

## **Gun Control Jeopardizes All Our Constitutional Rights**

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Today grave dangers threaten the individual rights of the people. Their rights are menaced from many directions. The most fierce assault is the erosion of rights by legal processes, a procedure most dangerous because it is so effective.

Those who don't own guns, as well as those who do, have become alarmed by the realization that an erosion of the individual right to have arms under Second Amendment spells dire peril for our other constitutional rights.

Their fears are well-founded by virtue of existing legal principles and historical precedents.

One of the favorite arguments disparaging the Second Amendment is that "the right of the people to keep and bear arms" is merely a collective right referring only to the people collectively as a common body.

In the consideration of the proposal for inclusion of the Second Amendment in the Bill of Rights, the U.S. Senate in 1789 soundly rejected a motion on the floor to add the restrictive words "for the common defense" after the words "to keep and bear arms." (As the British Parliament earlier had rejected an identical attempt to restrict the right to "have arms" in the English Bill of Rights of 1689.)

Moreover, those who think that "the right of the people to keep and bear arms refers only to a collective right confront a

serious threshold problem in their interpretation of the First and Fourth Amendments in our Bill of Rights:

Amendment I

"...the right of the people to assemble peaceably and petition the Government for a redress of grievances."

Amendment IV

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ."

The phrase "the right of the people" thus occurs in these amendments in the same way as in the Second Amendment. Accordingly, any restrictive "collective right" interpretation, limiting the Second Amendment's "right of the people to keep and bear arms," by equal logic threatens the individual liberties otherwise thought to be secured by the First and Fourth Amendments regarding peaceable assemblies, and searches and seizures.

Moreover, there is judicial precedent for the U.S. Supreme Court to limit First Amendment rights in the same breath as Second Amendment rights. In the famous *Cruikshank* case, the Supreme Court in 1875 held that the right to bear arms was not a federally protected right under the federal Civil Rights Act because the Second Amendment did not protect that right against state or private interference. Accordingly, the Court further held that the disarming of blacks by whites gave rise to no federally recognizable claim by the black victims. The Court additionally held in that same case that the First Amendment's "right of the people to assemble peaceably and petition the Government for a redress of grievances" gave rise to a federally protected right only in those assemblies whose purpose was to petition the Government for a redress of grievances and no others; that is, neither picketing nor other "demonstrations" or marches were at all protected under the First Amendment.

This stingy approach to the constitutional rights guaranteed by the First and Second Amendments was reaffirmed by the Court in 1885, in the famous *Presser* case dealing with armed marches in public places. Thus, the close legal connection between narrow readings of private individual rights and liberties under the Bill of Rights is embedded in the constitutional history of Supreme Court adjudication: A restrictive reading by that Court of the Second

Amendment simultaneously entails a restrictive reading of other Amendments. Interestingly, this decision-making was done in the name of enabling the police "to disperse assemblages organized for sedition and treason, and . . . to suppress armed mobs bent on riot and rapine." (On the other hand, the court in the *Presser* case agreed that the Second Amendment guaranteed the common-law right to keep and bear arms: Armed marches could be banned at common law.)

Another facet in the delicate balance and weight of the totality of the Bill of Rights is the obvious consideration that the average citizen, as well as the judges themselves, may ask: "If the Courts have the legal power to destroy one constitutional right in the Bill of Rights by a process of erosive 'interpretation' then don't these same Courts have the same power to destroy another of these provisions in the same Bill of Rights, particularly a provision which seems to be socially or politically troublesome?"

Another illustration of the close connection between the various rights in the Bill of Rights was supplied by the suggestion of a most respected Judge on the federal appellate bench that the Fourth Amendment's guarantees against unreasonable searches and seizures should be suspended for the sake of mass searches for firearms. According to that learned judge, no gun control law can be enforced under the "exclusionary evidence rule." He wrote, "The exclusionary rule has made unenforceable the gun control laws we have and will make ineffective any stricter control which may be devised."

What is the exclusionary rule? The Fourth Amendment in our Bill of Rights forbids "unreasonable searches and seizures." The exclusionary rule "is a judge made rule of evidence which bars 'the use of evidence secured through an illegal search and seizure.'"

The distinguished judge is, perhaps, correct in his conclusion as to the right against unreasonable searches and seizures. If, for example, in order to make gun control laws effective we must accede to the use in court of evidence which has been obtained illegally, then we must equally be constrained to accept evidence which has been illegally obtained by the police in all other kinds of cases.

Much to the chagrin and apparent consternation of the "big press" in America, the U.S. Supreme Court has approved certain searching and information-gathering operations by police in newspaper offices. There is still, however, the exclusionary rule

which protects the press against evidence illegally obtained. How much longer would that protection for the press exist if the exclusionary rule were abolished for gun owners, not on the grounds that they had committed murder, rape, assault or robbery, but because they merely possessed the means to do so?

None other than Norval Morris, former Dean of the Law School of the University of Chicago, whose appointment to a top post in the federal Law Enforcement Assistance Administration was successfully opposed by the NRA in 1978, has also written of the need to install metal detectors along passages where people travel, in a mass search for guns. Professor Morris would have liked to have seen the development of "portable and discriminatory monitors capable of secretly searching anyone passing through a door or along a footpath to ascertain if he carried a concealed gun," hastening to add: "There are surely no 1984 fears in this. There can be no right of privacy in regard to armament." Perhaps he did not realize that such a cavalier disregard for the rights of one class of citizens cannot be divorced from a similar lack of regard for the same rights of other classes.

Registration of firearms poses still another threat to liberty in an orderly society. A requirement by law to register a thing lawfully to be kept in the precincts of one's own home is offensive not only to elemental privacy but also to essential liberty in a free society governed by a Constitution. This is especially true if the acquisition and possession of the thing that must be registered have constitutional ramifications. For example, according to a definitive U.S. Supreme Court ruling in 1955, a requirement to register the purchaser of a newspaper or magazine is constitutionally defective and odious in the extreme, even if such a registration requirement be aimed only at foreign communist political propaganda. The mere existence of such a requirement itself, under the guise of governmental sovereignty and order, casts a constitutionally impermissible shadow of doubt on the loyalty, integrity and responsibility of the purchaser and reader of that newspaper or magazine, regardless of his particular purpose in purchasing or reading it. Registration of firearms, therefore, would lend dignity to otherwise unacceptable laws, such as those requiring the registration of suspect literature.

The registration of firearms, moreover, is of little or no value in solving crimes of violence since the only person to whom the firearm can be traced is the last honest gun owner in the chain of registered ownership. Virtually no one thinks guns would be

registered by criminals. It is the honest person upon whom the suspicion of guilt is cast by the tracing process. Yet, in a society which prides itself on any modicum of freedom, a person is presumed innocent until proven guilty beyond a reasonable doubt and is not required to give any evidence against himself.

These principles, according to latest U.S. Supreme Court rulings, are the substance of our Fifth Amendment's guarantees of due process of law and against compulsory self-incrimination. The guarantee against compulsory self incrimination, in particular, is so basic that it may not be legally counterbalanced in any criminal case today by any competing societal interest, no matter how strong that competing interest may be. On the other hand, registration of politically suspect objects, particularly firearms, contravenes these constitutional guarantees by reversing the presumption of innocence. It is thus neither politically nor socially comforting to contemplate the erosion of fundamental rights by governmental registration fiats promulgated under the guise of governmental convenience or public safety.

