays little part in modern academic exposition of the individual right position. In contrast, proponents of the state's

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4. See, e.g. Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. Am. Hist. 599 (1982); Kates, 82 Mich. L. Rev. at 230-35 (cited in note 1); Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 Hast. Const. L.Q. 285 (1983); Stephen P. Halbrook, *"That Every Man Be Armed": The Evolution of a Constititutional Right* (U. N.M. Press, 1984); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989); Don B. Kates, *Minimalist Interpretation of the Second Amendment* ("*Minimalist Interpretation*") in Eugene W. Hickok, ed., *The Bill of Rights: Original Understanding and Current Meaning* at 130 (U. Pr. of Va., 1991)("*Bill of Rights*"); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1162-73 (1991); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Towards an Afro-Americanist Reconsideration*, 80 Georgetown L.J. 309 (1991).

5. *United States v. Verdugo-Urquidez*, 110 S.Ct. 1056 (1990).

6. Levinson, 99 Yale L.J. at 642 (cited in note 4).

7. For a debate between the NRA's primary exponent of the amendment and myself as to the extent to which various moderate, sensible gun controls are allowable under the individual right view we both endorse, see Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms"*, 49 Law & Contemp. Probs. 151 (Winter 1986), and Don B. Kates, *The Second Amendment: A Dialogue*, 49 Law & Contemp. Probs. 143 (Winter 1986).

right view do focus on the issue of self-protection, straight-forwardly denying the existence of historical evidence that self-protection was one of the concerns underlying the second amendment.[8]

The purpose of this article is to explore the numerous and protean ways in which the concept of self-protection related to the amendment in the minds of its authors. Indeed, self-defense is at the core of the second amendment and was an element in the Founders' political thought generally. At the same time, it is important to recognize that the Founders' view of self-protection was not only stronger but also more inclusive than the concept described by many modern thinkers. To the Founders and their intellectual progenitors, being prepared for self-defense was a *moral* imperative as well as a pragmatic necessity; moreover, its pragmatic value lay less in repelling usurpation than in deterring it before it occurred.

The underpinnings of the classical liberal belief in an armed people are obscure to us because we are not accustomed to thinking about political issues in criminological terms. But the classical liberal worldview was criminological, for lack of a better word. It held that good citizens must always be prepared to defend themselves and their society against criminal usurpation—a characterization no less applicable to tyrannical ministers or pillaging foreign or domestic soldiery (who were, in point of fact, largely composed of criminals inducted from gaols)[9] than to apolitical outlaws.

To natural law philosophers, self-defense was "the primary law of nature," the primary reason for man entering society.[10] Indeed, it was viewed as not just a right but a positive duty: God gives Man both life and the means to defend it so that the refusal to do so reviles God's gift. A refusal to engage in self-defense is a Judeo-Christian form of hubris. Indicative of the intellectual gulf between that era and our own is that when Montesquieu asked, "Who does not see that self-defence is a duty superior to every precept?"[11] he was posing the question rhetorically rather than meaningfully.

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8. See, e.g., George D. Newton & Franklin E. Zimring, *Firearms and Violence in American Life* 259 (Nat. Com'n on Causes & Prevention of Violence, 1970) (characterizing the second amendment "as a scheme dealing with military service, not individual defense.").

9. Russell F. Weighley, *History of the United States Army* 19 (Macmillan Co., 1967). See note 45 for discussion of the billeting of criminous troops on the king's enemies as a punishment and means of surveillance. Throughout the eighteenth century, criminal offenses by English soldiers and sailors in the colonies were a constant occurrence, and a subject of constant antagonism between Americans and the English military which refused either to punish their men or to turn them over to local justice. See generally Pauline Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain. 1765-1776* (Alfred A. Knopf, 1972) ("*From Resistance to Revolution*").

10. William Blackstone, 3 *Commentaries* *4; see generally Thomas Hobbes, *Leviathan* ch. XIII (1651, rep. George Routledge & Sons, 1894).

11. Montesquieu, *The Spirit of the Laws*, in Mortimer Adler, ed. 35 *Great Books of the*

Radiating out directly from this core belief in self-defense as the most self-evident of rights came the multiple chains of reasoning by which contemporary thinkers sought to resolve a multitude of diverse questions. For instance, seventeenth and eighteenth century treatises on international law were addicted to long disquisitions on individual self-protection from which they attempted to deduce a law of nations.[12] More important for present purposes, John Locke adduced from the right of individual self-protection his justification of the right(s) of individuals to resist tyranical officials and, if necessary, to band together with other good citizens in overthrowing tyranny. Slavers, robbers and other outlaws who would deprive honest citizens of their rights may be resisted even to the death because their attempted usurpation places them in a "state of war" against honest men. Likewise, when a King and/or his officials attempt to divest a subject of life, liberty or property they dissolve the compact by which he has agreed to their governance and enter into a state of war with him—wherefore they may be resisted the same as any other usurper.[13] Similarly, Algernon Sidney declared: "Swords were given to men, that none might be Slaves, but such as know not how to use them."[14] "Nay, all Laws must fall, human Societies that subsist by them be dissolved, and all innocent persons be exposed to the violence of the most wicked, if men might not justly defend themselves against injustice . . . ."[15]

From these premises it followed, as Thomas Paine wrote, that "the good man" had both right and need for arms; moreover, no law would dissuade "the invader and the plunderer" from having them. So, "since some *will not*, others *dare not* lay them aside." "Horrid mischief would ensue were [the law-abiding] deprived of the use of them; . . . the weak will become a prey to the strong."[16] Cesare Beccaria assailed arms bans as a paradigm of simplistic legislation reflecting "False Ideas of Utility." His discussion deserves quotation in full, in part because Thomas Jefferson laboriously copied it in long-hand into his personal compilation of great quotations:

Western World 217 (Thomas Nugent, tr., Encyclopedia Britannica, 2d ed. 1990) ("*Spirit of the Laws*").

12. See, e.g. J.J. Burlamqui, *The Principles of Natural and Politic Law* 112-13, 119, 121 (Nugent, tr., Cambridge U. Press, 5th ed. 1807); de Vattel, *The Law of Nations: Principles of the Law of Nature* 22 (Joseph Chitty, tr., T. & J.W. Johnson, 1854).

13. John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government (Second Treatise of Government)* (1694), in Thomas I. Cook, ed., *Two Treatises of Government* 119, 129-30 (Haffner Pub., 1947).

14. Algernon Sidney, *Discourses Concerning Government* 270 (1698).

15. Id. at 266-67.

16. Moncure Conway, ed., 1 *Writings of Thomas Paine* 56 (Putnam, 1894) (emphasis in original) ("*Writings*").

> False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty—so dear to men, so dear to the enlightened legislator—and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designated as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree.[17]

Likewise, Montesquieu condemned laws against firearms as infringing the natural law of self defense.[18] As inheritors of these ideas, the Founders believed that the right to arms was a necessary ingredient of the moral duty of self-defense. The ideas underlying the second amendment are further obscured to us by the distinction we tend to draw between self-protection as a purely private and personal value, and defense of the community which we tend to conceptualize as a function and value of the police. Modern Americans tend to see incidents in which a violent criminal is thwarted by a police officer as very different from similar incidents in which the defender is a civilian. When the police defend citizens it is seen (and lauded) as defense of the community. In contrast, when civilians defend themselves and their families the tendency is to regard them as exercising what is, at best, a purely personal privilege serving only the particular interests of those defended, not those of the community at large. Such influential and progressive voices in American life as Garry Wills, Ramsey Clark and the *Washington Post* go further yet, labelling those who own firearms for family defense as "anti-citizens," and "traitors, enemies of their own patria"

17. Ceasare Beccaria, *An Essay on Crimes and Punishments* 87-8 (Henry Paolucci, tr., Bobbs-Merrill, 1963).

18. Montesquieu, *Spirit of the Laws* at 224-25 (cited in note 11).

who arm "against their own neighbors,"[19] and denouncing "the need that some homeowners and shopkeepers believe they have for weapons to defend themselves" as representing "the worst instincts in the human character," a return to barbarism and to "anarchy, not order under law—a jungle where each relies on himself for survival."[20]

The notion that the truly civilized person eschews self-defense, relying on the police instead, or that private self-protection disserves the public interest, would never have occurred to the Founders since there were no police in eighteenth century America and England.[21] In the tradition from which the second amendment derives it was not only the unquestioned right, but a crucial element in the *moral* character of every free man that he be armed and willing to defend his family and the community against crime. This duty included both individual acts and joining with his fellows in hunting criminals down when the hue and cry went up, as well as the more formal posse and militia patrol duties, under the control of justices of the peace or sheriffs.[22] In this milieu, individuals who thwarted a crime against themselves or their families were seen as serving the community as well.[23]

This failure to distinguish between the value of self-protection to individuals and to the community helps account for what modern readers may deem a remarkable myopia in seventeenth to nineteenth century discourse on crime, self-protection, and community interest. Without apparent consciousness of any difference, that discourse addressed issues of community defense as if it were only individual self-protection writ large. Thus, Montesquieu confidently asserted that "[t]he life of governments is like that of man. The latter has a right to kill in case of natural defence: the former have a right to wage war for their own preservation."[24] Likewise, Thomas Paine cited the indubitable right and need for "the good man" to be armed against "the vile and abandoned" as irrefutable evidence of the right and need of nations to arm for defense against

19. Quoted in Don B. Kates, *The Value of Civilian Handgun Possession as a Deterrent to Crime or a Defense Against Crime*, 18 Am. J. Crim. L. 113, 119 (1991).

20. *Guns and the Civilizing Process*, Washington Post A16, col. 1 (Sept. 26, 1972); Ramsay Clark, *Crime in America* 107 (Simon & Schuster, 1970).

21. See Kates, 82 Mich. L. Rev. at 214-16 (cited in note 1); Frank Morn, *Firearms Use and Police: A Historic Evolution in American Values* ("*Firearms Use*"), in Don B. Kates, ed., *Firearms and Violence* 489 (Ballinger, 1984).

22. Kates, 82 Mich. L. Rev. at 214-16 (cited in note 1); Malcolm, 10 Hast. Const. L.Q. at 290-92 (cited in note 4).

23. See generally Kates, 82 Mich. L. Rev. at 214-16 (cited in note 1); Morn, *Firearms Use*, in Kates, ed., *Firearms and Violence* at 489 (cited in note 21).

24. Montesquieu, *Spirit of the Laws* at 61 (cited in note 11).

"the invader and plunderer"; for, if deprived of arms, "the weak will become a prey to the strong."[25] As we have seen, Algernon Sydney and John Locke adduced from the right of individual self-defense their justification of the right(s) of individuals to resist tyranical officials and, if necessary, to band together with other good citizens to overthrow tyranny.

Thus a crucial point for understanding the second amendment is that it emerged from a tradition which viewed general possession of arms as a positive social good, as well as an indispensable adjunct to the individual right of self-defense. Moreover, arms were deemed to protect against every species of criminal usurpation, including "political crime," a phrase which the Founders would have understood in its most literal sense. Whether murder, rape, and theft be committed by gangs of assassins, tyrannous officials and judges or pillaging soldiery was a mere detail; the criminality of the "invader and plunderer" lay in his violation of natural law and rights, regardless of the guise in which he violated them. The right to resist and to possess arms therefore remained the same, as did the community benefit.

These notions of community benefit from individuals armed and ready to exercise their natural right of self-defense come together in the thought of Sir William Blackstone. Significantly, the way in which he described the right to arms emphasizes both the individual self-protection rationale and the criminological premises, which are so foreign to the terms of the modern debate over the second amendment.

Blackstone placed the right to arms among the "absolute rights of individuals at common law," those rights he saw as preserving to England its free government and to Englishmen their liberties. Yet, unquestionably, what Blackstone was referring to was individuals' rights to have and use personal arms for self-protection. He describes the right to bear arms as being "for self-preservation and defense," and self-defense as being "the primary law of nature [which cannot be] taken away by the law of society"[26]—the "natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."[27]

But Blackstone's analysis also demonstrates a final distinction between our world view and that of the Founders. For Blackstone saw the right to personal arms for personal self-defense as a *political*

25. Conway, ed., 1 *Writings* at 56 (cited in note 16).
26. William Blackstone, 3 *Commentaries* *4.
27. William Blackstone, 1 *Commentaries* *144.

right of fundamental importance. His discussion of the "absolute rights of individuals" ends with the following:

> In these several rights consist the rights, or, as they are frequently termed, the liberties of Englishmen. . . . So long as these remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or [an]other of these rights, having no other object upon which it can possible be employed. . . . And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular and free course of justice in the courts of law; next, to the right of petitioning the King and parliament for redress of grievances; and, *lastly, to the right of having and using arms for self-preservation and defense.*[28]

To readers with modern sensibilities this inevitably raises two questions to which the remainder of this article is devoted: Why did Blackstone regard the right to possess arms for self-protection as a political matter? How could he have grouped (what we at least conceive as no more than) a privilege to have the means of repelling a robber, rapist or cutthroat with such political rights as access to the courts and to petition for redress of grievances?

To answer these questions is to come to a fuller understanding of the moral and symbolic significance of the right to bear arms in the classical world view. Arms possession for protection of self, family and polity was both the hallmark of the individual's freedom and one of the two primary factors in his developing the independent, self-reliant, responsible character which classical political philosophers deemed necessary to the citizenry of a free state. The symbolic significance of arms as epitomizing the status of the free citizen represented ancient law. From Anglo-Saxon times "the ceremony of freeing a slave included the placing in his hands of" arms "as a symbol of his new rank."[29] Anglo-Saxon law forbade anyone to disarm a free man and Henry I's laws applied this even to the man's own lord.[30] Such precedents were particularly important to theorists like Blackstone and Jefferson, to whom the concept of "natural rights" had a strongly juridical tinge relating to the English legal heritage.

The Anglo-American legal distinction between free/armed and unfree/disarmed flowed naturally into the classical republican view that the survival of free and popular government required citizens

28. Id. (emphasis added).

29. A.V.B. Norman, *The Medieval Soldier* 73 (Thomas Y. Crowell Co., 1971)

30. *The Assize of Arms* (1181), reprinted in David C. Douglas & George W. Greenaway, eds., 2 *English Historical Documents* at 416 (Eyre & Spottiswoode, 1953).

of a special character—and that the possession of arms was one of two keys in the development of that character. From Machiavelli and Harrington classical republican philosophy derived the idea that arms possession and property ownership were the keys to civic virtue. In the Greek and Roman republics from whose example they took so many lessons, every free man had been armed so as to be prepared both to defend his family against outlaws and to man the city walls in immediate response to the tocsin warning of approaching enemies. Thus did each citizen commit himself to the fulfillment of both his private and his public responsibilities.[31]

The very survival of republican institutions depended upon this moral (as well as physical) commitment—upon the moral and physical strength of the armed freeholder: sturdy, independent, scrupulous, and upright, the self-reliant defender of his life, liberty, family, and polity from outlaws, oppressive officials, despotic government, and foreign invasion alike. That the freeholder might never have to use his arms in such protection mattered naught. Indeed, one basic tenet classical political theory took from its criminological premises was that of deterrence: if armed and ready the free man would be least likely ever to actually have to defend.

Commitment, duty, and responsibility are also viewed as positive rights because to the virtuous citizen the carrying out of responsibilities to family and duties to country are a right. The right of arms is one of the first to be taken away by tyrants, not only for the physical security despotism gains in monopolizing armed power in the hands of the state, but also for its moral effects. The tyrant disarms his citizens in order to degrade them; he knows that being unarmed

> palsies the hand and brutalizes the mind: an habitual disuse of physical forces totally destroys the moral; and men lose at once the power of protecting themselves, and of discerning the cause of their oppression.[32]

Thus, when Machiavelli said that "to be disarmed is to be contemptible," he meant not simply to be held in contempt, but to deserve it; by disarming men tyrants render them at once brutish and pusillanimous.

It was in this tradition of civic virtue through armament that Thomas Jefferson (who believed that every boy of ten should be given a gun as he had been) advised his fifteen year old nephew:

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31. Kates, 82 Mich. L. Rev. at 230-2 (cited in note 1).

32. Joel Barlow, *Advice to the Privileged Orders in the Several States of Europe: Resulting From the Necessity and Propriety of a General Revolution in the Principle of Government, Part I* 45 (1792, reprinted by Cornell U. Pr., 1956) ("*Advice to the Privileged*").

> A strong body makes the mind strong. As to the species of exercises, I advise the gun. While this gives a moderate exercise to the body, it gives boldness, enterprize and independance to the mind. Games played with the ball and others of that nature, are too violent for the body and stamp no character on the mind. Let your gun therefore be the constant companion of your walks.[33]

Of course the basis for the Founders' belief in the possession of arms was not limited to purely moral premises. Indeed, the Founders and their intellectual progenitors had an almost boundless faith in the pragmatic, as well as the moral, impact of widespread arms possession. They believed in the efficacy of civilian arms possession as deterrent and defense against outlaws, tyrants, and foreign invaders alike. Madison confidently assured his fellow-countrymen that a free people need not fear government because of "the advantage of being armed, which the Americans possess over the people of almost every other nation."[34] Arming the people is, according to Locke's followers Trenchard and Moyle,

> the surest way to preserve [their liberties] both at home and abroad, the People being secured thereby as well against the Domestick Affronts of any of their own [fellow] Citizens, as against the Foreign Invasions of ambitious and unruly Neighbours.[35]

This faith in the possession of arms buoyed up Locke and his English and American followers against their opponents' charge that their advocacy of a right to resistance and even revolution would lead to sanguinary and internecine disorders. To the contrary, they replied, that is what will come from disarming the people. Unchecked by the salubrious fear of its armed populace, government will follow its natural tendency to despotism. Tyrannous ministers will push their usurpations to the point that even an unarmed people will rise *en masse* to take their rights back into their bloody hands regardless of casualties.[36] But where the people are armed it would rarely, if ever, come to this for, as Thomas Paine asserted, "arms like laws discourage and keep the invader and plun-

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33. Thomas Jefferson to Peter Carr, August 19, 1785, in Julian P. Boyd, ed., 8 *The Papers of Thomas Jefferson* 405, 407 (Princeton U. Press, 1953).

34. Federalist 46 (Madison), in *The Federalist Papers* at 294, 299 (Arlington House, 1966).

35. John Trenchard & Walter Moyle, *An Argument Shewing, That a Standing Army is Inconsistent With a Free Government, and Absolutely Destructive to the Constitution of the English Monarchy* 7 (1697) ("*An Argument*").

36. Kates, *Minimalist Interpretation*, in Hickok, *Bill of Rights* at 132 (cited in note 4).

derer in awe and preserve order in the world as well as property."[37] To avoid domestic tyranny, wrote Trenchard and Moyle, the people must be armed to

> stand upon [their] own Defence; which if [they] are enabled to do, [they] shall never be put upon it, but [their] Swords may grow rusty in [their] hands; for that Nation is surest to live in Peace, that is most capable of making War; and a Man that hath a Sword by his side, shall have least occasion to make use of it.[38]

Whatever the merits of this deterrence theory, in other respects the Founders also carried their belief in the right to arms to absurdly utopian extremes. Writers like Timothy Dwight and Joel Barlow airily dismissed the dangers inherent in widespread possession of arms:

> [T]heir conscious dignity, as citizens enjoying equal rights, [precludes armed citizens having any desire] to invade the rights of others. The danger (where there is any) from armed citizens, is only to the *government*, not to the *society*; and as long as they have nothing to revenge in the government (which they cannot have while it is in their own hands) there are many advantages in their being accustomed to the use of arms, and no possible disadvantage.[39]

Even more outlandish to modern eyes is the explanation which the early English liberal Francis Place gave of how hatred and violence against the Jews were erased in eighteenth century England:

> Dogs could not be used in the streets in the manner many Jews were treated. One circumstance among others put an end to the ill-usage of the Jews. . . . About the year 1787 Daniel Mendoza, a Jew, became a celebrated boxer and set up a school to teach the art of boxing as a science, the art soon spread among the young Jews and they became generally expert at it. The consequence was in a very few years seen and felt too. It was no longer safe to insult a Jew unless he was an old man and alone. . . . But even if the Jews were unable to defend themselves, the few who would now be disposed to insult them merely because they are Jews, would be in danger of chastisement from the passers-by and of punishment from the police.[40]

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37. Conway, ed., 1 *Writings* at 56 (cited in note 16).

38. Trenchard & Moyle, *An Argument* at 12 (cited in note 35).

39. Barlow, *Advice to the Privileged* at 17 (cited in note 32). See also Timothy Dwight, 1 *Travels in New England and New York* xiv (Charles Wood, London ed. 1823).

40. Francis Place, *Improvement of the Working Classes* (1834), as quoted in R.K. Webb, *Modern England: From the Eighteenth Century to the Present* 115 n.14 (Dodd, Mead, 1970) ("*Modern England*").

The Founders' reasons for guaranteeing a right to arms for individual self-protection were not limited to abstract moral precepts or even a utopian belief in the potential efficacy of an armed populace against tyranny and mayhem. The second amendment reflects concrete historical circumstances which help explain why the right to arms in our Bill of Rights follows immediately upon the first amendment and precedes the third and fourth.

Probably the most obvious political ramification of the right to defensive arms is the deterrent effect of the power to disarm dissenters in a violence-ridden society. Until the early nineteenth century England was an enormously violent country overrun with cutthroats, cutpurses, burglars, and highwaymen, and in which rioting over social and political matters was endemic. Moreover, until 1829 it had no police. So when the seventeenth century Stuart Kings began selectively disarming their enemies the effect was not simply to safeguard the throne, but to severely penalize dissent. Those who had opposed the King were left helpless against either felons or rioters—who, by the very fact, were encouraged to attack them. The *in terrorrem* effect upon dissent of knowing that to speak out might render one's family defenseless while targeting them for every felon, and every enemy who might want to whip up riotous public sentiment against them, is obvious.

Many readers in well-policed modern America may find it difficult to see riot either as a socio-political phenomenon or as something to which personal self-protection is relevant. Yet over many years riot and nightrider attacks—perpetrated while police stand by—have served to undercut or destroy civil rights gains, strike back at racial and ethnic minorities, and exclude blacks from white neighborhoods. It has been suggested that the availability of firearms for protection against private, retaliatory violence was a key to the Civil Rights Movement's survival in the southern United States of the 1950s and 1960s.[41] Comparison might be made to South Africa where blacks, though an overwhelming majority, are subject to one of the world's most effective gun control campaigns.[42]

The disarming of minorities or dissenters in a climate in which they may be subject to private violence (often encouraged by government) has been a well-established policy in many countries including Nazi Germany and the Soviet Union. The leading example

41. John R. Salter and Don B. Kates, *The Necessity of Access to Firearms by Dissenters Whom Government is Unwilling or Unable to Protect*, in Don B. Kates, ed., *Restricting Handguns: The Liberal Skeptics Speak Out* 185 (North River Press, 1979) ("*Restricting Handguns*"); Cottrol & Diamond, 80 Geo. L.J. at 355 (cited in note 4).

42. See Raymond G. Kessler, *Gun Control and Political Power*, 5 Law & Policy Q. 381, 399-391 (1983).

is the Kristallnacht, in which thousands of Jews were beaten, raped and/or murdered and a billion reichsmarks of Jewish property was looted or destroyed in nationwide riots orchestrated by the Nazi Party after the Jews had been excluded from gun ownership under German law.[43] It is unlikely that many German Jews wanted to own arms, or that it would have made any difference to their eventual fate. But it is an item of faith in Israel that one reason the Jews persevered and triumphed in the Middle East—where they were during the 1930s a far smaller minority than in Europe, and subject to similar violence—was because they took steps to obtain and use arms.[44]

Rioters and vigilantes are not the only kinds of villains against whom the necessity of protection may be less clearly perceived today than it was in the age of Blackstone. No less a menace than rioters or outlaws was the pillaging soldier, loosed not only on foreign populations but in his own country for political, religious, or social reasons or because of the King's inability to pay and thus to control him. Generally speaking, there was no difference in character among rioters, felons and soldiers—who were often one and the same. Often the soldier was a common criminal inducted directly out of jail and unleashed on the King's enemies, whether foreign or domestic. The perpetration of such outrages upon his critics by Charles I engendered the Petition of Right of 1628 and helped eventually to bring him to the headsman. But of innumerable such examples that might be cited from European history in this period, probably the one most remembered by eighteenth century Englishmen and Americans would have been the persecution that drove the Huguenots to their shores by the thousands. As a modern historian has noted, among the numerous tribulations visited in the 1690s upon the Huguenots in order to compel them to convert,

> the most atrocious—and effective—were the *dragonnades*, or billeting of dragoons on Huguenot families with encouragement to behave as viciously as they wished. Notoriously rough and undisciplined, the enlisted troops of the dragoons spread carnage, beating and robbing the householders, raping the women, smashing and wrecking and leaving filth . . .[45]

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43. Kates, *Restricting Handguns* at 185 (quoting official commentary on the German Firearms Act of 1937 which explicitly excluded gun permit applications by Jews) (cited in note 41). See id. at 188 (statement by Hermann Goering, then head of the German police: "Certainly I shall use the police—and most ruthlessly—whenever the German people are hurt; but I refuse the notion that the police are protective troops for Jewish stores. The police protect whoever comes into Germany legitimately, but not Jewish usurers.")

44. Personal communication with Abraham N. Tennenbaum, Israeli attorney and police lieutenant.

45. Barbara W. Tuchman, *The March of Folly* 21 (Alfred A. Knopf, 1984).

As Englishmen and Americans were well aware from their reading of Bodin, Beccaria and Montesquieu, the Huguenots had been rendered incapable of resisting either individually or as a group by the Continental policy of disarming all but the Catholic nobility.

The need to be armed for individual protection had been brought home to late eighteenth century Americans by their own experience with the "licentious and outrageous behavior of the military" Britain sent among them during the decade of protest and turmoil that preceded the Revolution.[46] As in England itself, the people's unwillingness to enforce smuggling laws required the state to use soldiers to perform the duties of the non-existent police. Committed to the folly of "asserting a right [to tax the colonists] you know you cannot exert,"[47] during the 1760s and early 1770s England dispatched ever-increasing numbers of troops as the Stamp Tax was added to the Navigation Acts and then succeeded by the Townshend Acts, the Tea Tax, etc. These soldiers (eventually operating under a specially appointed British Customs Board) executed both ordinary warrants and the notorious Writs of Assistance under which they made wholesale searches of vessels, homes, vehicles, and warehouses, perusing goods, documents and records, all in a tumultuous process in which even those things not seized were often destroyed along with the surrounding furnishings.[48]

By 1768 the people of Massachusetts, the most radical and impatient of the colonies, had had enough. Rendered over-confident by military reinforcements, the Customs Board had seized John Hancock's ship *Liberty* and then fled to a British warship for safety in the resulting tumult. The Customs Board's intention to continue the searches was evident and General Gage was calling in troops for that purpose from all over the colonies and Canada. Seven years of protest had resulted in the colonies feeling the yoke of ever-increased military occupation and Massachusetts' latest protest (a circular letter to the other colonial legislatures urging non-payment of the taxes) had been met by an official demand that the letter be repudiated on pain of dissolution of the Massachusetts Assembly.

So leading figures in Boston, and the town officially, advised the citizens that their only resource was to arm themselves for the

46. This description is taken from *A Journal of the Times* (March 17, 1769), a Boston publication expressing the Whig point of view that was reprinted throughout the colonies and in England, excerpted in Oliver Dickerson, ed., *Boston Under Military Rule* 79 (Chapman & Grimes, 1936).

47. Lord Chesterfield, quoted in Tuchman, *March of Folly* at 158 (cited in note 45).

48. For a detailed discussion of the events detailed in this and the following paragraphs, see Stephen P. Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 U. Dayton L. Rev. 91 (1989).

protection of their liberty and property. An article reprinted in newspapers throughout the colonies alleged abuses by the soldiers carrying out searches "of such nature" and "carried to such lengths" that for "the inhabitants to provide themselves with arms for their defence, was a measure as prudent as it was legal . . . ." As to the legality of personal armament, the article went on to invoke Blackstone himself in terms that emphasize both the political nature of the right and its relationship to the right of self-defense:

> It is a natural right which the people have reserved to themselves, confirmed by the [English] Bill of Rights, to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.[49]

The denouement, of course, was an ever-escalating series of incidents between the colonists and troops attempting to enforce the taxes and customs duties and to suppress protest of them. The Boston Massacre, General Gage's confiscation of the arms stored at Lexington and Concord, and his subsequent attempt to disarm the entire populace of Boston are among the most important of the incidents that propelled the colonies into revolution.

The desirability of citizens arming themselves against illegal search may seem doubtful to modern Americans enjoying the benefits of a vigilant judiciary and police of a character far better than the soldiery known to our forefathers. But to eighteenth century Americans, the course of pre-Revolution British policy only confirmed the necessity of every free citizen having access to arms: "to disarm the people" said George Mason later, "was the best and effectual way to enslave them."[50] This imagery of "enslavement" and the possession of arms as the guarantee against it appears throughout the writings of Sidney, Locke and their disciples up to and including the Founders, forming a consistent theme consisting of the following propositions: every free man has an inalienable right to defend himself against robbery and murder—or enslavement, which partakes of both; the difference between a slave and a free man is the latter's possession of arms which allows him to exercise his right of self-defense; for government to disarm the citizen is not just to rob him of his property and liberty, it is the first step toward "enslaving" him, by robbing him of all his property and all his liberties. In America from the immediate pre-Revolutionary period through

49. From *A Journal of the Times* (March 17, 1769), excerpted in Dickerson, ed., *Boston Under Military Rule* at 79 (cited in note 46).

50. Jonathan Elliott, 3 *Debates in the Several State Conventions* 380 (J.B. Lippincott, 2d ed. 1836).

the debates over the Constitution, this equation of personal self-protection with resistance to tyranny—of self-protection against the slave trader to self-protection against "enslavement" by government—recurs again and again.[51]

In evaluating how such statements relate to the concept of self-protection it is also essential to remember that the imagery of a man defending himself against abduction by a slaver was not the mere figure of speech it might seem to us. Locke, Sidney and their contemporaries lived in a world in which human slavery was a grotesque reality; the Founders lived among, and upon the labor of, a people many of whom were being held under duress. At least some of the Founders were acutely conscious of the inconsistency between their noble declamations about their own freedom and their actual conduct regarding the enslavement of others. In invoking the right to resist "enslavement" they were analogizing to a situation conceived quite literally in terms of a right and need for direct personal self-defense.