Another aspect of the impact of gun control legislation is women's rights. Women are increasingly attracted to firearms ownership for self-protection and marksmanship because of skyrocketing criminal violence directed against them. Barriers against the individual's right to possess firearms therefore constrict women's rights of self-defense, whether such barriers be governmentally or privately imposed, as by restrictive licensing or gun club membership regulations or policies. To leave a woman only her fists or voice for self-defense seems the veriest discrimination against women.

The common law of England, for example, created what are called "common law crimes," such as murder, rape, arson, robbery, larceny and assault. These common law crimes formed the body of criminal law in the American colonies without any legislation both before and after the Revolution, until modern legislatures wrote criminal codes mostly in the latter half of the 19th century. Moreover, the common law also recognized and enforced what the great 18th century British jurist Sir William Blackstone called the "absolute rights of individuals."

Among these absolute rights of individuals, Blackstone proudly listed "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." It should be stressed at this point that Blackstone was not creating any new rights, but was merely listing the rights already secured to the British subject under the common law.

In speaking of the right of self-defense under the common law, Blackstone made the telling point:

(Self-defense) considers that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defense, therefore, as it is justly called the primary law of nature, so it is not neither can it be in fact, taken away by the law of society.

Echoing Blackstone, a New York City judge once wrote: "The right of self-defense is an inherent right of man, older than states or Constitutions."

Thus, any prior restraints on such a fundamental moral right of self-defense, as by licensing in a restrictive way the possession of firearms, violates the fundamental wisdom of the ages as well as the common law and the Constitution.

The common law sets the minimal standards to this day for the various provisions of the Bill of Rights as interpreted by our Supreme Court. Thus, Blackstone's words are very important, not only because they show how strongly the common law protected the absolute right of individuals to arms for self-defense, - so long as not in such manner or of such unusual type as to terrorize "the good people of the land," - but also because Blackstone's words have been so often used by the U.S. Supreme Court to this day as the definitive statement on the common law and as the basis for minimal standards of our own constitutional rights.

Indeed, the great work by Blackstone *Commentaries on the Laws of England*, was also widely used by the Founding Fathers in drafting our Constitution and Bill of Rights. Blackstone's *Commentaries* was respected as the definitive

authority on the common law, including the fundamental common law rights which were to be preserved under the new Constitution in 1789.

Only by using the common law as setting minimal standards for constitutional rights can judges avoid gradual, if not precipitous, deterioration of all constitutional rights by a process of narrow and restrictive "interpretation," not only of the Second Amendment, but also of all the others.

On the other hand, it is important to remember also that the Congress not only is able to enact legislation encroaching on fundamental rights, but also is legally presumed by the Courts to have acted in accordance with the Constitution. As a consequence, anyone who attempts to challenge in court any act of Congress on constitutional grounds has a correspondingly heavy burden of proof in the face of that strong legal presumption of constitutionality of all congressional acts.

Such a presumption becomes even stronger when legislators who vote for legislation eroding a constitutional right keep winning elections - Courts follow the election returns. Accordingly, it is clear that the legislative process can erode or even abolish constitutional rights of all kinds. That is why it is important to realize that any restrictive or prohibitory "gun control" legislation threatens the Second Amendment and hence similarly threatens the rest of the Bill of Rights.

Therefore, those who cherish liberty under the Constitution must oppose any restrictive "gun control" legislation - whether past, present, or future - as well as any other legislation encroaching on constitutional rights. All free men should proudly support legislation appealing any or all restrictive aspects of previously enacted "gun control" legislation.

# **THE BATTLE OVER GUN CONTROL**

**DON B. KATES, JR.**

In April of this year, Congress passed the Firearms Owners Protection Act. This act, the first federal gun law to pass in eighteen years, actually reduces the restrictions of gun Control Act. The often fierce debate that accompanied the passage of this legislation, though, demonstrated once again the political struggle over gun control in this country.

Most Americans think that controlling weapons is just plain sensible. Opinion polls show that most gun owners are actually of one mind with the general public in favoring it. For example, both gun owners and the public, by and large, favor such steps as the registration and licensing of guns and the banning of gun ownership to felons, juveniles, and the mentally impaired. Advocates of reasonable gun control approach guns pragmatically rather than ethically, viewing them as widely desired but nevertheless dangerous things which are sensible to control. Curtailing criminal misuse of guns is, of course, a prime concern of this pro-control thinking.

But the cause of reasonable gun control has been hampered in recent years by the presence among gun control advocates of a vocal minority motivated not by pragmatic concerns -- that gun control will reduce crime, for example - but by a moral vision that reviles guns and their owners. This antigun lobby sees the handgun simply as an abomination, and the desire to possess one for the protection of home and family, or for any other reason, as immoral, reactionary, and paranoid.<sup>1</sup> It supports the banning not just controlling - of handguns and, hence, has refused to support a loosening of even the most excessive handgun regulations.

The reaction of gun owners to such opposition has been predictable. Feeling offended, and perhaps even threatened by antigun rhetoric, the gun lobby has opposed even the most moderate controls. To understand the difference this anti-gun position has made, as opposed to the reaction a merely "pro-control" view would elicit, it is useful to remember that gun owners have not always opposed gun control. Most of our present gun laws, in fact, come from the Uniform Revolver Act which the NRA drafted and promoted early in this century. As late as 1957, legislation to bar military surplus imports was sponsored in the Senate by NRA life member John F. Kennedy. (Ironically, his purpose was not to prevent crime but to protect the domestic arms industry centered in the New England.)

In focusing on the baleful effect of antigun rhetoric, I am not denying that gun owners are often equally intemperate. But though their intemperance is notoriously counterproductive, it hurts the gun lobby far less than antigun vituperation hurts the cause of reasonable gun control. For the strident opposition to gun ownership that characterizes the antigun lobby foredooms the cooperation that is essential if better controls are to be enacted and obeyed. A situation has developed, then, in which no matter how reasonable in the abstract a gun control proposal might

seem, gun owners think it will end up being administered from an antigun perspective.

### **Arbitrary Administration**

The history of American gun law and its enforcement unfortunately lends credence to the paranoia gun owners feel as a beleaguered minority. The Sullivan Law as administered in New York City is a case in point. Enacted in 1911, it made New York the first state to require a permit for a handgun on one's own premises (to this date, only a few states require such a permit). Support for its passage came not from liberal reformers interested in limiting crime - their focus at the time was liquor, not guns (indeed such liberals as Teddy Roosevelt, his niece Eleanor, and Drew Pearson carried guns for their own protection) - but from business and the then - conservative American Bar Association which associated handguns with foreign-born anarchists, labor agitators, and criminals. Articles, not just editorials, in conservative papers like the New York Times spoke of "low-browed foreigners" prowling gun shops for bargains; handguns reposing "chiefly in the pockets of ignorant and quarrelsome immigrants of lawbreaking propensities"; and "the practice of going armed . . . among citizens of foreign birth."