This background suggests why Blackstone saw political overtones in the right to arms, coupling his discussion of it to rights that are plainly political in nature. It helps explain why in the Bill of Rights arms follows religion, expression, press and petition—and is followed by the third amendment guarantee against quartering of soldiers and the fourth against unreasonable searches and seizures. In view of this background, two other connections between the fourth, third, and second amendments merit mention: First, in both French and English experience, searches and seizures would generally have been carried out by soldiery rather than by civil authorities; second, the castle doctrine which the fourth amendment enunciates ("a man's home is his castle and his defense") originated in caselaw exonerating freeholders who had killed intruders.[52] In short, not only are these rights phrased in substantially identical terms (the first, second, and fourth amendments all speak in terms of rights "of the people"), but their roots, and the situations in which they were visualized as operating, are closely identified.

The self-defense origins of the second amendment are thus many and complex. Natural law philosophers saw self-defense as the primary natural right. From it they adduced a variety of other rights (for both individuals and collectivities), the most obvious and closely related being the right to arms. These connections were particularly important to Lockeans and their progeny down to and in-

51. See Maier, *From Resistance to Revolution* (cited in note 9).

52. See Kates, 82 Mich. L. Rev. at 205 (cited in note 1), and cases cited therein at note 5.

cluding the Founders. They saw killings, maimings, assaults, despoilation and raping as equally criminal whether the perpetrators were apolitical outlaws or "lewd Villains" serving a "wicked Magistrate." Viewing despotic impositions and terrorization of the people as a species of *criminal* usurpation, the Founders saw the rights of individual arms possession and resistance, and of collective revolution where necessary, as aspects of the right to self-defense. At the same time the Lockeans believed widespread popular possession of arms to be a powerful deterrent to political and apolitical crime alike.

No less important in shaping the amendment was the Anglo-American legal tradition (as the Founders understood it) which was influential both in its own right and as support for the view of the right to arms which the Founders took from classical political philosophy. In that tradition there were no police and the very idea of empowering government to place an armed force in constant watch over the populace was vehemently rejected as a paradigm of abhorrent French despotism.[53] Notwithstanding the evident need for municipal police, it would be another forty-fifty years before police were commissioned in either English or American cities. Even then they were specifically forbidden arms, under the view that if these were needed they could call armed citizens to their aid. (Ironically, the only gun control in nineteenth century England was the policy forbidding police to have arms while on duty.)[54]

In the absence of a police, the American legal tradition was for responsible, law abiding citizens to be armed and to see to their own defense, and for most military age males to chase down criminals in response to the hue and cry and to perform the more formal police duties associated with their membership in the *posse comitatus* and the militia. It was the possession of arms in these contexts which the second amendment constitutionalized. "The right" to arms refers to that which pre-existed in American common and statutory law, i.e., the legal right to possess arms which was enjoyed by all responsible, law-abiding individuals, including both militiamen and those exempt from militia service (the clergy, women, conscientious objectors and men over the age of militia service).

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53. See Tuchman, *March of Folly* at 148 (cited in note 44); see also Webb, *Modern England* at 184 (cited in note 40).

54. The British tradition of unarmed policing persists to this day because crime, particularly violent crime, fell rapidly throughout nineteenth century England; in contrast, as American violence increased police seized the right to be armed by refusing to patrol unarmed. Colin Greenwood, *Firearms Control: A Study of Armed Crime and Firearms Control in England and Wales*, ch. 1 (Routledge & Kegan Paul, 1971); Morn, *Firearms Use*, in Kates, *Firearms and Violence* at 496-500 (cited in note 21).

Nor should it be thought that the Founders would necessarily have repudiated their belief in the right of self-defense—and of individuals to be armed for self-defense—if they had anticipated the replacement of the militia and *posse comitatus* by modern police agencies. They knew of the Stuarts' attempts to penalize dissent by disarming their opponents in an era of rampant crime and violence. Nor would it have seemed prudent to rely on the state as protector (rather than exploiter) of its unarmed citizens, given the examples of the Customs Board, and of General Gage's troops and the soldiery generally, in eighteenth century America or Stuart England and Bourbon France. Rather those examples confirmed both the criminologically based worldview of classical philosophy and its foundation in the even more ancient dictum that just and popular governments rest upon widespread popular possession of arms. Basic to tyrants is the "habit of distrusting the masses, and the policy, consequent upon it, of depriving them of arms."[55]

55. Ernest Barker, ed. & tr., *The Politics of Aristotle* 237 (Oxford U. Press, 1972).

Assault Rifle Legislation: Unwise and Unconstitutional

In the wake of tragic shooting incidents involving semiautomatic rifles, the media has discovered an "assault weapon" problem in the United States. *Time* magazine subtitled its February 6, 1989 cover story "America's streets become free-fire zones as police, criminals, and terrified citizens wield more and ever deadlier guns."[1] The story included pictures of the coffins of the victims of the Stockton "massacre," as well as a timeline chart entitled, "Calendar of senseless shootings." As a dramatic climax, the article reproduced a photograph of a police officer holding up the "assault rifle" used by Patrick Purdy to fire into the yard of a Stockton, California school.[2] The *Time* reporters, caught in the emotion of the Stockton shootings, promptly set out their agenda of "what should be done" about the "assault weapon" problem. Their first proposal was, of course, that "[t]he Federal Government should ban outright the import or sale of paramilitary weapons to civilians."[3]

Reporters covering the Stockton shootings placed the blame for this tragic event on the semiautomatic weapons misused during the course of the shootings. Patrick Purdy killed himself, and it remains far easier to damn the inanimate objects that he left behind than to cope with the general social problems surrounding such incidents or the more specific criminality of a disturbed individual. However, understandable media and public sympathies have generated an unwise legislative response to the alleged "assault weapon" problem. On the federal, state, and local levels, legislators have hastily drafted and passed bills concerning "assault weapons," particularly when such efforts have been cast as being "anti-drug."[4]

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1. Church, *The Other Arms Race*, TIME, Feb. 6, 1989, at 20.

2. *Id.* at 20, 22-23.

3. *Id.* at 26.

4. *See, e.g.*, The Antidrug, Assault Weapons Limitation Act of 1989, S. REP. No. 160, 101st. Cong., 1st. Sess. 6-8 (1989) [hereinafter SENATE REPORT] (introduced by Senator DeConcini to reduce semiautomatic firearms abuse by drug traffickers and violent criminals); Roberti-Roos Assault Weapons Control Act of 1989, CAL. PENAL CODE §§ 12275-12290 (West 1990) [hereinafter Roberti-Roos]; MD. ANN. CODE art. 27 §§ 442, 481E (1989) (placing greater restrictions on 17 varieties of "assault weapons," and providing punishments for failure to comply or attempts to evade); COLO. REV. STAT. §§ 16-11-103, -11-303, -13-309 (1989) (finding that action was necessary for the immediate preservation of the public peace, health, and safety, and providing mandatory sentencing for use of an "assault weapon" during the commission of violent crimes, such as drive by shootings); 1989 Fla. Sess. Law Serv. 89-306 (West

It is the purpose of this note to show that, first, legislation of this "anti-assault weapon" genre is unnecessary and will be ineffective. Second, this note will argue that, even if legislatures choose to pass such unwise legislation, the results of their efforts will be unconstitutional. Third, this note will propose solutions to the problems associated with the criminal misuse of semiautomatic firearms.

I. THE UNWISE LEGISLATIVE RESPONSE

A. Federal, State, and Local Legislation

Several members of Congress have sponsored bills to correct the perceived "assault weapon" problem.[5] Senator DeConcini's proposed "Anti-Drug Assault Weapons Limitation Act of 1989," ("S. 747''), is fairly typical of many legislative efforts. S. 747 would ban transfer, importation, or possession of any "assault weapon." "Assault weapon" is defined as any of nine types of semiautomatic firearms, including "all models" of the *Avotomat Kalishnikovs*, commonly referred to as "AK-47's."[6] This prohibition does not apply to any lawful possession of such a weapon before the effective date of the law so long as the owner complies with a further registration requirement.[7] Knowing failure to register such an "assault weapon" is punishable by a $1,000 fine and/or six months in prison.[8] Use of an "assault weapon," as defined in the bill, in the commission of a crime of violence or a drug

1989) (creating a Florida Commission on Assault Weapons to "combat the unlawful use of assault weapons in the state'').

On February 7, 1989, only three weeks after the January 17, 1989, Stockton schoolyard incident, Los Angeles passed an "emergency ordinance" that outlawed the sale or possession of assault weapons within city limits. "Assault weapon" was defined as "a weapon with a magazine of twenty rounds or more that is able to fire single rounds rapidly with each pull of the trigger." Owners of these firearms were given 15 days from the effective date of February 8, 1989, to render their guns inoperable or turn them over to police for destruction. L.A. Times, Feb. 8, 1989, at I20, col. 1.

5. *See* Assault Weapon Control Act of 1989, S. 386, 101st Cong., 1st Sess., 135 CONG. REC. S1361-62 (daily ed. Feb. 8, 1989) (introduced by Senator Metzenbaum); *"Assault Weapon Import Control Act of 1989," 1989: Hearings on H.R. 1154 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 101st Cong., 1st Sess. 4-10 (1989) [hereinafter *Hearings*] (H.R. 1154 was introduced by Representative Gibbons). For a helpful chart summarizing the provisions of several currently proposed federal "Assault Weapon" statutes, see Bea, *Semiautomatic Military-Style Firearms: Proposed Statutory Definitions*, CRS REPORT FOR CONGRESS 89-415 GOV (July 11, 1989).

6. SENATE REPORT, *supra* note 4, at 6.

7. *Id.* at 7.

8. *Id.*

trafficking crime carries a ten year punishment in addition to the punishment for the commission of the underlying offense.[9]

Other legislation on the federal and state level has attempted to define "assault weapon" by magazine capacity, military styling, or, as in S. 747, by the brand name.[10] State and local efforts have been passed more hastily. For example, California now has both state and municipal ordinances in place to address the alleged "assault weapon" problem.[11] Even so, little evidence exists that state legislation, or Congressional action on bills like S. 747, is necessary or will be effective.

B. The Problem of Definition

Current legislation includes incorrect and misleading definitions of the "assault weapons" that it targets. Indeed, definitional problems in bills such as S. 747 are so serious that they would result in the failure to remove any particularly dangerous class of weapons from the public sphere.

Semiautomatic weapons require that the shooter pull the trigger for each shot fired. After each shot, the gasses produced by the ignition of a cartridge cycle the action and chamber another cartridge. When the shooter pulls the trigger again, the same "self-loading" occurs, and the firearm is again ready for firing.[12] Semiautomatic rifles were prevalent in the early 1900's, and until the Second World War were

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9. *Id.* at 6-7.

10. *See* Assault Weapon Control Act of 1989, S. 386, 101st. Cong., 1st Sess., 135 CONG. REC. S1362 (daily ed. Feb. 8, 1989) (listing approximately eight brands of firearms considered "assault weapons" and then including in the definition "any other semiautomatic firearm with a fixed magazine capacity exceeding ten rounds . . . and . . . any other shotgun with a fixed magazine, cylinder, or drum capacity exceeding six rounds.''); Roberti-Roos, *supra* note 4, at § 12276 (defining "assault weapons" by trade names in three categories of rifles, pistols, and shotguns, and including in the definition similar firearms that have military-style modifications such as folding stocks or bayonet mounts, or that have other alterations in such features as barrel or clip size); COLO. REV. STAT. § 16-11-103 (1989) (defining "assault weapon" as "any semiautomatic center fire firearm that is equipped with a detachable magazine with a capacity of twenty or more rounds of ammunition . . .''); SENATE REPORT, *supra* note 4, at 6 (S. 747 defines "assault weapon" with nine categories of weapons listed by brand names including, for example, the Norinco AK-47 copy, and the Colt AR-15.).

11. *See, e.g.*, Roberti-Roos, *supra* note 4, at § 12276. For an in depth look at the dynamics of the legislative process in passing California state restrictions, see L.A. Times, May 5, 1989, at I1, cols. 5-6. It is interesting to note that this new piece of legislation was in place only a few months after the January 17, 1989 Stockton Schoolyard shootings. For a discussion of the Los Angeles emergency ban on "assault weapons" that was passed only three weeks after the Stockton shootings, see *supra* note 4.

12. *Hearings, supra* note 5, at 10, 114-15.

usually chambered for large cartridges that were effective at long ranges but generated tremendous recoil.[13]

Fully automatic weapons, or "machine guns," employ the same sort of self-loading action as semiautomatic weapons, but they do not require a pull of the trigger for each shot. Machine guns will discharge every round in the magazine as long as the trigger is depressed. Until the 1950's, hand-held machine guns were primarily chambered for small pistol cartridges that were effective at short ranges and generated controllable amounts of recoil at high cyclic rates of fire.[14]

During the Second World War, strategists envisioned a new type of rifle that would have the advantages of both semiautomatic and fully automatic designs. Firearms engineers realized that such a weapon would have to use a medium-sized cartridge that would have longer effective ranges than the traditional machinegun cartridge but would still generate controllable levels of recoil.[15] The Germans won the race to introduce this new "assault rifle." In 1942, as Soviet troops surrounded the crack unit *Kampfgruppe Scherer*, German aircraft dropped in crates of the new *Maschinerkarabiner* 42 (Mkb 42).[16] These rifles chambered the mid-size 7.92 x 33 millimeter cartridge and had a selector switch that allowed soldiers to use them either as fully automatic or semiautomatic weapons.[17] The *Kampfgruppe* shot its way out of the trap with the new Mkb 42's, and military experts around the world began to note the merits of selective fire assault rifles.[18] In 1947, the Soviet Union accepted Colonel Mikhail Kalashnikov's design for an assault rifle. This *Avotomat Kalashnikova* of 1947 (AK-47) chambered the medium-sized 7.62 x 39 millimeter cartridge. This weapon, at the flip of a selector switch, operated in either a fully or semiautomatic

13. Edward Ezell, a curator at the Smithsonian, provides a detailed history of the development of the assault rifle. One of the motivations for designing the new rifle was that "most standard infantry rifles of the 1939-1945 era were capable of delivering a lethal projectile to ranges greater than twelve hundred meters . . . and . . . the recoil forces ("kick") from such weapon/ammunition combinations were generally heavy." E. EZELL, THE AK-47 STORY 98-99 (1986). Ezell notes that rapid fire with these cartridges was virtually unmanageable. *See also* I. HOGG, THE ILLUSTRATED ENCYCLOPEDIA OF FIREARMS 314 (1987) (stating that "the standard military cartridge . . . was capable of delivering accurate fire to ranges of up to 2000 yards").

14. *See generally*, E. EZELL, *supra* note 13, at 94-124 (Ezell notes that "[t]he submachinegun possessed a high rate of fire, . . . but it fired relatively low-powered pistol cartridges. Such ammunition had very limited striking power and was generally good only for very close-quarter combat"). *Id.* at 96-98.

15. *Id.* at 99.

16. *Id.* at 95.

17. *Id.*

18. *Id.*

mode.[19] Many other nations, including the United States, rushed to produce assault weapons that also employed medium-sized cartridges that had this selective fire capability.[20]

Private citizens in the United States cannot purchase any of these assault weapons because they are capable of fully automatic fire. Weapons capable of fully automatic machine gun fire have been regulated heavily in the United States since 1934 and private sale or possession of these weapons has been completely banned since May, 1986.[21]

Many firearms manufacturers have offered semiautomatic-only copies of military rifles for civilian use.[22] These rifles provide civilian owners with all of the benefits of new, highly-reliable designs without illegal, fully automatic capability.[23] These military-style semiautomatics have been mislabeled as "assault weapons" by legislators attempting to bring about greater regulation of the ownership of semiautomatic firearms.[24] For example, Senator DeConcini included a section in S. 747 defining nine base types or patterns of semiautomatic firearms as "assault weapons."[25] Seven of the categories of weapons include rifles, two of the categories include pistols, and one category includes shotguns.[26] In labeling any of these firearms "assault weapons" the bill's definitional section is misleading.

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19. *Id.* at 112.

20. *See id.* at 94-124.

21. 18 U.S.C. § 922(b)(4) (Supp. V 1987).

22. *See, e.g.*, GUNS & AMMO 1990 ANN. ISSUE [hereinafter GUNS & AMMO]. This issue includes a complete firearms catalog and manufacturer's directory for 1990. The section entitled *Semiautomatic Centerfire* includes 33 military-style, semiautomatic rifles.

23. These weapons are very difficult to convert to fully automatic fire. For example, B.A.T.F. testimony has indicated that it requires additional parts and special tools to alter an AKS copy of the AK-47 to full-auto. *See infra* note 29. Not suprisingly, Los Angeles police officers testified that they have never confiscated an Uzi or AK-47 copy that had been converted to fully-automatic fire. *Hearings, supra* note 5, at 67-68.

24. SENATE REPORT, *supra* note 4, at 16.

25. S. 747 defines "assault weapon" in section 3 as "(A) Norinco, Mitchell, Poly Technologies Avtomat Kalashnikovs (all models), (B) Action Arms Israeli Military Industries UZI and Galil, (C) Beretta AR-70,(SC-70), (D) Colt AR-15 and Car-15, (E) Fabrique Nationale FN/FAL, FN/LAR, and FNC, (F) MAC 10 and MAC 11, (G) Steyer AUG, (H) INTRATEC TEC-9, and (I) Street Sweeper and Striker 12. *Id.* at 6. Section 3 further provides that "[t]he Secretary, in consultation with the Attorney General, may, when appropriate, recommend to the Congress the addition or deletion of firearms to be designated as assault weapons." *Id.*

26. S. 747 assault weapon categories (A),(B),(C),(D),(E), and (G) include rifles, categories (F) and (H) include pistols, and category (I) includes shotguns). *See supra* note 25; for descriptions and current market information, see generally GUNS & AMMO, *supra* note 22. Since rifles like the AK-47 look-alikes have been the focus of much of the "assault weapon" debate, this note will primarily focus on the legitimacy of "assault rifle" restrictions. However, much of the discussion is equally applicable to the

Senator DeConcini's nine types of assault weapons are not assault weapons at all; these weapons are only capable of semiautomatic fire.[27] This definitional problem is more than a semantic quibble because it can limit any possibility that the so-called "assault weapon" legislation will alleviate the problems targeted in its passage. Legislating against semiautomatic firearms that happen to look like military weapons does not draw any meaningful distinctions between those firearms that are banned as "assault weapons" and those that are not.[28]

1. The Lack of Functional Distinctions—Little functional difference exists between military look-alike semiautomatic firearms and semiautomatic firearms of a more traditional design.[29] Both styles of weapons are self-loading and capable of firing similar types of cartridges.[30] Some bills, such as Senator Howard Metzenbaum's S.386, have tried to use magazine capacity in distinguishing between acceptable semiautomatics and "assault weapons."[31] However, a distinction

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shotgun and pistol categories that are lumped together with rifles under the catch-all label "assault weapons."

27. *See id.* For an concrete example of the mislabeling, note the controversy surrounding the AK-47 assault rifle. The Soviet made AK-47, as discussed above, was designed as a true military assault rifle with selective fire capability. Since it can function as a fully-automatic weapon, the private purchase of an AK-47 has been banned since May of 1986. The weapons repeatedly called AK-47's by a confused press and legislators are not AK-47's at all, but are semiautomatic-only look-alikes of the true Soviet military rifles. Patrick Purdy did not use an AK-47. He used a Chinese, semiautomatic copy of the AK-47 known as the AKM-56S. *See* 135 CONG. REC. S1870 (daily ed., Feb. 28, 1989) (Purdy used a semiautomatic copy of an AK-47 design that is not functionally distinguishable from other semiautomatic hunting rifles.). For a blatant example of the confusion about the AK-47, see *infra* text accompanying notes 99-102. Some have speculated that those attempting to pass legislation like S. 747 are not eager to correct the misperceptions. *See infra* text accompanying note 103.

28. Several senators noted, "The Bureau of Alcohol, Tobacco, and Firearms has no definition of 'assault weapon.' The military definition—a selective fire weapon capable of firing in either an automatic or a semiautomatic mode—is inapplicable to the commercial arena." *See* SENATE REPORT, *supra* note 4, at 16. The senators also stated that the definition was inapplicable because military-style semiautomatics are not distinguishable in function or in dangerousness from other more traditional semiautomatic designs. *Id.* at 17.

29. According to the testimony of B.A.T.F. before the Senate,

> [t]he AK-47 is a select fire weapon capable of firing 600 rounds per minute on full automatic and 40 rounds per minute on semiautomatic. The AKS and AK-47 are similar in appearance. The AK-47 is an NFA type weapon, having been manufactured as a machine gun. The AKS is difficult to convert, requiring additional parts and some machinery . . . The AKS is a semiautomatic that, except for its deadly military appearance, is no different from other semiautomatic rifles. As a matter of fact, the identical firearm with a sport stock is available and, in appearance, no different than other so-called sporting weapons.

Hearings, *supra* note 5, at 70; *see also* Milek, *Shooting Bench*, GUNS & AMMO, November, 1989, at 16 (stating that, for example, the military-style HK-91 is just a like-chambered variant of the HK-770 Sporter, and that there are no real differences between weapons labeled as "assault weapons" and sporting rifles such as the semiautomatic Remington Model 7400 Sporter).

30. *See* Milek, *supra* note 29, at 16.

31. *See supra* note 10.

based on the ability of a weapon to accept a large magazine is pointless because any weapon capable of accepting a box magazine can utilize a magazine of indeterminate capacity.[32] A distinction based on the size of magazines commonly used in a firearm is also meaningless.[33] Since it requires only about 1.5 seconds to change a magazine, no reason exists to believe that, for example, a weapon with two fifteen round magazines is functionally distinguishable from one equipped with three ten round magazines.[34]

2. *Not Distinguishable in Dangerousness*—Firearms deemed "assault weapons" in current bills are no more dangerous than many other firearms that these bills do not regulate.[35] As Congressional testimony indicated, common hunting shotguns that are not even semiautomatic are potentially more lethal when misused than military-style semiautomatics.[36] The Winchester Model Twelve "pump" shotgun can fire six "00 buckshot" shells, containing large, .33 caliber shotgun bullets, in three seconds.[37] Since each "buckshot" shell contains twelve of these .33 caliber bullets, the non-semiautomatic Winchester shotgun can fire seventy-two potentially lethal bullets in three seconds.[38] The Remington Model 1100 12-gauge shotgun is a popular semiautomatic duck hunting gun,[39] and it can dispatch 72 buckshot bullets in two and one half seconds.[40] The rate of fire of a semiautomatic copy of the AK-47 is forty shots per minute.[41] Either the Model 12 or the Model

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32. *Hearings, supra* note 5, at 68.

33. 135 CONG. REC. S1870 (daily ed. Feb. 28, 1989).

34. One witness testified that magazine limits are inherently futile because criminals would either disregard them and employ larger magazines or tape smaller ones end to end to achieve the same effect. The witness concluded that "it would make almost as much sense to prohibit tape as to limit the quantities of these magazines." *Hearings, supra* note 5, at 62.

35. 135 CONG. REC. S1873 (daily ed. Feb. 28, 1989).

36. *Id.*

37. *Id. See also* Steele, *Guns for Today's Detectives*, PETERSON'S HANDGUNS, October 1989, at 56, 60 (stating that Federal Witness protection teams have chosen Remington Model 870 pump shotguns because "the shotgun at close range comes closer in achieving total stopping efficiency than anything else").

38. 135 CONG. REC. S1873 (daily ed. Feb. 28, 1989).

39. Handgun Control Inc. co-chairman Nelson Shields uses this shotgun for hunting. *Id.*

40. *Id.*

41. *See supra* note 29. *See also* E. EZELL, *supra* note 13, at 164 (giving a complete table of rates of fire for the AK-47 and AKM designs in full and semiautomatic modes).

It is also interesting to note that the bullets fired by the AK-47 look-alikes are designed to avoid lethal wounds and are consequently less deadly than many fired by sporting-style weapons. Col. Martin L. Fackler, M.D., Director of the United States Marine Corps Wound Ballistics Lab, stated that

> [m]ilitary bullets are designed to limit tissue disruption—to wound rather than kill. The full-metal-jacketed bullet is actually more effective for most warfare; it removes the

1100 shotguns, neither of which is currently considered an "assault weapon," is potentially more dangerous than the proscribed weapons that have a more evil-looking "military" styling.[42] As Los Angeles County Sheriff Sherman Block stated, "Semiautomatic assault weapons in their present legal incarnations are not inherently more deadly than their more conventional hunting-style cousins."[43] Current legislation that attempts to ban these improperly defined classes of "assault weapons" will not remove any unusually dangerous weapons from the public sphere.

C. Anti-Assault Rifle Statutes are Unnecessary

Legislatures have expressed several common motivations in passing statutes restricting military "look-alike" semiautomatic rifles. Senator DeConcini, in introducing S. 747, claimed that assault weapons were the "weapons of choice" of gangs and drug dealers, and suggested that his bill would reduce the "carnage" created by individuals engaged in the illegal drug trade.[44] Indeed, the stated purpose of S. 747 is to "reduce the number of deaths and injuries attributable to assault-type semi-automatic firearms abuse by drug traffickers and violent criminals."[45] With a similar flourish, the California legislature passed the "Roberti-Roos Assault Weapons Control Act of 1989," a more extensive ban than S. 747, after finding that rapid-fire assault weapons

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> one hit and those needed to care for him . . . newspaper descriptions comparing their effects with a grenade exploding in the abdomen . . . must cause the thinking individual to ask: . . . how is it possible that 29 children and one teacher out of 35 hit in the Stockton schoolyard survived . . . ? If producers of assault rifles had advertised their effects as depicted by the media, they would be liable to prosecution under truth-in-advertising laws.

Wall St. J., April 10, 1989, at A13, col. 1 (letter to the editor); *see also* Maddox, *Facts Don't Seem to Matter in AK-47 Debate*, Charlotte Observer, Oct. 29, 1989, at B1, cols. 2-4 (noting that the purpose of military-style AK-47 fire is: "to wound rather than kill").

42. 135 CONG. REC. S1873-74 (daily ed. Feb. 28, 1989).

43. L.A. Times, Feb. 24, 1989, at V6, col. 3. Block also stated that Patrick Purdy could have "wreaked equal havoc" in Stockton with a number of other more common semiautomatics, and that "a semiautomatic rifle is a semiautomatic rifle, whether it was designed for military or other purposes, and the reality is that semiautomatic military weapons have been available for many years, certainly since World War II." *Id.*

44. 135 CONG. REC. S3634 (daily ed. April 11, 1989). Other witnesses have testified to Congress last year, when the Brady Bill was under consideration, that the "Saturday night special" was the weapon of choice of drug dealers. *Hearings*, *supra* note 6, at 62.

45. SENATE REPORT, *supra* note 4, at 1-2. The title of S. 747 is "The Antidrug, Assault Weapons Limitation Act of 1989."

Washington's Inspector General, Baron Von Steuben, proposed a "select militia" of 21,000 that would be given government issue arms and special government training.[131] When the proposed Constitution was presented for debate, anti-Federalists complained that it would allow for the withering of the citizen militia in favor of the virtual standing army of a "select militia."[132] Richard Henry Lee, in his widely-read *Letters from the Federal Farmer to the Republican*, warned ratifiers that a select militia had the same potential to deprive civil liberties as a standing army. He believed that a constitution must insure that a general militia of the able-bodied citizenry guards the "solid interest of the community." Lee stated, "[T]o preserve liberty, it is essential that the whole body of the people always possess arms . . . ."[133]

Federalists promoting the new Constitution allayed fears of select militias and Congresses' broad powers to "raise armies" under Article I, section 8. They claimed that Americans would have nothing to fear from either type of army since American citizens were universally armed.[134] Noah Webster, in the first major Federalist pamphlet, attempted to calm Pennsylvania anti-Federalists with this argument:

> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any bands of regular troops that can be, on any pretence, raised in the United States.[135]

James Madison, who later drafted the second amendment, noted in Federalist 46 "the advantage of being armed, which the Americans possess over the people of almost every other nation . . . ."[136] He then chided the nations of Europe for being "afraid to trust their people with arms."[137]

Many convention delegates that ratified the Constitution expressed discontent over the Federalists' assurances about existing protection of the right to possess arms.[138] New Hampshire delegates passed the key ninth vote that ratified the Constitution after an assurance that a Bill of Rights would be drafted with a protection for the right of individuals

131. *Id.* at 600.
132. *Id.* at 600-15.
133. R. LEE, LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 124 (1977).
134. Hardy, *supra* note 117, at 599.
135. *Id.*
136. THE FEDERALIST NO. 46, at 299 (J. Madison) (C. Rossiter ed. 1961).
137. *Id.*
138. Hardy, *supra* note 117, at 604.

dividual rights view: each citizen has a constitutional right to bear arms.

1. *The Framers' Intent*—In 1982, the Senate Subcommittee on the Constitution noted that when James Madison drafted the second amendment, he "did not write upon a blank tablet."[120] The English and Colonial history that predated the Bill of Rights affirmed an individual right, if not a duty, to own firearms.[121] The English background of the individual right to possess weapons dates back to the reign of King Alfred the Great in 690 A.D.[122] Under King Alfred, every free male was required by law to possess the weapons of an infantryman and serve in the citizen militia.[123] By the late 1600's, the English Bill of Rights declared that the people could "have arms for their defense," a guarantee of the individual right to possess firearms.[124]

The English colonies in America quickly established an individual right to bear arms that paralleled the developments in England.[125] In 1658, the Virginia House of Burgesses required every householder to have a functioning firearm.[126] Colonial recognition of the right, and duty, to bear arms eventually aided the effort to break with England. When the number of British soldiers increased in the colonies, colonists asserted their right to own firearms in order to defend their liberties.[127] As the New York Journal Supplement proclaimed in 1769, "It is a natural right which the people have reserved for themselves, confirmed by their Bill of Rights, to keep arms for their own defense."[128] The Revolutionary War strengthened the colonists' beliefs about the importance of an individual right to bear arms.[129]

After the successful revolution, the maintenance of a citizen militia was a primary concern of the framers of the Constitution.[130] General

120. SENATE SUBCOMM. ON THE CONSTITUTION OF THE COMM. ON THE JUDICIARY, 97TH CONG., 2D SESS., THE RIGHT TO KEEP AND BEAR ARMS 6 (Comm. Print 1982) [hereinafter SUBCOMM. ON THE CONSTITUTION].

121. *Id.*

122. Hardy, *supra* note 117, at 562. Hardy provides a useful history of the second amendment that traces its development back through early English history.

123. *Id.*

124. SUBCOMM. ON THE CONSTITUTION, *supra* note 120, at 3.

125. Hardy, *supra* note 117, at 588.

126. *Id.*

127. *Id.* at 589-90.

128. *Id.*

129. "The experience of the Revolution thus strengthened the colonial perception of a link between individual armament and individual freedom. The colonists, who perceived themselves as staunch Whigs, continued to see free individual armament as Whig dogma." *Id.* at 593.

130. *Id.* at 600-15.