Though permit denial was at first concentrated in the Italian and Jewish areas, over the years it became the unacknowledged mechanism for banning handguns to the general population. New York decided in 1957, for example, that target shooting was no longer a legitimate reason for handgun ownership; permits would henceforth be issued only to businessmen, security guards, and a select few wanting guns for their own protection, by the early 1970s. This policy of progressively limiting permits given to ordinary citizens had reduced premises permits to less than one-seventh the number issued in London (although New York City was estimated to have one to two million unpermitted handguns). When New York appellate courts held that applicants could only be rejected if found unfit, New York City simply ignored the rulings. When the gun lobby obtained injunctions forcing the city to comply, it did, but only after establishing a two-year wait to obtain the gun-permit form. Finally, when the New York legislature reaffirmed the court decision and ordered that permit approvals or denials be made within six months, the city imposed an enormous processing fee, making application and renewal economically feasible only for the well-to-do.

## **"Carry" permits and the perquisites of privilege**

The most desired handgun permit is not the premises permit but the "carry," which allows the holder to have a gun wherever he goes. Even states that do not require permits to keep a handgun at home tend to limit carry permits severely. But New York City's policy of limiting handgun ownership seems to apply only to ordinary citizens, not to those influential enough to qualify for the carry permit. By the 1970s, although only about 550 premises permits were issued each year, 25,000 carry permits were issued in New York City. Though the lists of permit holders in the city are legally public record, New York suppressed them until 1980, when a journalist obtained a court order demanding they be given to him. A subsequent newspaper article described the permit holders as "entertainers, publishers, media stars, [and] politicians of all stripes." Among the nationally prominent people on that and later lists (on a list leaked in 1977) were David, John, Laurence, and Winthrop Rockefeller, Leland Dupont, Henry Cabot Lodge, Robert Goulet, Sid Caesar, Donald Trump, William Buckley, Michael Korda, Arthur Godfrey, and Lyman Bloomingdale. Ironically, also named in news articles as permit holders have been such prominent gun control advocates as John Lindsay, Nelson Rockefeller, and Arthur Sulzberger, publisher of the New York Times. Dr. Joyce Brothers, who says gun ownership indicates male sexual dysfunction, was not listed; her husband was.

Of course such prominent people may face dangers to which ordinary citizen is not exposed. For instance, the only carry permit issued in San Francisco in 1990 went to then Supervisor Diane Feinstein after her house was machine-gunned by the New World Liberation Front. But does such special danger justify such singular privilege? Contrast Feinstein's situation to that of an ordinary San Franciscan. He is an elderly Chicano whom the San Francisco Examiner reports has held on to his grocery by outshooting fifteen armed robbers; nearby stores have closed because thugs have either bankrupted them or have casually executed their unresisting proprietors. Permit or not, this grocer has to carry a gun to and from his store. But in San Francisco, permits are available only to politicians and the very wealthy whose lifestyles exempt them from the common crimes against which a gun may have utility. Yet since personal firearms can do little to protect against the special dangers prominent people face, it seems, then, that handgun permits are available only to those who need them least.

That Feinstein received the only carry permit in the city should (and in any other context would) have outraged those most concerned with equality before the law. If permits are to be issued to those with influence who may fear for their safety, they should be available to the ordinary citizen also threatened by some kind of criminal violence.

## **Condoning permit abuse**

Of course, the fact that a few prominent antigun spokesmen may be hypocritical does not nullify the need for permit Laws. Carrying a gun for protection does, in fact, occasion far more difficult decisions about its use than keeping a gun at home. Felonious endangerment and necessity to shoot are reasonably clear when a burglar or rapist breaks into occupied premises. Street incidents in contrast, may require training and knowledge to evaluate when to shoot.<sup>2</sup> The solution to discrimination in permit administration, then, is not to abandon the law, but to correct abuses of it. Unfortunately, in this case, the forces that normally defend Americans from government abuse are suffused with the sentiments which prompted the abuses in the first place.

Arbitrary and discriminatory administration is seen as acceptable in the antigun view. If common citizens who want a handgun to protect home and family are held to be sexually aberrant, paranoid, trigger-happy rednecks whom it is imperative to disarm, almost any means that does so is likely to seem justified. The National Coalition to Ban Handguns (NCBH) actually touts New York City as a model for gun control everywhere. (For obvious reasons, the NCBH does not discuss the issue of discriminatory administration.) When such a discussion was forced on the NCBH's principal spokesman, his response was significant: He blithely replied that there is no problem so long as permits are confined to people like Times publisher Sulzberger (whom he described familiarly as "Punch") who are obviously not criminals.

Apparently, the NCBH is not concerned with a discriminatory administration that grants a gun permit to "Punch" Sulzberger but denying one to those who may have legitimate concerns for their safety: grocers in Spanish Harlem; welfare recipients whom robbers target, knowing when their checks come and where they cash them; the elderly trapped in deteriorating neighborhoods (like the Manhattan couple who in 1976 hanged themselves in despair over repeatedly losing their pension checks and furnishings to robbers). But even if, as the NCBH argues, guns do not provide protection from violent crime, common citizens in a violent society have at least as much right to one as do the prominent and wealthy. Moreover, the speculations and anecdotal local data long cited to show the uselessness of handguns is now contradicted by solid national data. According to this data, handgun-armed citizens actually thwart about as many crimes annually as handgun-armed criminals succeed in committing. Citizens acting in legitimate self-defense kill about three times more assailants and robbers than do police.<sup>3</sup> Furthermore, prison surveys show many criminals, fearing armed victims more than the police, are diverted into non-confrontational crime.

The only article of the anti-gun faith supported by modern research is that the handgun is rarely used against burglars -- not because it is inherently ineffective but because burglars usually strike unoccupied premises. Yet it turns out that a burglar's chances of being caught, prosecuted, and actually serving time are even less than that of his meeting an armed citizen. Gun ownership, it seems, is a greater deterrent to crime. Other antigun activists have not always practiced the NCBH's prudent silence about gun permit abuses: some even endorse these abuses outright. The premier antigun writer, Carl Bakal, approvingly cites such examples as denial of a New York permit to a "rifle instructor with a spotless record" because a relative "had been in trouble with the police." A former St. Louis alderman described gun law administration in that city (under Missouri permit requirements) as the automatic rejection of applications from non-

voters, homosexuals, and women lacking written permission from their husbands. He offered no defense of this discrimination as policy, approving only of the result -- that the applicants were denied handgun ownership, as he thinks all ordinary citizens should be.

### **Discriminatory punishment**

Some states have no system under which one can even apply for a permit to carry a protective firearm. While this avoids Sullivan Law - type formal discrimination, enforcement is so arbitrary that violation becomes certain. When a physician has been maimed or murdered by frantic drug addicts who, think he must be carrying drugs, for example, his colleagues, are unlikely to be deterred from carrying a handgun because, they lack a permit: nor are judges, many of whom carry guns themselves because of threats from criminals, likely to jail them, even if they are prosecuted.

The NCBH, though, has the antidote for such "soft judges": legislatively mandate a year in prison for citizens caught carrying a gun, even if they are doing so in necessary self-defense and lack a permit only because these are unavailable to ordinary citizens. Massachusetts, which pioneered such legislation, recently sent a man to prison for carrying a handgun with which he had shot a coworker when knifed by him in a subway station. (The man had begun carrying the gun only after he received threats from the coworker.) In affirming the sentence, the state's high court wrote:

We are not unaware that some may say that the defendant is to be punished for acting reasonably in the face of a serious and real threat. [The defendant did not merely arm himself out of some fear of crime in general.] It was founded on an earlier assault by Michael with a knife and became a real and direct danger when Michael attacked the defendant with a knife at the [subway station]. We are also advised from the record that the defendant is a hardworking family man without a criminal record, who was respected by his fellow employees (Michael excepted). Michael, on the other hand, appeared to have lacked the same redeeming qualities. He was a convicted felon who had serious charges pending against him at the time of the defendants trial (quite apart from the charge of assaulting the defendant). It is possible that the defendant is alive today only because he carried a gun that day for protection. Before, [the legislature mandated the one-year minimum sentence.] such special circumstances involving the accused should be reflected reasonably in the sentencing or dispositional aspect of the proceeding. That option is no longer open to the judicial branch of government.