The debate over current gun control proposals has generated different theories about the meaning of this amendment.[112] Advocates of gun control legislation often espouse a "collective rights" interpretation of the second amendment, while opponents of gun control legislation adhere to an "individual rights" theory.[113]

Under the collective rights interpretation, only a state's well-regulated militia possesses any right to bear arms. "Militia" is usually defined as state police and national guard units.[114] Therefore, no individual citizen has a constitutional right to own a firearm.[115] The second amendment prohibits only the federal government from unduly burdening a state's effort to arm its national guard units or its police forces. A recent law journal article highlighted the net effects of the collective rights approach. It stated that "[t]echnically, . . . Congress could prohibit private ownership of all firearms without violating the second amendment."[116]

The "individual rights" theory of the second amendment grants each citizen of the United States the right to keep and bear arms.[117] Under this interpretation, federal or state governments would violate the second amendment by unduly burdening an individual's right to possess a firearm.[118] This note argues that the "right to bear arms" is an individual right and that this right extends to possessing military-style semiautomatics. Current "assault rifle" legislation unduly burdens this right and is, therefore, unconstitutional.

A. The Individual Right to Bear Arms

Several federal courts have accepted the collective rights theory of the second amendment.[119] However, available historical evidence and the majority of second amendment jurisprudence supports the in-

112. Note, *The Constitutional Implications of Gun Control and Several Realistic Gun Control Proposals*, 17 AM. J. CRIM. L. 19, 30-32 (1989) (authored by Mark Udulutch).

113. *Id.*

114. *See* Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 106 (1987); Hardy, *infra* note 117, at 560.

115. Note, *supra* note 112, at 32.

116. *Id.*

117. *See* Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 560 (1986). This article provides a summary of contemporary interpretations of the second amendment and a thorough discussion of the intention of its framers.

118. *Id.*

119. *See, e.g.*, Stevens v. United States, 440 F.2d 144 (6th Cir. 1971).

Before proponents of S. 747 claim that public opinion supports their bill, they need to demonstrate that this support is more than just confusion over what "assault weapon" statutes do as well as confusion over what an "assault weapon" is. If public opinion does not support the true objectives of these bills, Americans' views may change as definitional problems become more apparent.[106]

G. Costs

The true costs of S. 747, just like the depth of public support for this bill, may be difficult to assess. The Committee on the Judiciary Report on S. 747 did include a letter from the Congressional Budget Office that concluded that Senator DeConcini's bill would "result in no significant additional costs to the Federal Government, and would have no significant effect on Federal revenues."[107]

However, several senators noted that the cost to the federal government is only one relevant cost that should be considered in appraising the burdens of a bill.[108] Congressional testimony revealed that there are currently 600,000 firearms in the United States that will have to meet S. 747's registration requirements.[109] The cost of distributing registration papers to owners will significantly burden consumers and may bankrupt some firearms dealers.[110] S. 747 will also "cost" Americans access to highly reliable firearms used for legitimate purposes across the United States. Most significantly, S. 747 may cost Americans freedoms guaranteed by the Bill of Rights. "Assault rifle" legislation such as S. 747 violates the second amendment.

II. Assault Rifle Legislation Is Unconstitutional

The second amendment of the United States Constitution states:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.[111]

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106. Even Barbara Bush seems to have undergone a change in opinion. The First Lady told the press that she favored banning the AK-47. In a later press conference, her press secretary retracted those statements, saying, "She doesn't know anything about guns. She's afraid of guns. I think she was thinking of fully automatic weapons." L.A. Times, Feb. 24, 1989, at V1, cols. 3-4.

107. Senate Report, *supra* note 4, at 12.

108. *Id.* at 20-21.

109. *Id.*

110. *Id.*

111. U.S. Const. amend. II.

It is difficult to interpret these poll results because the press and public seem confused about the definition of "assault rifle." *Time* magazine's February 6, 1989 cover story provides an excellent example of the problem. The story includes a chart entitled "Street Favorites: Assault Weapons Available Over the Counter."[99] The first entry is the "AK-47" and readers are told that the AK-47 is "Soviet designed, adopted by armed forces in many nations."[100] The chart does not tell the reader whether it is addressing semiautomatic-only copies of the AK-47, or the fully automatic AK-47 military rifle. If the reporters meant to discuss the true, fully automatic assault rifle, this weapon has been banned since 1986 and is not "available over the counter."[101] If the reporters meant the semiautomatics designed to look like the AK-47, this rifle has not been "adopted by armed forces in many nations" because it does not have fully-automatic capability.[102]

Some lobbyists are overjoyed that Americans may think "assault rifle" legislation bans fully automatic machine guns. In a recent pamphlet the Educational Fund to End Handgun Violence stated:

> The semiautomatic weapons' menacing looks, coupled with the public's confusion over fully automatic machine guns versus semiautomatic assault weapons [()anything that looks like a machine gun is assumed to be a machine gun[)] can only increase that chance of public support for restrictions on these weapons.[103]

As several Senators noted, attaching the label "assault weapon" to certain semiautomatic firearms was a brilliant stroke.[104] Members of Congress, like Gary Ackerman of New York, may fall into this carefully laid trap when S. 747 comes to a vote. In House "assault weapon" debate, Ackerman actually asked whether hunters needed "a Mac 10 machine gun with 30 round banana clips of armour piercing bullets to bag a quail?"[105] Both armour piercing bullets and machineguns are heavily regulated and are not the subject of current "assault weapon" legislation.

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99. Church, *supra* note 1, at 25.

100. *Id.*

101. 18 U.S.C. §922(b)(4), (o)(1) (Supp. V 1987).

102. For a general discussion of the adoption of selective fire assault weapons by modern military forces, see E. EZELL, *supra* note 13.

103. *Hearings, supra* note 5, at 76.

104. SENATE REPORT, *supra* note 4, at 16. Senators Thurmond, Hatch, Simpson, Grassley, and Humphrey commented that "[i]n the attempt to generate support for banning these guns, they have been referred to as 'assault weapons,' a term which conjures up some idea of terrible weapons that have no purpose other than killing innocent people." *Id.*

105. 135 CONG. REC. S1868 (daily ed. Feb. 28, 1989).

So-called "assault rifles" are also properly used to protect the person and property from modern renditions of ancient violent crimes.[89] Law enforcement officials testified before Congress that semiautomatic firearms are "often essential for self defense."[90] Chief Gerald Arenberg, executive director of the National Association of Chiefs of Police, pointed out that Gulf Coast boat owners have been buying semiautomatic Uzis in response to the violence of drug smugglers. Smugglers have frequently commandeered pleasure boats after pulling alongside and murdering passengers with illegal, fully automatic military weapons.[91] The Chief stated that highly reliable military look-alikes such as the Uzi might be "essential" for surviving such encounters.[92] In the home the menacing looks and intimidating cocking sound of a semiautomatic AK-47 copy might be enough to give pause to even the most determined criminal.[93] However, bills like S. 747 would ban the purchase of semiautomatic versions of the Uzi and AK-47.[94] Ironically, such bills might only succeed in removing the best defense that law abiding citizens have against modern criminal violence.

F. Public Opinion

Proponents of bills such as S. 747 have justified current legislation by referring to the results of national polls.[95] Public opinion polls do seem to indicate that Americans favor restrictions on "assault weapons."[96] In the weeks following the Stockton schoolyard shootings, a Gallup poll of 1000 adults showed that seventy-two percent believed that the Federal Government should ban the sale of assault rifles in the United States.[97] In April, 1989 an NBC/Wall Street Journal poll found that seventy-four percent of Americans believed that "the federal government should ban the sale of assault rifles in the United States."[98]

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89. *Id.*

90. The testimony noted, for example, that "[a]nyone who reasonably fears attack by a gang—such as a store owner in the middle of a Miami riot—could reasonably conclude that the reliability and rapid fire capability of an Uzi or an AR-15 is the only effective way to protect his or her family from murder." *Id.*

91. *Id.*

92. *Id.*

93. Snapping the bolt of an AK-47 look-alike chambers the first cartridge and produces a loud, distinct cocking sound.

94. *See supra* note 25.

95. *See* SENATE REPORT, *supra* note 4, at 24-28 (including a full five pages of public opinion polls that seem to suggest the public would support S. 747).

96. *Id.*

97. *Id.*

98. *Id.*

These rifles are useful for hunting and other recreational activities.[78] Hunters have often used military-style semiautomatics such as the Colt AR-15.223 or Ruger Mini 14.223, and these rifles are legal to hunt with in 48 states.[79] The Ruger and Colt are particularly popular as ranch or "varmint" rifles.[80] However, under current proposals, one or both would be banned as "assault rifles."[81]

Military-style semiautomatics are also very popular target rifles.[82] The Colt AR-15, labeled an "assault weapon" under S. 747, is used every year in national target matches in Camp Perry, Ohio.[83] Given their long-distance accuracy, AK-47 look-alikes are also rifle range favorites.[84] Since military-style semiautomatics are rugged, high-performance rifles, they are well-suited for use by citizens as militia sidearms.[85] Citizens of the United States have used such personal sidearms to aid law enforcement officials in restoring public order on several occasions.[86] In 1977, a blizzard in Buffalo, New York and a flood in Johnstown, Pennsylvania both prompted local officials to call for citizens to arm themselves and restore the public order.[87] While the possibility of invasion or civil war may seem remote in 1990, fifty years ago several governors called on citizens to take up arms and prepare to defend the United States.[88]

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78. Military-style semiatuomatic rifles "are used lawfully for hunting in some 48 states, and can be seen in the hands of target shooters at nearly every rifle range in the country." 135 CONG. REC. S1872 (daily ed. Feb. 23, 1989). *See supra* note 73 and accompanying text.

79. 135 CONG. REC. S1872 (daily ed. Feb 23, 1989). *See also* Milek, *supra* note 29, at 16 (noting the usefulness of the Ruger Mini 14 and Colt AR-15's as sport or ranch rifles); Seyfried, *Springfield Armory's Ideal Boar Rifle*, GUNS & AMMO, November, 1989, at 60, 60-61 (stating that the military-style Springfield M1A rifle provides the perfect combination of accuracy, high capacity, and reliability for rugged sports like boar hunting in North Carolina).

80. Milek, *supra* note 29, at 16.

81. See *supra* notes 4-5 for current definitional schemes.

82. *See supra* note 78. The Colt AR-15 has an excellent reputation for accuracy and reliability and has been a preferred rifle in target competitions, which include courses of fire of under 600 yards. NATIONAL RIFLE ASSOCIATION, M-16 AR-15 1 (1987) (NRA Book Service). In 1977, at Camp Perry, Ohio, these M-16 rifles were used by several shooters of the National Trophy Individual Match event, and they have also been used in NBPRP and other NRA matches. *Id.* at 12. The pamphlet goes on to provide tips for fine-tuning the AR-15 for competition.

83. *Hearings, supra* note 5, at 70.

84. 135 CONG. REC. 1872 (daily ed. Feb. 23, 1989).

85. 135 CONG. REC. E1677 (daily ed. May 15, 1989) (opinion of Chief Gerald Arenberg and other law enforcement officials that military-style semiautomatics are exactly the type of firearms that should be protected as militia sidearms); *see also supra* note 78 and accompanying text.

86. 135 CONG. REC. S1869-70 (daily ed. Feb. 28, 1989).

87. *Hearings, supra* note 5, at 77.

88. 135 CONG. REC. E1677 (daily ed. May 15, 1989).

as the AK-47 military look-alike rifles, were suitable for sporting purposes and could therefore be imported.[72] Though the standards for importation have now changed with the emotion of the "assault-rifle" scare, such military-style semiautomatic rifles have maintained a much-deserved appeal for several legitimate purposes.

1. *Attractive Attributes of So-Called "Assault-Rifles"*—As the BATF recognized, military style semiautomatic weapons have several characteristics that have made them popular with American sportsmen. First, these rifles have a greater immunity to weather conditions and abuse than more traditional hunting rifles.[73] A semiautomatic copy of the AK-47 can be dropped in the mud, drug through brush, and can withstand the rigors of cold or hot hunting climes.[74] Second, many rifles such as the AK-47 look-alikes use high-performance ammunition that is well-suited to hunting medium-sized game at reasonable ranges.[75] Finally, military style semiautomatic rifles such as the AK-47 copies are capable of sterling accuracy that makes them valuable as target or hunting rifles.[76] These firearms are the latest "high performance" rifles on the market, and this has left many sportsmen profoundly impressed with their potential.

2. *Sporting and Other Uses*—Firearms styled after military weapons have been the favorites of sportsmen throughout United States history and semiautomatic rifles of military design are no exception.[77]

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72. *See id.*

73. *See* L.A. Times, Feb. 24, 1989, at V1, col. 1 (several owners and frequent users of the AK-47 look-alikes discuss the attributes of the design and its ready adaptability to field and range use).

74. *See id.*

75. *Id.; see also* Jamison, *.223, .308, .30-06, .45-70: The U.S. Military's Fearsome Foursome*, SHOOTING TIMES, March 1990, at 36. This article notes that four modern military cartridges, and the military-style semiautomatics that chamber them, have become very popular with hunters. The author particularly highlights the use of the .223 cartridge by ranchers attempting to control the populations of varmints such as gophers and coyotes. The most common .223 rifles that the author mentions are the military look-alike Colt AR-15, and Ruger Mini-14.

76. L.A. Times, Feb. 24, 1989, at V1, cols. 2, 4.

77. The single-shot, level-action [sic], and bolt-action rifles which copied the 19th century military firearm in design were the universal choice of sportsmen until World War I.

> By World War II, the United States was the only nation using semiautomatic firearms as standard equipment, and in the 1950's, civilians, too, sought semiautomatic designs for hunting rifles. There is nothing new about the popularity of military-style firearms, and there is nothing new about the semiautomatic mechanical action itself. What is new is the cosmetic appearance of some semiautomatic firearms, as once again some civilian shooters favor firearms resembling those used by the military.

Hearings, supra note 5, at 68.

National statistics accord with the low number of assault rifles confiscated in large cities. Four percent of all homicides in the United States involve rifles of any type, and less than half of one percent of those rifles could be considered military look-alike semiautomatic rifles.[53] In fact, according to 1987 *FBI Uniform Crime Reports*, Americans are far more likely to be killed by a knife or a blunt object instead of by a rifle of any type.[54] While they may appear menacing, both local and national crime statistics do not indicate that the so-called "assault rifles" are a serious crime or drug problem.

2. *The Experience of Law Enforcement Officers*—The practical "street" experience of police officers supports the empirical evidence: assault rifles are not the "weapons of choice" of criminals or drug dealers. According to George R. Wilson, the chief of the firearms section of the Washington, D.C. Metropolitan Police, drug dealers most commonly use sophisticated nine millimeter pistols.[55] Lieutenant Reginald Smith, a spokesman for the District's police department stated, "We see (an assault rifle) occasionally, but it's rare. The vast majority of weapons we see are revolvers or pistols."[56] Detective Jimmy L. Trahin of the Los Angeles Police Department's Firearms/ Ballistics Unit testified before Congress that he did not consider assault rifles to be the weapons of choice of L.A. criminals.[57] These rifles also do not seem to be the weapons chosen for highly-publicized L.A. gang killings. V.G. Gunises, whose SEY YES organization in South Central Los Angeles works to help former gang members, pointed out that most Los Angeles gang killings involve handguns.[58] Lieutenant James Moran, the commander of the New York City Police Department Ballistics Unit, told reporters that N.Y.P.D. experience was quite different from some press claims. "A rifle is not what is usually used by the criminals. They'll have handguns or sawed off shotguns . . . . These drug dealers are more inclined to use the 9 mm pistol than go to a cumbersome AK-47 rifle."[59]

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53. *Hearings, supra* note 5, at 73. Only one percent of all homicides in the United States are committed with weapons of military caliber, and only one half of one percent of these homicides is attributable to military-style semiautomatic rifles. *Id.* at 67, 73.

54. 135 CONG. REC. E1930 (daily ed. May 31, 1989) (statement of William Dannemeyer of California including a chart from F.B.I. Uniform Crime statistics).

55. Wall St. J., April 7, 1989, at A12, col. 3.

56. Wash. Post, March 6, 1989, at B1, col. 6.

57. SENATE REPORT, *supra* note 4, at 18.

58. L.A. Times, Feb. 8, 1989, at I20, col. 4.

59. N.Y. Times, Feb. 5, 1989, at E26, col. 5.

are "a threat to the health, safety, and security of all citizens of this state."[46]

While such attempts to address drug and crime problems are certainly well-meaning, little evidence exists that assault weapon statutes are necessary to protect the public from drug-related violence or other criminal activity. Semiautomatic military-style rifles, though sinister in appearance, are simply not the "weapons of choice" of criminals and drug dealers.

1. Empirical Evidence Fails To Support the Legislative Response—In Los Angeles, of the 4,000 or more guns seized by police during 1988, only three percent would fall under even an expansive definition of "assault weapon."[47] Only 2.2% of the firearms confiscated in San Francisco in 1988 were military-style semiautomatics.[48] Assault weapons comprised one percent of the 4,800 firearms seized by the San Diego police during 1988, and were involved in only eight of the cities 144 homicides.[49] Police in Akron, Ohio seize about 400 weapons a year, and only two percent of these could arguably be classified as assault weapons.[50]

In New York City and Washington, D.C., two areas of the country with notorious crime and drug problems, empirical evidence comports with the evidence available from other cities. New York City police statistics reveal that of the 16,370 guns seized in New York in 1988, only 1,028 of them were rifles of any type, and no doubt even fewer would fall under S. 747's definition of "assault weapon."[51] Of the 3,000 or more weapons that the Washington, D.C. police confiscated in 1988, not one was an assault rifle.[52]

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46. Roberti-Roos, *supra* note 4, at § 12275.5.

47. SENATE REPORT, *supra* note 4, at 18 (testimony of Detective Jimmy L. Trahin of the Los Angeles Police Department Firearms/Ballistics Unit). Trahin's calculations were based on S. 386's broader definition of "assault weapon."

48. *Hearings, supra* note 5, at 68.

49. *Id.* at 77 (quoting a March 5, 1989 article in the San Diego Union).

50. *Id.* (quoting a March 13, 1989 article in the Akron Beacon-Journal that included an interview with Akron patrolman Robert Offret. Offret works in the patrol's property room).

51. N.Y. Times, February 5, 1989, at E26, col. 3 (interview with Lieutenant James Moran, commander of the New York Police Department Ballistics Unit).

52. Wall St. J., April 7, 1989, at A12, col. 3 (statement of George R. Wilson, chief of the firearms section of the Metropolitan Police Department). *See also* Wash. Post, March 6, 1989, at B1, col. 6 (Bureau of Alcohol, Tobacco, and Firearms statistics show that less than 10% of weapons seized in the District in 1988 were rifles of any type, and that out of 72 murder weapon traces, only one weapon was a rifle of any type).

to own firearms.[139] The delegates suggested that the new Bill of Rights provision be worded as follows: "Congress shall never disarm any citizen unless such as are or have been in Actual Rebellion."[140] In the Virginia convention, Patrick Henry stated, "The great object is that every man be armed" and "everyone who is able may have a gun."[141] The Virginia convention demanded a Bill of Rights to protect the right of the people to bear arms with this type of wording: "That the people have a right to keep and bear arms; that a well-regulated militia composed of the body of the people trained to arms is the proper, natural, and safe defence [sic] of a free state."[142] During the ratification process five state conventions demanded similar protection of the right of citizens to bear arms.[143]

The first Congress delegated the duty of writing a Bill of Rights to James Madison. Madison obtained copies of state proposals and attempted to combine them in a succinct passage that all state delegates would accept.[144] Thus, the original intent of the second amendment remained consistent with the intentions of the states that demanded it. Indeed, it is ironic that "collective rights" theorists claim that the second amendment only vests rights in a states' police and national guard. James Madison wrote the amendment in order to prevent the right to bear arms from vesting only in "select militias" like state national guard units. The second amendment was written to secure an individual right to bear arms that provided an ultimate check on government and any of its "select" militias.[145]

2. *The Structure of the Constitution and the Text of the Second Amendment*—The location of the second amendment within the Con-

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139. H.R. Doc. No. 398, 69th Cong., 1st Sess. 1026 (1927).

140. *Id.*

141. Subcomm. on the Constitution, *supra* note 120, at 5.

142. H.R. Doc.. No. 398, 69th Cong., 1st Sess. 1030 (1927).

143. "State conventions had made no fewer than five appeals for such a right; such accepted rights as freedom of speech, of confrontation, and against self-incrimination could boast but three endorsements." Hardy, *supra* note 117, at 604.

144. Subcomm. on the Constitution, *supra* note 120, at 6.

145. There can be little doubt . . . that when the Congress and the people spoke of a "militia," they had reference to the . . . entire populace capable of bearing arms, and not to any formal group such as what is today called the National Guard . . . .

Id. at 7.

When the framers referred to the equivalent of our National Guard, they uniformly used the term "select militia" and distinguished this from "militia." Indeed, the debates over the Constitution constantly referred to organized militia units as a threat to freedom comparable to that of a standing army, and stressed that such organized units did not constitute, and indeed were philosophically opposed to, the concept of a militia.

Id. at 11.

stitution further supports an individual rights interpretation. The second amendment was not placed with the militia clause in Article I, section 8, as collective rights interpretation suggests.[146] Instead, the framers placed the second amendment among other provisions that granted individual rights.[147]

The wording of the second amendment suggests the same conclusion. As the Senate Subcommittee on the Constitution noted in 1982, "The Framers of the Bill of Rights consistently used the words 'right of the people' to reflect individual rights—as when these words were used to recognize the 'right of the people to peaceably assemble'" in the first amendment.[148] The second amendment contains this "right of the people" wording and creates an individual right.

3. *Second Amendment Scholarship*—Several legal scholars who wrote during the early years of the Constitution's existence believed that the second amendment granted an individual right. In 1825, William Rawles noted in his "View of the Constitution" that, in light of the second amendment,

> No clause in the Constitution could by a rule of construction be conceived to give Congress the power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.[149]

Fifty years later, constitutional scholars like Thomas Cooley embraced the individual rights approach. Cooley wrote, "The meaning of (the second amendment) undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose."[150] Modern commentators, such as members of the Senate Subcommittee on the Constitution, agreed with Professor Cooley's analysis.[151] In a 1982 report the Subcommittee found that the "militia" referred to in the second amendment comprised the entire populace and not only select militias such as state national guard units.[152]

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146. Hardy, *supra* note 117, at 609.
147. *See* SUBCOMM. ON THE CONSTITUTION, *supra* note 120, at 11.
148. *Id.*
149. *Id.* at 7.
150. T. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 271 (reprint 1981).
151. SUBCOMM. ON THE CONSTITUTION, *supra* note 120, at 11.
152. *See supra* note 145.

4. *Case Law Interpretations*

a. *The United States Supreme Court*—The United States Supreme Court held in *United States v. Cruikshank*[153] that the second amendment, like other provisions of the Bill of Rights, does not restrict the power of state governments.[154] The Supreme Court also noted that the right to bear arms was an individual right. In *Presser v. Illinois*,[155] the Court stated,

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states, and in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms . . . .[156]

In *Dred Scott v. Sanford*,[157] the Court—as it denied the citizenship of blacks—stated that granting citizenship to blacks would have the (presumably feared) effect of allowing them to "keep and carry arms."[158]

In 1939, the Supreme Court explicitly interpreted the second amendment. In *United States v. Miller*,[159] two defendants were charged under section 11 of the 1934 "National Firearms Act" with the unlawful transportation of an unregistered "sawed-off" shotgun in interstate commerce.[160] The United States District Court quashed the indictment on the grounds that section 11 of the National Firearms Act violated the second amendment.[161] The state appealed the decision, but the defendants disappeared and failed to file briefs with the Supreme Court in support of the lower court decision.[162] Nevertheless, the Supreme Court employed an "individual rights" interpretation of the second amendment. Instead of defining the militia as a select group such as the national guard, the Court defined "militia" as "all males physically able of acting in concert for the common defense."[163] The Court went on

153. 92 U.S. 542 (1876).

154. "The second amendment declares that [the right to bear arms] shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress." *Id.* at 553.

155. 116 U.S. 252 (1886).

156. *Id.* at 265.

157. 60 U.S. (19 How.) 393 (1857).

158. *Id.* at 417.

159. 307 U.S. 174 (1938).

160. *Id.* at 175.

161. *Id.* at 177.

162. Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63, 88 (1982).

163. *Miller*, 307 U.S. at 179.

to note that the state expected this militia "to appear bearing arms supplied by themselves . . . ."[164]

Even though the Court recognized an individual right to bear arms, the justices still had to decide what types of "arms" individuals had a right to bear. The Court suggested that militia arms would consist of "the kind in common use at the time"[165] that had "some reasonable relationship to the preservation or efficiency of a well-regulated militia . . . ."[166] Since the defendants had not briefed this issue, the Court could not hold that the "National Firearms Act" violated the second amendment through the regulation of sawed-off shotguns. The majority wrote,

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the second amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.[167]

Although the Court held that this particular case did not present a violation of the second amendment, the majority opinion did recognize the individual right to bear arms as evidenced by the original intention of the second amendment.

b. *State Case Law*—State courts have often interpreted the second amendment of the United States Constitution and similarly worded state constitutional provisions.

1. *Interpreting the Second Amendment*—Several state courts have found that the second amendment of the United States Constitution grants an individual right to bear arms. In an early case, the Georgia Supreme Court held that the broad wording of the second amendment kept state as well as federal legislatures from tampering with "[t]he right of the whole people, old and young, men, women and boys . . . to keep and bear *arms* of every description, and not *such* merely as are used by the *militia* . . . ."[168]

Two later state supreme court cases have also interpreted the second amendment as granting an individual right to bear arms. In

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164. *Id.*

165. *Id.*

166. *Id.* at 178.

167. *Id.* (quoting Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840)).

168. Nunn v. State, 1 Ga. (1 Kel.) 243, 251 (1846).

State v. Nickerson,[169] the Montana Supreme Court held that the second amendment of the United States Constitution, as well as provisions in the Montana Constitution, granted an individual "the right to keep and bear arms and to use same in defense of his own home, his person and property."[170] In *People v. Liss*,[171] the Illinois Supreme Court noted that the second amendment protected the use of firearms by citizens "in the protection of person or property."[172]

2. *Interpreting State Constitutions*—Many state constitutions have provisions similar to the second amendment of the United States Constitution.[173] State courts that interpret these provisions have often adopted an individual rights approach.[174] In a watershed 1871 case, the Tennessee Supreme Court noted that sections 24 and 26 of the Tennessee Constitution protected "the same rights" as the second amendment, "and for similar reasons."[175] The court further held that the Tennessee legislature could not inhibit a citizen's "right to purchase [arms], to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair" nor prohibit a citizen's use of such arms for all the ordinary purposes and in all the ordinary modes.[176]

The second amendment of the United States Constitution furnished the wording for Article I, section 24 of the North Carolina Constitution, and in *State v. Dawson*,[177] the North Carolina Supreme Court interpreted section 24 as granting both an individual and a collective right to bear arms.[178] Article 27 of the Oregon Constitution provides that "[t]he people shall have the right to bear arms for defence [sic] of themselves, and the State . . . ,"[179] and the Oregon Supreme Court held

169. 126 Mt. 157, 247 P.2d 188 (1952).

170. *Id.* at 166, 247 P.2d at 192.

171. 406 Ill. 419, 94 N.E.2d 320 (1950).

172. *Id.* at 424, 94 N.E.2d at 323.

173. Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 4 DET. C.L. REV. 789, 790 (1982).

174. *See* City of Las Vegas v. Moberg, 82 N.M. 626, 485 P.2d 737 (N.M. Ct. App. 1971); People v. Nakamura, 99 Colo. 262, 62 P.2d 246 (Colo. 1936); Shubert v. DeBard, 398 N.E.2d 1339 (Ind. Ct. App. 1980); Fife v. State, 31 Ark. 455, 461 (1876).

175. Andrews v. State, 50 Tenn. 165, 178 (1871).

176. *Id.* at 179.

177. 272 N.C. 535, 159 S.E.2d 1 (1968).

178. *Id.* at 545, 159 S.E.2d at 9 (Article I section 24 of the North Carolina Constitution provides, in part, that "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed. . . .").

179. State v. Kessler, 289 Or. 359, 361, 614 P.2d 94, 95 (1980) (quoting article I, § 27 of the Oregon Constitution).

both in 1980 and 1981 that this provision gave individuals the right to bear arms for self-defense or militia purposes.[180]

Since these state constitutional provisions parallel the second amendment in both wording and historical background, state case law provides further support for an individual rights theory. When this state case law is considered alongside Supreme Court decisions, and the original intention of the framers, it seems clear that the second amendment grants an individual right to bear arms. However, a further step in the constitutional analysis of bills such as S. 747 exists.

B. "Assault Rifles" are Protected Arms

Proponents of current "assault rifle" legislation have argued that even if one recognizes an individual right to bear arms, military-style semiautomatics are not the type of arms that individuals have a right to bear. Although the framers might have intended that citizens have a right to possess the single-shot rifles, shotguns, and pistols of their day, proponents of assault rifle legislation argue that the second amendment never intended to give citizens the right to own modern small arms such as military-style semiautomatics.[181]

Judges that must interpret the second amendment, like those that must interpret the first and fourth amendments, must consider the implications of new technology. The framers of the Constitution could not foresee surface-to-air missiles, just as they may not have foreseen television, radio, or wiretapping. Courts have reassessed rights under the first and fourth amendments in light of the new technology, and found that new technology has not eliminated the rights protected by those amendments.[182] Under the second amendment, courts have

180. *Id.* at 367-68, 614 P.2d at 100 (holding that Article I, section 27 of the Oregon Constitution includes a right to possess certain arms for defense of person and property); State v. Blocker, 291 Or. 255, 260, 630 P.2d 824, 825 (1981) (mere possession of weapons like a "billy club" is protected by the Oregon Constitution).

181. *Hearings*, *supra* note 5, at 104. Hon. Charles B. Rangel, National Council For a Responsible Firearms Policy, Inc., stated,

> I understand the second amendment and the right to bear arms. I understand the right to protection and all of those issues. I am well aware of the fact that just because a gun is powerful and has lots of fancy features, it does not mean that each and every person who purchases it does so with the intent of taking human lives.
>
> But I also understand the fact that we cannot continue to allow human beings, and not animals, to be hunted down with these weapons. People are being stalked through the streets and the neighborhoods and pumped full of bullets like prey on "Wild Kingdom."

Id.

182. Hardy, *supra* note 117, at 633-34.

created standards to address the development of new weapons technology and continued to protect the individual right to bear arms.