Leniency may be even less forthcoming (to the disadvantaged and minorities) despite their greater need for protection. In a case that received national publicity several years ago, a black woman, upon entering her housing project, found that a man had broken through a thin wall, raped her roommate, and thrown her out of the fifteenth-story window. The woman, brandishing a handgun, managed to frighten the assailant away. The police arrived too late to capture him, but they did arrest her for carrying the handgun.

Judges find that the vast majority of defendants charged with carrying a gun illegally (in states without carry permits or where permits are denied to citizens without political influence) have no criminal record. They are secretaries, shopkeepers, the poor, the elderly, many of whom carry guns because they have been raped or mugged with the police arriving too late to protect them. A judge in Chicago's "gun court" writing in a local legal publication, notes that his readers:

Would not go into ghetto areas except in broad daylight under the most optimum conditions - surely not at night, alone, or on foot, but some people have no choice. To live or work or have some need to be on this frontier, imposes a fear which is tempered by possession of a gun.

Antigun advocates do not grasp (not even for the purpose of refuting it) the idea that banning handguns might burden the poor and minorities, those most subject to crime. Consider the following from the NCBH's "20 Questions and Answers on Gun Control":

Q. Does the banning of handguns discriminate against minority members of our society?

A. No. Handguns would be illegal in the hands of the total populace, including all racial and religious groups, the rich and the poor alike.

Yes--and to sleep under bridges is forbidden equally to the rich and the poor alike.

### **The gun laws of '68**

In the wake of the assassinations of Martin Luther King and Robert Kennedy, the Congress hastily passed -- over bitter NRA opposition -- the Gun Control Act of 1968. This act created a maze of regulatory laws, violations which were to be considered not misdemeanors but felonies -- and for which neither good intent nor lack of knowledge could be used in defense. That this act has had little or no crime-reductive value is conceded by all sides in the gun debate. But the repeated and varied injustices to which it has given rise have confirmed gun owners in their belief in the malignant intent and effect of gun control.

In one typical case a man and wife who owned a gun store were convicted of an "illegal" sale at a gun show although they had all the various licenses and had obtained all the necessary purchase-record information. Unbeknown to them, the unintended effect of an obscure regulation precluded licensees from selling at gun shows -- although unlicensed private citizens could do so without keeping records at all. Required to convict them, the trial court imposed a sentence of only one day -- on probation; the court of appeals, in affirming, took the unusual step recommending a presidential pardon. Nevertheless the couple lost their business, because felons cannot possess guns. This type of injustice is what the recently passed Firearms Owners Protection Act sought to correct.

A further flaw in the 1968 act is its failure to define who actually is a gun dealer. Obviously a gun store owner is a dealer, but so also are many people who would not normally

think of themselves as such -- and who find themselves subject to felony penalties if they fail to obtain the proper licenses or to keep the required records. A sporting goods importer, for example, ran into trouble with the law when he bought sixteen thousand starter pistols -- despite his desperate attempts to cancel the order when he found out that they were convertible to firearms. A police officer who on retirement sells to fellow officers the eight handguns he accumulated in his over-thirty years of service is liable for prosecution. So is an executor who never personally owned a gun but tried to obtain full value for the estate by selling the deceased's collection (comprising all rifles used by the various powers in World War I) as a collection rather than breaking it up and selling the guns individually to gun stores at perhaps 50 percent of their value. Each of these people is, without knowledge or intent, guilty of multiple felonies under the 1968 federal act. Further exacerbating this injustice is the fact that, even if these people had known enough to consult the agency which administers the act, they would have probably been told that they were not dealers and would not need licensure as such. A combination of frequent changes in administrative policy, ineptitude in implementing them, and the act's complexity and ambiguity has resulted in cases where citizens were misadvised that they could engage in activities for which they were later convicted. Such convictions are routinely upheld: Agencies cannot authorize violations of a statute by misinterpreting it.

Given how complex and poorly written the 1968 act is, agency misinterpretations are understandable. But that does not explain the fact that those in the agency responsible for search and seizure and enforcement practices have, in the words of antigun journalist Robert Sherrill, "shown less awareness of the Constitution than any other group of law enforcement officials at any level of government, with the possible exception of Mississippi sheriffs." After subsequent extensive senate hearings, Sherrill's views were reiterated (somewhat less pungently) in a 1982 Senate Judiciary Committee report:

[The testimony] reveals conduct by an official law enforcement agency of the federal government that borders on the criminal. . . . Based upon these hearings, it is apparent that the enforcement made possible by current firearms laws are so constitutionally, legally and practically reprehensible. . . . [The agency] has primarily devoted its firearms enforcement efforts to the apprehension . . . of individuals who lack all criminal intent and knowledge. . . . Since existing law permit [such prosecution], numerous collectors have been ruined by a felony record carrying a potential sentence of five years in a federal prison. Even in cases where the collectors secured acquittal, or [where charges were dropped] agents . . . have generally confiscated the entire collection of the potential defendant.

The American Civil Liberties Union, if it simply displayed its normal fidelity to constitutional rights, could dispel the beleaguered - minority paranoia that gun owners suffer. The ACLU could, for example, sue on behalf of gun owners whose civil liberties are violated and recognize that the Second Amendment guarantees a constitutional right to bear arms.<sup>4</sup> Instead the ACLU characterizes the Second Amendment as guaranteeing not an individual right to arms, but only a state right. Furthermore, the ACLU shuns litigation against discriminatory abuses in state permit laws or the federal gun agency's violations of civil liberties.<sup>5</sup>

The ACLU was, in fact, a founding member of the NCBH, which strongly opposed

holding any hearings on agency abuse. When hearings were held, the NCBH denied throughout them that there were any civil liberties violations. Instead the NCBH denounced NRA's megalomania about the "so-called rights of gun owners . . ." Regrettably, the evidence these hearings provide of massive agency misconduct has been completely ignored by the antigun civil liberties establishment. Instead antigun organizations put forth an all-out effort to defeat the corrective legislation which has just passed Congress, despite the fact that the abuses to be corrected served no gun control purpose but only injured individual owners. In the light of such indifference from the civil liberties establishment to government abuses of gun owner rights, is it any wonder that gun owners militantly oppose any additions to government power that might also be used unreasonably against them?

### **Antigun advocacy--a symbolic crusade?**

Why do antigun organizations and spokesmen play into the gun lobby's hands by making statements that inevitably cement millions of gun owners into fanatic opposition to control? Perhaps their motivations resemble those of the temperance crusaders earlier in this century, as explained in sociologist Joseph Gusfield's *Symbolic Crusade: Status Politics and the American Temperance Movement*. Gusfield suggests that what Prohibition advocates were seeking was not so much to change human behavior but to legally enshrine their own morality while condemning that of their opponents.

That this is the case can be seen in the systematic avoidance by handgun ban advocates of the key criminological issue: enforceability. Learned diatribes against the constitutional sanctity or defensive value of handguns abound -- but never addressed is the issue of how handguns are to be confiscated from the forty to fifty million owners who disagree. Enforcement problems will dwarf those of Prohibition's. Handguns, unlike liquor, are reusable, and their continued use does not involve the visibility and risk of perpetual illegal purchase. A ban would not even prevent handgun proliferation: witness the extent of drug smuggling. Moreover, handguns could be resold more cheaply on the black market than they are now legally.

Any machine shop and many home workshops can produce, at a fraction of the cost of legal handguns, modern guns in cheap metal versions which could suffice for the purposes of self-defense or of committing crime.

These facts are known to anyone who bothers to research enforceability. Yet it is no exaggeration to say that neither these nor other enforcement issues are ever analyzed in even scholarly arguments for handgun prohibition. (One ten-thousand word article -- which is atypical in that it at least notices the issue -- devotes but a single sentence to the need for "strict enforcement.") How can people who other situations trumpet enforceability obstacles advocate banning handguns without ever even addressing the enforcement issue? I submit that it is only because a handgun ban is to them purely symbolic moral legislation rather than a serious criminological program.

Whether law ought to ratify a purely symbolic moral position held by most of the population is a debatable issue. But in our context it is irrelevant, for most Americans do not share the antigun belief in the innate depravity of gun ownership. The irony is that attempts

nevertheless to reify that belief into law blight the chances for the kind of pragmatic gun control most Americans, including most gun owners, would support.

## FOOTNOTES

1. The tone of anti-gun opposition to gun owners themselves can be seen by surveying the titles of typical anti-gun articles: “Sex Education Belongs in the Gun Store,” “Bulletbrains and Guns That Don’t Kill,” “The NRA Can’t Wash the Blood Off Its Tired Old Cliches,” “Handgun Nuts Are Just That – Really Nuts,” “Neurotic Attachment to Guns,” and so on.
2. Unfortunately, neither in New York, San Francisco, nor virtually anywhere else are carry permits conditioned on in-depth testing of when to shoot. Only a few jurisdictions test marksmanship at all.
3. Gary Kleck, “Policy Lessons From Recent Gun Control Research,” *Law and Contemporary Problems*, Vol. 49, No. 1 (Winter 1986).
4. One may deride the NRA’s reading of the Second Amendment as a guarantee against any form of gun control conceivable. But that it guarantees responsible adults the right to possess handguns for home defense is established by: its background in classical liberal thought and common law; the plainly expressed views of the Founding Fathers; its legislative history; and its uniform treatment in legal commentaries from 1791 until recent times.
5. The ACLU has, however, recently filed an amicus brief in the Supreme Court urging invalidation of a provision of the 1968 act under which no one who has ever been committed to a mental asylum may obtain permission to have a gun.

## **GUNS POLITICS AND REASON**

**Lance K. Stell**

A significant portion of the American intellectual community is heir to a conventional wisdom about guns. For them, this wisdom paints a chilling picture by the numbers. It takes shape something like this. Private American citizens own approximately 120,000,000 guns (give or take twenty million). Fifty-five to sixty million of these are handguns. Fifty percent of all American households have one or more guns. Approximately ten thousand handgun homicides are committed each year. I add to this number, tens of thousands of woundings plus more than two thousand accidental deaths plus several thousand gun-suicides. A national scandal? What's the answer? In a heartbeat, the conventional wisdom screams its answer: GUN CONTROL! Pollsters Harris and Gallup say a substantial majority of Americans want it. Liberals like Ted Kennedy want it. Conservatives like George Will want it. Shouldn't we have it? Why can't we get it?

But wait. What is the scandal? That private citizens own so many guns? That approximately 22,000 homicides occurred last year? That slightly less than half of these were committed with guns? All of the above? The first because of the third? What does "gun control" mean? Is requiring a permit to purchase firearms gun control? Is registering all gun owners gun control? Is gun safety education gun control? Is prohibiting the discharge of firearms in dense populated areas gun control? Is prohibiting private ownership of handguns gun control? Is prohibiting domestic manufacture and importation of all handguns gun control? Is requiring gun-wielding criminals to serve minimum prison terms gun control? Groups as hostile one another as the National Coalition to Ban Handguns and NRA each support more than one of these "control" measures. So, if someone proclaims support for gun control, or "more" or "stricter" gun control, what does he mean? Whose side can claim his support?

At present, there are roughly 20,000 laws concerning guns on the books. What effects have these laws had on violent crime rates? If we need more gun control laws, precisely how should such statutes be worded? How would they be enforced? What trade-offs in liberty and privacy would have to be made to secure the desired benefits if, say, a comprehensive handgun ban became law and were vigorously enforced? Is there reason to suppose that banning handguns would be more successful than our first go-round at a "noble experiment?" In the last decade, the private stock of guns has increased sharply. What relation does this fact have to violent crimes rates over the same period? Is there "a domestic arms race?" If so, who is racing whom? Is it the law abiding citizen versus the criminal? The criminal versus the police? Law-abiding citizen versus law-abiding citizens? What motivates law abiding citizens to acquire firearms? What considerations operate in a criminal's decision whether to use a firearm in a planned crime?

Reasonable questions? Important questions? Not to people who think in terms of foregone conclusions. The books under review are not for them. These books ought to be read by persons who think that controversial public policy questions should be informed by well-reasoned argument, good evidence and historical understanding. Would anyone reject this

principle? Surprisingly, many do, or at least their conduct suggests that they do. For far too many, grip on this principle slips when the topic is guns. Determining a person's position on "gun control" is a social litmus test; the enlightened are thereby distinguished from the benighted.

When discussion turns to guns, otherwise rational people who ordinarily sort out distinguishable issues and analyze them separately, proceed to jumble everything together. For example, consider the following set of controversies, each provocative in its own way, we have the criminological theory that most violent criminals behave like rationally self-interested predators. Because they weigh perceived benefits against perceived costs the theory implies that these persons may be deterred from objectionable activities by increasing the perceived risks above some threshold. If we assume that a rational predator prefers a comparatively helpless victim (all else equal), the theory suggests that we shall better deter violent crime by publicly encouraging law-abiding citizens to own and become proficient in the use of weapons.

We also have a theory which says that many violent criminals are just like the rest of us except that their motivational structure has been transformed by a "weapon sickness" which "infected," them when they acquired a gun. This theory suggests that gun ownership acts on a person like a slow virus. Having contracted the disease, there waits only the catalyst of the right provocative moment; our otherwise ordinary citizen becomes an agent of death. It seems to follow that in order to make serious reductions in violent crime, we must eliminate the deadly virus which infects its death dealing carriers (pun intended). Ban guns.

Next consider the controversy about self defense. We have the view that each competent adult bears the primary responsibility for protecting himself from deadly threats to his life and has a right to use any reasonable means to do so.

We also have the view that the state, through its police, owes a duty to each citizen to bear the defensive burden. As custodians of public security, only designated officials have a right to possess guns. Only designated officials have a right to use deadly force to repel aggressive threats to lives of the law-abiding although private citizens may be forgiven for resorting to self-help in extremis.

Then there are the moral/cultural/recreational issues associated with hunting, target shooting and gun collecting. We have views which hold that hunting is not an inherently wicked activity, that target shooting is a legitimate sport, and that gun collecting is no more suspect than collecting vintage automobiles.