1. *The Reasonable Relationship Test*—In *Miller*, the United States Supreme Court recognized an individual right to bear arms, but also stated that this right extends to those arms with "some reasonable relationship to the preservation or efficiency of a well regulated militia."[183] However, *Miller* does not specify the types of modern arms that would satisfy this standard. Fortunately, other courts have provided a framework for deciding which modern "arms" bear "some reasonable relationship to a well regulated militia."[184]

The Oregon Supreme Court noted that "the term 'arms' as used by the drafters of the constitution probably was intended to include those weapons used by settlers for both personal and military defense . . . . The term 'arms' would not have included cannon or other heavy ordnance not kept by militiamen or private citizens."[185] As personal sidearms, the framers used single shot rifles, shotguns, and pistols; and they intended, no doubt, that the second amendment would protect the individual ownership of those types of firearms.[186] During the years that immediately followed the drafting of the Constitution, when single-shot sidearms still predominated, courts protected absolutely the private possession of these sidearms without any qualification whatever as to their kind or nature.[187]

After the Civil War, courts addressed the implications of a developing weapons technology. The Civil War firmly established the popular use of repeating rifles and pistols as personal sidearms, and the Tennessee Supreme Court addressed this development. In the 1871 case *Andrews v. State*,[188] the court held that, although the Tennessee Constitution did not protect "every thing that may be useful for offense or defense," the Constitution did protect "the rifle of all description, the shotgun, the musket, and repeater."[189] In 1876, the Arkansas Supreme Court stated that protected "arms" included "the usual arms of the citizen of the country."[190] The court agreed with the Tennessee court's listing of these arms and noted the addition of the "army and

183. United States v. Miller, 307 U.S. 174, 178 (1938).

184. *Id.*

185. *Kessler*, 289 Or. at 368, 614 P.2d at 98.

186. *Id.* at 368-69, 614 P.2d at 98-99.

187. Simpson v. State, 13 Tenn. 356, at 359-60 (1833). *See also* Nunn v. State, 1 Ga. (1 Kel.) 243, 251 (1846) (affirming the individual right to "keep and bear arms of every description").

188. 50 Tenn. (3 Heisk.) 165 (1871).

189. *Id.* at 179.

190. Fife v. State, 31 Ark. 455, 461 (1876).

navy repeaters, which, in recent warfare, have very generally superceded the old-fashioned holster, used as a weapon in the battles of our forefathers."[191] These early courts—without using the exact wording of the later *Miller* test—found that personal sidearms, including new repeating firearms, fell within the reach of constitutional provisions drafted in times of more simplistic weapons technology.

In 1980, the Oregon Supreme Court approached more modern weapons developments in a similar manner. The court noted that since the era of the Civil War, "[t]he development of powerful explosives, . . . combined with the development of mass produced metal parts, made possible the automatic weapons, explosives, and chemicals of modern warfare."[192] It concluded that such modern heavy ordnance, used exclusively by the military, would not be considered individual "arms" deserving of constitutional protection.[193] To the Oregon Supreme Court, citizens possessed a right to own personal arms "commonly used" for individual defense or militia service.[194]

Miller and these state cases provide some guidance from which to ascertain what "arms" individuals have a right to bear. Clearly these protected personal "arms" are not a category that froze during the 1780's. Courts may constitutionally protect modern military-style semiautomatics just as they protected "repeating" rifles after the Civil War.[195] As *Miller* implied, modern weapons that bear "some reasonable relationship to a well-regulated militia" merit constitutional protection.[196] Relevant considerations for modern or old designs seem to include the following: (1) whether a type of firearm is a personal sidearm and not heavy ordnance used exclusively by the miliary, and (2) whether a type of firearm is commonly possessed by individuals as a sidearm for purposes of personal defense or potential militia service. These considerations provide guidance to courts in order to preserve individual rights while preventing modern-day heavy ordnance from threatening the public safety.

2. *"Assault Rifles" Satisfy the* Miller *Test*—Military-style semiautomatic rifles are personal sidearms, and not "heavy ordnance" used exclusively by the military.[197] These so-called "assault rifles" assess

191. *Id.* at 460-61.
192. *Kessler*, 289 Or. at 369, 614 P.2d at 99.
193. *Id.*
194. *Id.* at 98-99.
195. *See supra* note 191 and accompanying text.
196. *See supra* notes 166-67 and accompanying text.
197. *See supra* notes 77-93 and accompanying text.

the capability of semiautomatic fire, and they remain functionally indistinguishable from more traditionally-styled semiautomatic sidearms.[198] The military does not exclusively use either modern or traditionally-styled semiautomatics. American civilians have owned semiautomatics since the early 1900's, and currently an estimated twenty to thirty million own these firearms.[199] As discussed earlier in this note, modern, military-style semiautomatics are no more dangerous than many non-semiautomatics currently available.[200] Empirical evidence and the experience of urban police indicate that these rifles do not have the serious consequences of military "heavy-ordnance" because they are not the weapons of choice of criminals or drug dealers.[201] Though these rifles may look sinister, "assault rifles" are merely the latest technology in personal sidearms, just as repeating rifles and pistols were the latest technology during the 1870's.

Many Americans own "assault-rifles" as sidearms for either personal defense or possible militia service.[202] As discussed earlier in this note, an estimated 600,000 firearms fall under the S. 747 definition of "assault weapon."[203] Whether for use by Gulf-Coast yacht owners or citizens defending the home, these military-style semiautomatic rifles are highly reliable defensive arms. The same characteristics make military-style semiautomatic firearms ideal for militia training and use as well.

Of all the firearms on the market today, military-style semiautomatic firearms appear to be the individual "arms" with the clearest claim to protection under the second amendment. These firearms offer all of the advantages of modern, reliable military design, without the public safety threat of fully-automatic capability.[204] So-called "assault

198. *See supra* notes 29-34 and accompanying text.

199. 135 CONG. REC. S3015 (daily ed. March 17, 1989). Civilians own military-style semiautomatic rifles as part of rifle collections or as nostalgic reminders of service in the military. *See, e.g., Commemorative M-16 Offer*, GUNS & AMMO, June 1989, at 7 (offering Vietnam veterans an engraved, semiautomatic version of their service rifle with a frame for wall-mounting). Even such benign commemoratives would fall within the sweep of legislation like S. 747 because they could conceivably be taken out of the frame and fired.

200. *See supra* notes 35-43 and accompanying text.

201. *See supra* notes 47-59 and accompanying text.

202. 135 CONG. REC. S3015 (daily ed. March 17, 1989).

203. SENATE REPORT, *supra* note 4, at 20.

204. *See, e.g.*, Bierman, *Rashid*, GUNS & AMMO'S COMPLETE GUIDE TO SURPLUS FIREARMS 44 (1988) (commenting on the reliability, accuracy, and historical interest of the Egyptian "Rashid" variant of a Soviet military semiautomatic rifle). The author notes that while the selective fire AK-47 rendered the Rashid obsolete for military purposes, this Egyptian semiautomatic rifle is an excellent selection for the civilian hunter, target shooter, or gun collector with an interest in military history.

rifles" satisfy the *Miller* test by bearing "some reasonable relationship to the preservation of a well-regulated militia."

C. *Undue Burden*

Current legislative proposals unconstitutionally burden the individual constitutional right to own military-style semiautomatic rifles. S. 747, for example, prohibits the "transfer, importation, or possession" of any "assault weapon."[205] Those who lawfully owned these "assault weapons" before the effective date of the law must go through further registration requirements that may be difficult for them and many legitimate firearms dealers.[206] The severe restrictions, and outright bans, employed in bills like S. 747 clearly impose an undue burden on constitutional rights.

No compelling state interest exists that justifies such violations of individual rights. As discussed in Part I(C) of this note, "assault weapons" are not a peculiarly dangerous class of firearms, and are not frequently used in modern violent crime.[207] Given the evidence available, "assault rifle" legislation will have no effect beyond the infringement of the rights of law-abiding citizens.[208] The denial of these constitutional rights remains unacceptable, given the availability of less restrictive legislative alternatives.

III. PROPOSALS

The major concern of legislators passing "assault rifle" legislation is the criminal misuse of these firearms.[209] Proposed legislation, to be effective, must directly target this misuse. Legislators should consider the following proposals:

1. Fund the appointment of at least one Assistant U.S. Attorney in each District to prosecute felon-in-possession cases under 18 U.S.C. 922(g) and relevant sections of the Firearms Owners Protection Act, Public Law 99-308. More consistent enforcement of existing statutes would directly target criminal misuse of all firearms, particularly in the context of drug-trafficking offenses.[210]

205. *See supra* note 6 and accompanying text.
206. *See supra* notes 109-10 and accompanying text.
207. *See supra* notes 35-43 and accompanying text.
208. *See supra* notes 60-67 and accompanying text.
209. *See supra* notes 44-46 and accompanying text.
210. *Hearings*, *supra* note 5, at 75. These proposals were suggested to Congress during testimony on proposed "assault weapon" statutes.

2. Fund the creation of new minimum security and Level III prison facilities. Prison facilities must be adequate to insure that those convicted of the criminal misuse of firearms actually serve the sentences prescribed by statute.[211]

3. Create a task force that will exert informal pressure on the entertainment industry to encourage industry officials to reduce the portrayal of criminal misuse of military-style semiautomatic firearms. Beginning in 1983, prime-time television shows such as *The A Team, Wise Guy, Hardcastle & McCormack, Riptide, 21 Jump Street,* and *Miami Vice* have filled American homes with the depiction of criminal misuse of "assault weapons."[212] While direct links between these portrayals and criminal violence may be difficult to establish, at least one study has linked television and movie depictions of "assault weapons" to increased sales of those weapons.[213] Dr. Park Dietz, the specialist in violent behavior who conducted this recent study, called NBC's *Miami Vice* "the major determinant of assault gun fashion for the 1980's."[214]

A task force could draft voluntary guidelines limiting the depiction of the misuse of military-style semiautomatics, and the task force, along with interested citizens' groups, could exert informal pressure on industry officials to conform to these guidelines.

IV. Conclusion

"Assault Rifle" legislation such as S. 747 offers several political advantages. This legislation allows its proponents to appear "tough on crime and drugs" while they exploit the political potential latent in the emotion surrounding such tragic events as the Stockton shootings.

Unfortunately for its proponents, "assault rifle" legislation is unconstitutional. Second amendment jurisprudence establishes an individual right to bear arms that protects the possession of military-style semiautomatics. S. 747 and similar state legislation, would unduly burden this fundamental right.

Hopefully, legislators will table bills like S. 747 long before courts would have to sustain a constitutional challenge. Available evidence

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211. *Id.*

212. Austin Amer. Statesman, Sept. 17, 1989, at A19, col. 2.

213. *Id.* at A19, col. 3. In fact, the study showed that after one episode of Miami Vice featured the Bren 10, gun stores were flooded with demands for the unusual weapon and the price has now reached $1200 per gun. *Id.*

214. *Id.*

suggests that "assault rifle" legislation is simply unnecessary. Despite their "evil" appearance, military-style semiautomatics are no more dangerous than many non-semiautomatics. According to empirical evidence and police experience, "assault rifles" are not the weapons of choice of drug dealers or other criminals. Even if military-style semiautomatics played a significant role in violent crime, sociological evidence suggests that "assault rifle" legislation would not prevent the criminal misuse of these weapons.

To limit the criminal misuse of firearms, legislators must take the more difficult and costly steps of providing sufficient funding to the prosecutors and prisons that directly confront the problems of firearms misuse. While these measures may not seem as simple as S. 747, an effective firearms policy, as well as the preservation of basic second amendment rights, will be well worth the effort.

Eric C. Morgan

1. Ambrose Bierce. "Deliverance."

A Snake swallowing a frog head-first was approached by a Naturalist with a stick.

"Ah, my deliverer," said the Snake as well as he could, "you have arrived just in time; this reptile, you see, is pitching into me without provocation."

"Sir," replied the Naturalist, "I need a snakeskin for my collection, but if you had not explained I should not have interrupted you, for I thought you were at dinner."

Ambrose Bierce. *Fantastic Fables.* New York: Dover, 1970. (1898) "The Tyrant Frog," p. 78.

2. Jerome Tuccille. Libertarianism vs. Conservatism.

Libertarianism is basically Aristotelian (reason, objectivity, individual self-sufficiency) while conservatism is just as fundamentally Platonic (privileged elitism, mysticism, collective order). (p. 6)

[E]very individual has the right to defend himself against any person or organization, including government, that initiates the use of force against him. The right of revolution is inalienable; the right of revolution is nothing more nor less than the right of self-defense. (pp. 96-97)

Jerome Tuccille. *Radical Libertarianism: A New Political Alternative.* New York: Perennial Library/Harper & Row, 1971. (1970)

3. The Idaho Constitution (Art. III, Sec. 1) states that: "The people *reserve to themselves* the power to propose laws, and enact the same at the polls independent of the legislature. This power is known as the initiative. . ." **(Emphasis added)**

There is a similar statement in the California Constitution (Art. II, Sec. 8a): "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them."

4. Clarence Lee Swartz. Jury Nullification.

If any law is to be enforced, a jury must convict the alleged lawbreaker. If the jury is representative of the general sentiment of the community (and it will be, if fairly drawn by lot from the whole community), there will be, on an average, the same proportion of men on the jury who are opposed to the invasive law as there is among the people in general. Let it be supposed, for instance, that one-twelfth of the community is opposed to a certain invasive law. This is only a small portion of the majority necessary to repeal it by voting, and at the ballot box that one-twelfth would be powerless. But that one man, in every twelve, who is opposed to that law can, if on a jury, prevent a verdict from being rendered. Thus, if only nine per cent of the community are opposed to a bad law, they can prevent its enforcement. This is less than one-fifth of the number necessary to repeal a law through the medium of an election.

Clarence Lee Swartz. *What Is Mutualism?* New York: Vanguard Press, 1927, p.151.

5. Benjamin R. Tucker. Jury Nullification.

[Lysander] Spooner was a stanch advocate of the jury system as the best method of administering justice,—not the jury system of today, but that originally secured by Magna Carta. On this subject he wrote an exhaustive legal work entitled "Trial By Jury," in which he maintained that no man should be punished for an offence unless by the unanimous verdict and sentence of twelve men chosen by lot from the whole body of citizens to judge not only the facts but the law, the justice of the law, and the extent of the penalty, and that the gradual encroachment of judges upon the rights of juries had rendered the latter practically worthless in the machinery of justice.

Benjamin R. Tucker, "Our Nestor Taken From Us," *Liberty,* May 28, 1887. Reprinted in: Lysander Spooner. *Vices Are Not Crimes: A Vindication of Moral Liberty.* Cupertino, Calif.: TANSTAAFL, 1977, pp. 39-46, at 43.

6. Lysander Spooner. Five Tribunals to Pass on Validity of Laws.

[I]n a representative government. . . there is no absurdity or contradiction, nor any arraying of the people against themselves, in requiring that the statutes or enactments of the government shall pass the ordeal of any number of separate tribunals, before it shall be determined that they are to have the force of laws. Our American constitutions have provided five of these separate tribunals, to wit, representatives, senate, executive, . . . jury, and judges; and have made it necessary that each enactment shall pass the ordeal of all these separate tribunals, before its authority can be established by the punishment of those who choose to transgress it. . . . There is no more absurdity in giving a jury a veto upon the laws, than there is in giving a veto to each of these other tribunals.

Lysander Spooner. *An Essay on the Trial by Jury.* Mesa, Arizona: Arizona Caucus Club, no date, p. 11. (1852)

7. Alan Scheflin and Jon Van Dyke. Judges Dilute Sixth Amendment Rights.

Jury nullification has been argued by defense lawyers in almost every major political case in the last fifteen years. (p. 54)

In our opinion, the failure to tell the jury of its power to nullify seriously weakens the concept of "jury," thereby impermissibly diluting the defendant's Sixth Amendment rights. (p.55)

Alan Scheflin and Jon Van Dyke, "Jury Nullification: The Contours of a Controversy," *Law and Contemporary Problems* 43: No. 4, Autumn 1980, pp. 51-115.