We also have views which hold that hunters are morally depraved enemies of the environment who violate the rights of their prey, that target shooting is sublimated aggression, and that gun collectors suffer from a castration complex. They assemble their collections out of sexual frustration.

Finally, there are the Second Amendment issues. A sizable majority of Americans believe that the Second Amendment-confers an individual right to keep and bear arms. Yet many legal scholars disagree with them. These scholars claim that the Second Amendment confers a

right upon the states to organize militias. The supposed right to keep and bear arms is totally restricted to and subordinate to the state interest in securing the common defense.

Any thoughtful person must agree that these issues are very complicated. No doubt a thoughtful person could think of even more issues and still more complications, could think of putting them in more or less provocative ways. Yet, debates about guns are sharply polarized. People are categorized as either "pro-gun" or "anti-gun," labels rich in emotional connotations but poor in cognitive value.

Emotional invective and over-simplification lead to implausible characterizations of both sides. Good liberals who get angry about ethnic or racial stereotypes sweepingly characterize those who keep guns, no matter for what reasons, as having "I.Q. .38." Others, instead of insulting the intelligence of gun owners, impugn their grasp of sexual reality. Thus Arthur Schlesinger, Jr., suspects "that men doubtful of their own virility cling to the gun as a symbolic phallus and unconsciously fear gun control as the equivalent of castration."<sup>2</sup> One cannot help but wonder what might cause a distinguished man of letters who ordinarily writes with such care to paint in unflattering colors with such a broad brush. Other writers creatively apply a corollary of this pseudo - Freudian theory to women. In her account of the Jean Harris murder trial, Oiana Trilling asserts "There are women for whom the idea of masculinity and fierceness are not to be disentangled from one another." When the headmistress acquired the gun she used to kill the Scarsdale doctor, Trilling adds, Harris "became capable of assault. She was supplied what she'd been deprived of by biology."<sup>3</sup> Those who have them discharge them whenever they can and fantasize when they cannot. Those who lack guns envy those who have them.

Writers Like Schlesinger and Trilling neglect to take seriously the implications of their theory: If the phallic theory of handgun ownership were correct, we would not only have a simple but disparaging explanation for the acquisitive behavior of the nation's gun owners, we should also predict widespread violent resistance bordering on social revolution were the prohibitionist legislation which they typically favor to pass. The phallic theory predicts that male gun owners would be as violently resistant to enforcement of such legislations as they would be to mandatory castration. The theory's phallus-envy corollary predicts that women gun owners would cleave mightily to the cold-steel substitutes for their biological deprivation. Handgun prohibition threatens unsublimated frustration for these women.

Although the phallic theory has a ready explanation for the gun-banning preferences of its adherents too, they neglect to interpret their own preferences in the context of the demeaning social theory they apply to others. They eschew campaigning under the banner "Phallus Envy League."

Is the phallic theory serious social psychology? Probably not. More likely, the so-called phallic theory is just "respectable bigotry,"<sup>4</sup> another ad hominem in what one writer has called "The Great American Gun War."<sup>5</sup>

Paradoxically, gun prohibitionists who caricature gun owners so unkindly follow a course which makes it less likely that the measures they favor will become law. Such calumny convinces America's handgun owners that they are a hated minority whose days are numbered by

mortal enemies-enemies who hate them more than crime. With the die cast so, gun owners are made to think that they have everything to lose if those who loathe them have any political success at all. Partisans for gun owners know this. They quickly disseminate the nastier cartoons and vituperative op-ed pieces in publications read by gun owners to fan the flames of incipient paranoia.

On the side of gun owners, people who should also know better characterize anyone who supports any increased restrictions on firearms as a "gun grabber" a closet totalitarian, a subverter of an enumerated Constitutional right, a mortal enemy of all basic American values.

Calumny thus exists on both sides. Both pour hatred into the river of spite which separates them. But there is an important asymmetry. Gun owners who revile their political opponents wish, in the last analysis, to be left alone. Prohibitionists, on the other hand, need voluntary compliance from gun owners if enforcement costs for their favored laws are not to be prohibitive. Gun owners, having been caricatured as atavistic, violence-loving, borderline sexual perverts, are not likely to cooperate voluntarily.

Seeking light rather than heat, what would a rational person think? Surely a rational person would suspect that the motivations people have for possessing guns is an empirical question which, when investigated carefully, would likely reveal the same complexity which underlies most human action. No person acting upon rational principles would accept derogatory arm-chair psychologizing as a substitute for empirical investigation. On the other hand, people who are "pro-gun," for whatever reasons, must admit that guns are dangerous machines which kill and wound tens of thousands of Americans each year. Reducing the number should be an aim supported by all reasonable people. Whether changes in social policy can contribute toward this end at acceptable cost should be an open question.

Enlightenment is also wanting on the question how the Second Amendment to our Constitution should be understood. How did the Framers understand those words? Is it true that the mention of "arms" in the document which shapes our legal and political institutions reveals only the understandable, but transitory importance which firearms had during our frontier days? What weight should be given to the understandings of the Framers when contemporary problems they could not have foreseen, beg for solutions to which they, but not all of us, might have principled objections? How tightly should their understandings, their intentions, bind us today?

If rational discussion of the link between firearms and violence is possible if people can replace slogans with informed judgment, if people are open to challenging the received wisdom that the Second Amendment articulates a "collective right" only, then the books under review will prove of considerable value; not necessarily because they decisively dispose of important questions but because they bid to raise the level of a debate which has lacked balance and reason for too long.

## **The Gun Myth**

The conventional wisdom about guns is transmitted as a myth. Rational discussion about

gun policy requires that the myth be articulated and challenged. It is a myth in the sense that: (1) it expresses the social consciousness of a group or social class, shaping group members' perceptions things or forces enter into "real" (as opposed to apparent) causal relations; (2) it is shielded by its proponents from refutation; evidence contrary to the myth, rather than rationally assessed, is either ignored or the motives of those who present it are disparaged; (3) to adherents, those who challenge the myth are outsiders, enemies or reactionaries; (4) its component claims are either demonstrably false, misleading half-truths, or are unsubstantiated by good evidence.

We can characterize myths in other ways. However, these four criteria, individually necessary and jointly sufficient, will serve well enough. According to the gun myth, the American involvement with firearms began as a marriage of convenience and necessity, only to be transformed into a perverse romance which now spawns violence and domestic disorder. As the story runs, firearms were a necessary part of the frontier experience. They provided needed protection from wild beasts, from an occasionally hostile, native population, were useful in securing sustenance.

However, the society became more civilized; the necessity of self-help withered. No longer needed tools, guns became symbols in a romantic fantasy with America's past. The fantasy has not been benign. Stained with a widening river of blood, the fantasy's social costs have been and continue to be enormous. Despite becoming less necessary, the gun has become even more common. Driven by paranoia, an insane domestic arms race now parallels the nuclear arms race. In this shooting gallery called America, the readily available gun, all-too-frequently mixes with common anger to make otherwise ordinary citizens into killers of spouses and friends.