8. Godfrey Lehman. On the Fine Art of Jury Stacking.

There is only one individual who can determine what questions are invasive, and from his decision there can be no appeal. That is the individual for himself, who retains the exclusive right to control. That is the essence of all privacy. Even to put the juror in a position of having to explain why a question is embarrassing or invasive is embarrassing or invasive in itself. (p. 103)

The prosecution wants conviction-prone jurors: the defense wants acquittal-prone jurors. Of course their goals conflict. Neither side is seeking constitutional impartiality. We are being instructed that facts and evidence carry no weight; the stacked jury will be swayed by extra-evidentiary pre-dispositions. (p. 107)

Godfrey Lehman, "The Unconstitutionality of Voir Dire, Peremptory Challenges and Jury Books in Jury Selection," *Lincoln Law Review* 14: No. 2, 1983, pp. 53-132.

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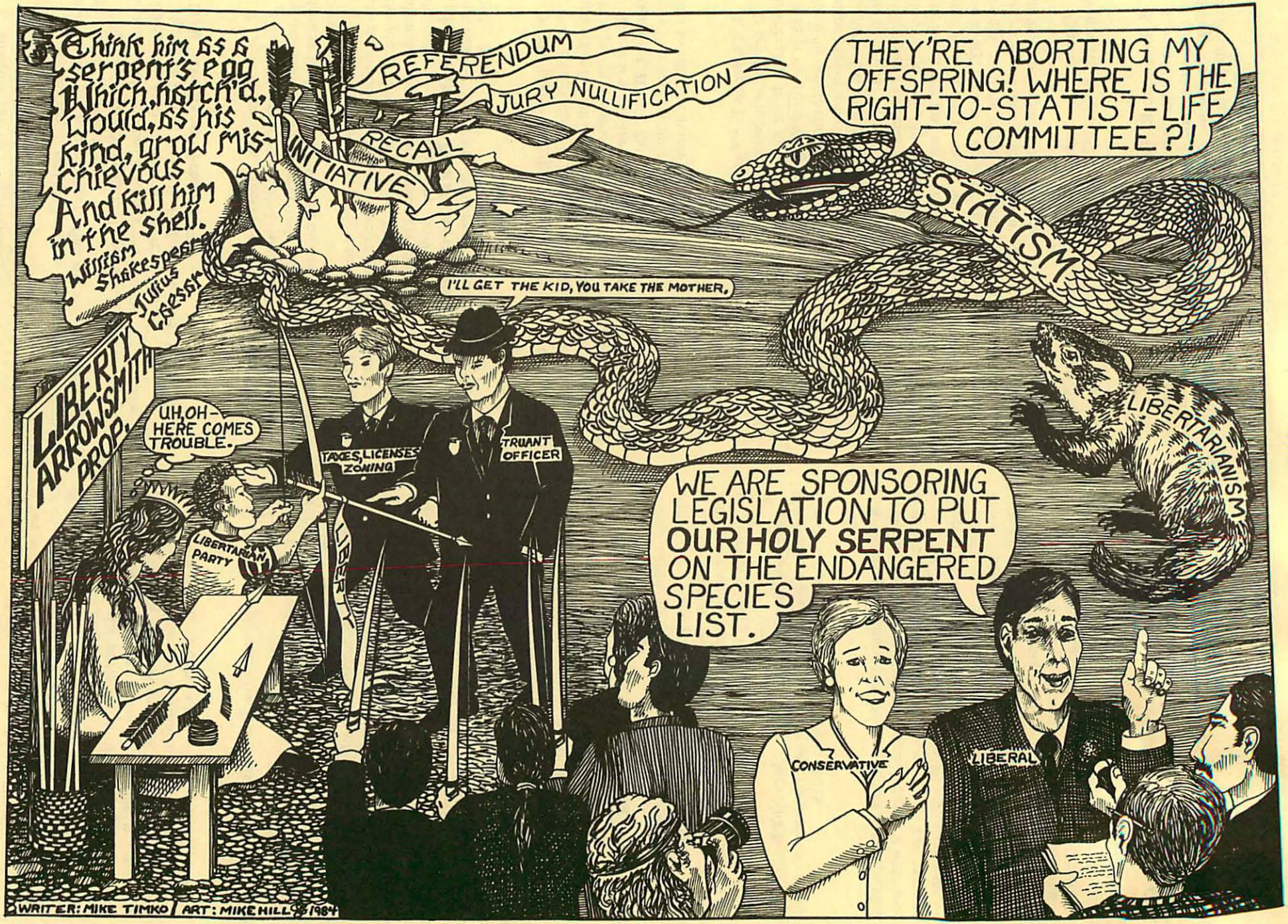

Think him as a serpent's egg Which, hatch'd, would, as his kind, grow mischievous And kill him in the shell.
William Shakespeare Julius Caesar
REFERENDUM
JURY NULLIFICATION
RECALL
INITIATIVE
THEY'RE ABORTING MY OFFSPRING! WHERE IS THE RIGHT-TO-STATIST-LIFE COMMITTEE?!
STATISM
I'LL GET THE KID, YOU TAKE THE MOTHER.
LIBERTY ARROWSMITH PROP.
UH, OH - HERE COMES TROUBLE.
LIBERTARIAN PARTY
TAXES, LICENSES ZONING
TRUANT OFFICER
LIBERTY
WE ARE SPONSORING LEGISLATION TO PUT OUR HOLY SERPENT ON THE ENDANGERED SPECIES LIST.
CONSERVATIVE
LIBERAL
LIBERTARIANISM
WRITER: MIKE TIMKO | ART: MIKE HILL © 1984

1. Mark Twain. Congress as a Criminal Class.

It could probably be shown by facts and figures that there is no distinctly native American criminal class except Congress.

—Pudd'nhead Wilson's New Calendar.

Mark Twain. *Following the Equator: A Journey Around the World.* Hartford, Conn.: The American Publishing Co., 1897, p. 99.

2. Charles T. Sprading. The Power to Command and the Weakness to Obey. . .

The Libertarians say: Let those who believe in religion have religion; let those who believe in government, have government; but also let those who believe in liberty, have liberty, and do not compel them to accept a religion or a government they do not want. . . . The power to command and the weakness to obey are the essence of government and the quintessence of slavery.

Charles T. Sprading. *Liberty and the Great Libertarians: An Anthology on Liberty; A Hand-book of Freedom.* Los Angeles: Published for the author, 1913, p. 22.

3. Stephen P. Halbrook. An Armed Populace the Basis of Popular Sovereignty.

The classical republican political philosophers strongly influenced the founding fathers generally in the direction of a libertarian vision of individual rights coupled with a fundamental distrust of government, and particularly in regard to the necessity of an armed populace to effect popular sovereignty. (p. 381)

[T]he two categorical imperatives of the Second Amendment—that a militia of the body of the people is necessary to guarantee a free state, and that all of the people have a right to keep and bear arms—were derived from the classical philosophical texts concerning the experiences of ancient Greece and Rome and seventeenth century England. Aristotle, Cicero, Machiavelli, Locke, Sidney, Trenchard, and Gordon provided the philosophical vindication of an armed populace to counter oppression which found expression in the Declaration of Independence and Bill of Rights. In this sense the people's right to have their own swords was based on the sharpest intellectual swords known to the founding fathers. (p. 383)

Stephen P. Halbrook, "The Second Amendment as Phenomenon of Classical Political Philosophy," pp. 363-83; in Don B. Kates, Jr., ed. *Firearms and Violence: Issues of Public Policy.* San Francisco: Pacific Institute for Public Policy Research/Cambridge, Mass.: Ballinger, 1984.

4. Theodore Roosevelt. The Results of Disarmament. . .

The worst infamies of modern times—such affairs as the massacres of the Armenians by the Turks, for instance—have been perpetrated in a time of nominally profound international peace, when there has been a concert of big powers to prevent the breaking of this peace, although only by breaking it could the outrages be stopped. Be it remembered that the people who suffered by these hideous massacres, who saw their women violated and their children tortured, were actually enjoying all the benefits of "disarmament." Otherwise they would not have been massacred; for if the Jews in Russia and the Armenians in Turkey had been armed, and had been efficient in the use of their arms, no mob would have meddled with them.

Theodore Roosevelt. *An Autobiography.* New York: Charles Scribner's Sons, 1925, p. 606.

5. Richard Hofstadter, *et. al.* Political Blizzard of '88.

Hayes and Harrison, two of the five Republican Presidents of the period, had tolerable reputations; but these two were as innocent of distinction as they were of corruption and they have become famous in American annals chiefly for their obscurity. Their relation to underlying political realities is expressed in the retort of Boss Matt Quay to Harrison's remark upon his election in the close campaign of 1888. "Providence," breathed the aristocratic Harrison solemnly, "has given us the victory." "Think of the man," snorted Quay. "He ought to know that Providence hadn't a damn thing to do with it." Harrison would never know, he added, "how close a number of men were compelled to approach the gates of the penitentiary to make him President." Harrison found out soon enough what his role was expected to be. "When I came into power," he once lamented in Theodore Roosevelt's presence, "I found that the party managers had taken it all to themselves. I could not name my own Cabinets. They had sold out every place to pay the election expenses."

Richard Hofstadter. *The American Political Tradition: And the Men Who Made It.* New York: Random House/Vintage Books, 1948, p. 172.

6. John Hospers. Government Criminals.

[B]y far the most numerous and most flagrant violations of personal liberty and individual rights are performed by *governments*. . . . The major crimes throughout history, the ones executed on the largest scale, have been committed not by individuals or bands of individuals, but by governments, as a deliberate policy of those governments—that is, by the official representatives of governments, acting in their official capacity.

John Hospers. *Libertarianism: A Political Philosophy for Tomorrow.* Los Angeles: Nash Publishing, 1971, p. 5.

7. William B. Greene. Private vs. Governmental Oppressors.

No country is truly free whose constitution does not furnish the citizens with protection against the wrong-doing of other citizens, and also guarantees him against the wrong-doing of the government itself. No oppressor is so intolerable as an oppressive government; for the private oppressor acts with his own force only, while the governmental oppressor acts with the irresistible force of the whole people.

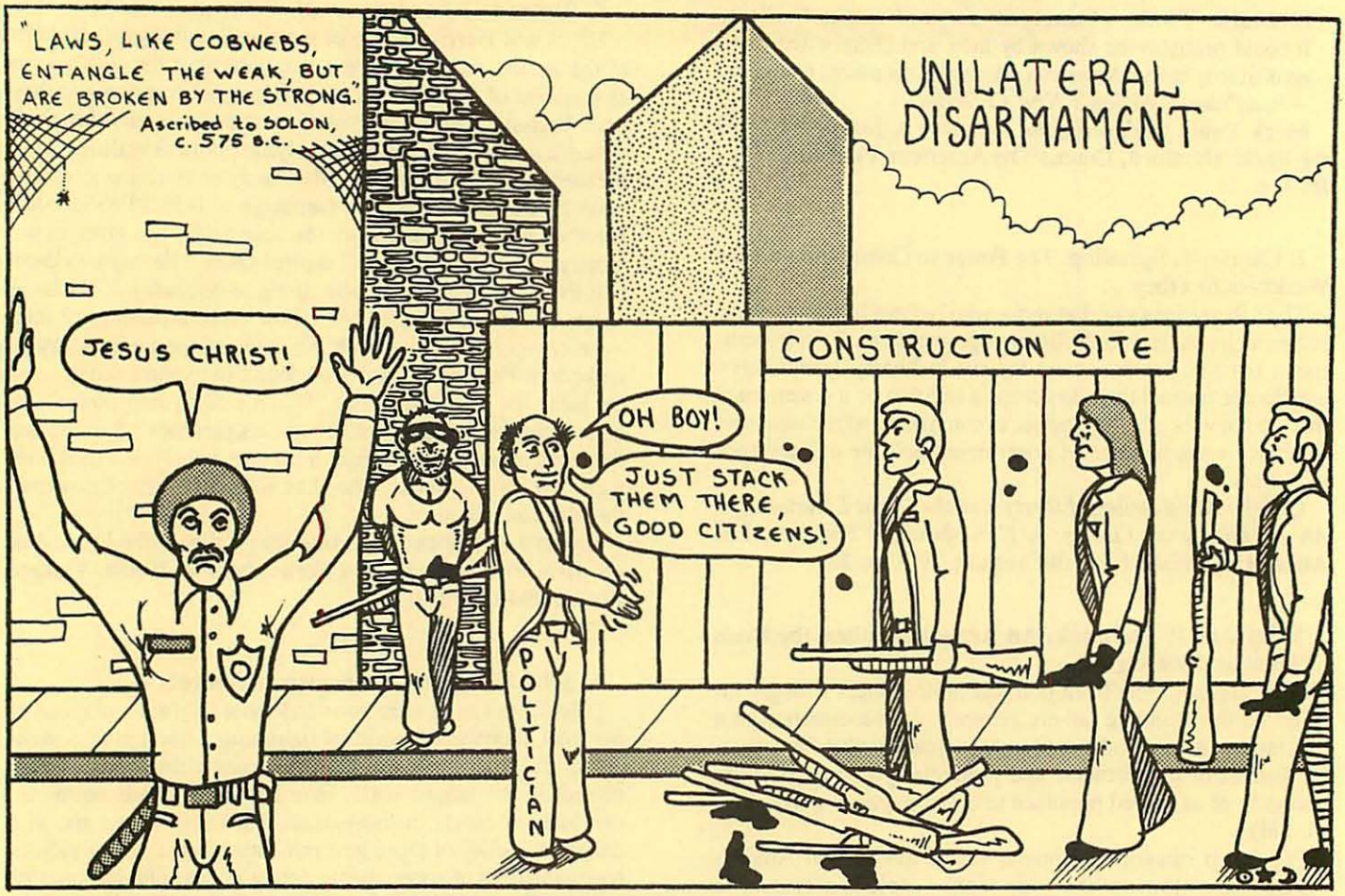
William B. Greene, *The Sovereignty of the People,* 1868. Cited by Rudolf Rocker, *Pioneers of American Freedom: Origin of Liberal and Radical Thought in America.* Los Angeles: Rocker Publications Committee, 1949, pp. 156-57.

8. Lord Acton. Liberty.

Liberty alone demands for its realisation the limitation of the public authority, for liberty is the only object which benefits all alike, and provokes no sincere opposition. (p. 184)

Liberty provokes diversity, and diversity preserves liberty by supplying the means of organisation. (p. 185)

John Emerich Edward Dalberg-Acton, First Baron Acton. Gertrude Himmelfarb, Compiler. *Essays on Freedom and Power.* "Nationality" (1862), pp. 166-95. Glencoe, Ill.: The Free Press, 1949.


"LAWS, LIKE COBWEBS, ENTANGLE THE WEAK, BUT ARE BROKEN BY THE STRONG."
Ascribed to SOLON, c. 575 B.C.
UNILATERAL DISARMAMENT
JESUS CHRIST!
CONSTRUCTION SITE
OH BOY!
JUST STACK THEM THERE, GOOD CITIZENS!
POLITICIAN


WE'LL DISARM AFTER THE CRIMINALS DISARM!
CONSERVATIVE
WE'LL DISARM AFTER THE STATE DISARMS! – i.e., NEVER!
LIBERTARIAN

B.A.T.F.

JOIN THE ~~ARMY~~,

travel to exotic distant lands; meet exciting, unusual people and kill them.

[B.A.T.F and Waco. Anonymous flyer circulated in Los Angeles, California — Spring 1993.]