Human decency demands that the romance with guns end. A substantial majority of Americans now echo that demand. Alas, their humane desires are frustrated by the skillful, if perverse, machinations of a small but powerful minority the "gun lobby." This group shamelessly opposes the very sort of legislation which accounts for the low rates of personal violence in other modern democracies. The gun lobby deflects attention away from the brutality which it perpetuates by arguing fallaciously that the Constitution secures an individual right to firearms ownership - a position which the courts have rejected and with which no serious legal scholar agrees. The success of this small minority confers upon the United States the dubious distinction as the only modern, industrial, urban state which does not severely restrict the private ownership of firearms. Its scandalously high violent crime rate tolls in condemnation.<sup>6</sup>

Furthermore, modern social science has shown that there is a casual connection between the comparatively high rate of gun ownership in the United States and its violent crime rate (which notoriously exceeds that of, say, England or Japan); that guns function like disease causing agents, transforming their otherwise mentally healthy possessors into violence-prone aggressors (the mechanism which explains the correlation); that a vigorously enforced handgun ban would have a favorable effect on violent death rates. Important questions can be raised about the "Gun Myth" as I have summarized it. Is there any sense in which it describes the position of anybody? If it does, is it sufficiently pervasive to count as the "conventional wisdom" on guns? When did the myth come into being? How and by whom is it perpetuated?

A chapter in *Firearms and Violence* written by William Tonso, addresses these questions. Tonso shows that support among social scientists, other intellectuals and the media for the set of beliefs and attitudes which I have called the gun myth is very widespread. "Since the latest push for controls began in the early 1960's, articles on the subject in such news and general interest magazines as *Life*, *Time*, *Newsweek*, *The Saturday Evening Post*, *Reader's Digest*, *Harper's*, *Saturday Review*, *The Nation*, and *The New Republic* have been almost unanimous in the strong support of gun control . . . The national television networks have also been almost unanimous in the support of controls through various documentaries on the subject as well as through such television favorites as "Laugh In," "All in the Family," "Hawaii Five-O." The leading urban newspapers have all editorialized in favor of controls, the *Washington Post* once doing so for seventy-seven straight days, . . ." <sup>7</sup> But now another question arises. Why not infer from the widespread support the so-called "gun myth" enjoys that it is not a myth at all. Perhaps the impressive individuals who share these beliefs provides some inductive support for thinking that the beliefs are true, or if these beliefs are false or misleading, (which remains to be seen), perhaps that's all there is to it. Many false beliefs which have enjoyed widespread support are not therefore "myths." Evidence must be given that these beliefs, even if false, function as myth.

What evidence is there? Tonso offers several reasons for thinking that the conventional wisdom on guns is myth rather than real wisdom. First, he points out that it is not uncommon for non-scholarly, anti-gun polemics such as *The Right to Bear Arms*, by irate citizen Carl Bakal, and *Saturday Night Special*, by investigative reporter Robert Sherrill, to be cited in social science textbook analyses of the gun issue without any mention of the political interests of such writers. Second, social scientists who are occupationally critical of opinion polls and the inferences drawn from them commonly accept polls about gun issues at face value even though there is good reason not to do so. Third, those few social scientists who examine the background interests and historical factors which place the activities of the anti-control forces in context fail to deal similarly with the pro-control forces. As Wright, Rossi and Daly discovered when they undertook their comprehensive review of the scholarly literature on the subject.

One would be ill advised to point to the academic literature on weapons and crime as an example of the scientific objectivity that is discussed in introductory methods textbooks. Both "guns" and "crime" are emotionally laden symbols that evoke strongly held and not always rational feelings, anxieties, and concerns, and researchers are not exempt from such evocations . . . Thus many (perhaps all) researchers in this area bring with them to the research task a set of personal beliefs and political ideologies which if they do not destroy outright the credibility of the research, at least sometimes interfere with sound research judgments.

Tonso argues that there is strong social class aspect to the Great American Gun War which pits "cosmopolitan America" against "bedrock America." Cosmopolitan America tends to be urban, holds more advanced academic degrees, is politically liberal, upper middle class. Bedrock America tends to be rural or small town, holds fewer advanced degrees, is politically conservative, lower-middle or working class.

The American intellectual elite includes not only the nation's "top" writers, journalists, and other such literary folk, but its "top" educators, scholars, and scientists. Social and otherwise, as well. Cosmopolitan America, therefore, is not only generally more adept at articulating its views than is bedrock America: It also possesses the means to place its views before bedrock as well as cosmopolitan America: Reader's Digest and TV for the former: New Republic and college social science courses for the latter. Through its scholarly and scientific connections cosmopolitan America can also coat these views with a thick veneer of what passes for impartial scientific authority: consider the gun control issue and the conventional social scientific treatment of it as a case in point.

Is Tonso's argument an ad hominem too? Is it anything more than an attempt to undermine the conventional wisdom on guns by showing that those who perpetuate it tend to represent social class values characteristic of "cosmopolitan America?" Any account which attempts to place certain widely shared beliefs "in context" by pointing out the socioeconomic position of their supporters runs the risk of ad hominem, But if the received wisdom on guns can be undermined independently by showing that rational support for it is very weak, then it is no ad hominem to point out the class based nature of its support. In the end, everything hinges on the amount of rational support which the received wisdom on guns enjoys. Indeed, whether the received wisdom on guns is myth or reality depends upon it, In what follows, I shall extract some of the major claims in the gun myth and explore what rational light can be shed on them by the books under review.

## History

As I have recounted it, the gun myth begins with an historical claim, Such historical claims are important because they purport to give perspective on the present by shaping our beliefs and attitudes towards it. To have a non-distorted perspective on the present presupposes accurate history. Accurate American political history sheds light upon the meaning of the Constitution by illuminating what its words meant to those who wrote them. The stakes are high. Winning the struggle to articulate the canonical version of American's historical involvement with guns has implications

for how the Second Amendment should be interpreted and applied.

The historical claim in the Gun Myth serves in support of an argument that since the sole justification for widespread gun ownership was frontier necessity, its ground was limited to the conditions which made it necessary. With the disappearance of frontier conditions, the justification for widespread, private arms ownership evaporated. Thus Senator Edward Kennedy argues 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."<sup>9</sup> Although citizens who feel vulnerable to violent crime may doubt the Senator's judgment that the need for defensive weapons vanished with our forefathers, the historical claim is the issue at hand.<sup>10</sup>

The historical claim in the Gun Myth asserts that the American relationship with guns began with our frontier experience; back then, guns were items of convenience, if not necessity. This claim is not so much false history as it is history with selective amnesia.<sup>11</sup> Understanding America's relationship with guns requires that our historical investigation probe a more distant past; we must probe the experiences, the republican traditions of those statesmen who shaped our institutional design.

Toward this end, Stephen Halbrook writes what amounts to a detailed legal brief which aims to restore these lost memories. He proposes to establish unambiguously that the Second Amendment secures an individual right to keep and bear arms. Thus Halbrook argues, ". . . an understanding of the authoritarian absolutism of Plato, Bodin, Hobbes, and Filmer is as necessary as an understanding of classical libertarian republicanism in order to know what America's founders rejected as well as what they accepted. Those who drafted and supported the Bill of Rights followed the libertarian tradition of Aristotle, Cicero, and Sidney, and they rejected the authoritarian, if not totalitarian, tradition of Plato, Caesar, and Filmer. These two basic approaches in political philosophy have consistently enunciated opposing approaches to the question of people and arms, with the authoritarians rejecting the idea of an armed populace in favor of a helpless and obedient populace and the libertarian republicans accepting the armed populace and limiting the government by the consent of that armed populace." (p. 8).

The issue of what business, if any, the ordinary citizen has with arms antedates the American frontier experience by two thousand years. Aristotle and Plato disagreed about it. Plato thought that private ownership of arms should not be permitted because armed citizens would be in a position to protect their own interests against the interests of despotism. Aristotle agreed that an armed citizenry was an obstacle to despotism but favored it for that reason. In fact, Aristotle thought that bearing arms was a mark of those who possessed full membership in the political community.<sup>12</sup> "The whole constitutional setup is intended to be neither democracy nor oligarchy but mid-way between the two-what is sometimes called 'polity,' the members of which are those who bear arms."<sup>13</sup> Aristotle objected to giving one social class a monopoly on arms bearing, "Hippodamus planned a city with a population of ten thousand, divided into three parts, one of skilled workers, one of agriculturalists, and a third to bear arms and secure defense, . . . [which is objectionable because] . . . the farmers have no arms, the workers have neither land nor arms; this makes them virtually the servants of those who do possess arms. In

these circumstances the equal sharing of offices and honours becomes an impossibility."<sup>14</sup>

Aristotle thought that a citizenry which possessed its own arms deterred foreign invasion, deterred domestic tyranny, and could wage effective personal defense against criminal threats to life. This latter idea conveys the thought that the individual adult citizen bears primary responsibility for defending his life against immediate deadly threats to it; an idea transmitted through the common law and embedded in our legal system. Theorists of republican Rome and their authoritarian opponents also disagreed about the desirability of popular ownership of arms. Cicero articulated an enduring strand of republican thinking when he argued that a law-abiding citizen, when armed, was in a position to enforce the natural law:

And indeed, gentlemen, there exists a law. not written down anywhere but inborn in our hearts; a law which comes to us not by training or custom or reading but by derivation and absorption and adoption from nature itself; . . . I refer to the law which lays it down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right. When weapons reduce them to silence, the laws no longer expect one to await their pronouncements. For people who decide to wait for these will have to wait for justice, too--and meanwhile they must suffer injustice first. Indeed, even the wisdom of the law itself by a sort of tacit implication, permits self-defense, because it does not actually forbid men to kill; what it does, instead, is to forbid the bearing of a weapon with the intention to kill. When, therefore, an inquiry passes beyond the mere question of the weapon and starts to consider the motive. A man who has used arms in self-defense is not regarded as having carried them with a homicidal aim.<sup>15</sup>

In England, popular ownership of arms was never questioned until Charles II created a "new militia" (in effect, the beginnings of a standing army) and in 1670, got Parliament to pass a law authorizing confiscation of most privately owned weapons. James II increased the size of the standing army and continued to disarm commoners, especially Protestants. The English Bill of Rights must be understood against this background. Thus, Halbrook notes that, of the 13 articles in the English Bill of Rights, 11 imposed duties and disabilities upon the crown while only two secured specific liberties to the subject: the right to address petitions to the king; the right of Protestants to carry arms for their own defense.

This historical excursion is apposite because the statesman of our revolutionary period knew about the long-standing debate over popular ownership of arms; they were self-conscious heirs to the republican position in it. They were familiar with oppression by standing armies and attempts by the Crown to disarm the people. They also regarded themselves as perpetuators of the Glorious Revolution, as bearers of those rights secured to all Englishmen by the Bill of Rights. Thus Garry Wilis reminds us that, "The question of basic rights, obscure to their descendants, seemed clear to men, who felt themselves the heirs of the Revolution, of the glory derived from 1688. Americans of the 1770s felt they were approaching a 'centennial' of their own, reliving memories of the English Bill of Rights."<sup>16</sup>

To men like Thomas Jefferson, popular ownership of arms was a distinctive republican

(and personal) virtue, Consider Thomas Jefferson's advice to his nephew, Peter Carr:

A strong body makes the mind strong. As to the species of exercise, I advise the gun. While this gives a moderate exercise to the body, it gives boldness, enterprize and independence 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. Never think of taking a book with you.<sup>17</sup>

Or as he writes to George Washington: "One loves to possess arms."<sup>18</sup> These sentiments express another strand in republican thinking; arms possession and republican virtues are causally linked. The paragon of civic virtue, the bulwark of republican society, was the citizen warrior, an ideal first lionized by Machiavelli, but more importantly, fully appropriated by the republican political tradition. Writing in the 1770s, a libertarian writer much admired by American republican thinkers, James Burgh, decried the decadence of English society. Having been

seduced by luxury and commerce, Englishmen had surrendered their arms.

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, who 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."<sup>19</sup>

When armies are paid by tax money, tax money will be collected by armies; the death of English liberty was inevitable, or so thought Burgh. Clearly the Federalists did not intend this to happen in America. Consider The Federalist No. 46 in which James Madison derides European despots for being "afraid to trust the people with arms," He goes on to argue that under the new constitution the people need not fear their government because they will remain secure in "the advantage of being armed, which Americans possess over the people of almost every other nation . . . "

Needless to say, Jefferson's belief that gun carrying inculcates desirable character traits contrasts sharply with the contemporary thought that carrying guns makes people violence-prone and irresponsible. Of course Jefferson may have been wrong. But the contrast in sentiment between Jefferson and the current conventional wisdom is marked. More to the point, the connection between good character, good citizenship and arms which these Framers make is self-consciously drawn from long-standing republican traditions.

A history which explains the American experience with guns solely by reference to the old frontier is afflicted with selective amnesia, a condition worse than total amnesia. Because they do not remember anything, total amnesiacs cannot be deceived by their memories. Perhaps many Americans would now reject those theories of republican virtue which enjoyed the allegiance of the Framers. But if this done, it should be done informedly and not ignorantly.

Halbrook has done a valuable service merely in digging out an amazing collection of quotations from the Greeks onward, pro and con, on the effects and desirability of an armed citizenry. Opponents of private ownership of firearms may not like the authoritarian philosophical forbears of their position, so they should be grateful to Halbrook for providing them the texts and opportunity for arguing that the republican political philosophers whose company they would rather keep were right to favor popular government but were wrong to link popular ownership of arms to it.

Yet the historical chapters of Halbrook's book while instructive deserve criticism because of their tendency to view the historical record with tunnel vision. Halbrook tends to see the complex struggle for political freedom as essentially a class struggle over popular possession of arms. Halbrook is surely right to point out that there has been a dearth of attention paid to historical debates which have seen so much riding on whether the common people shall have arms. But the ideas of rule of law (rather than of men), of due process, of jury trial by peers, of natural rights to life, and liberty, of constitutionally limited government, and of the common welfare are important elements in freedom's story too.

Similarly, in his determination to establish that the founding fathers meant to constitutionally protect "the right of the people to keep and bear Arms," Halbrook neglects to give any place to the clause which precedes his main object of interest viz., the cause which reads "A well regulated Militia, being necessary to the security of a free state . . . What relation does this clause have to the right of the people to keep and bear arms? Does it subordinate the right totally to the collective interest in maintaining a free state (where by "free state" is meant a state free from subservience to foreign powers and from domestic tyranny as well)? Nor does the Second Amendment mention one compelling political end for which an armed people is a necessary condition, leaving it open that there are many permissible, but comparatively less urgent, ends which the right to keep and bear arms serves? On logical grounds, there is no reason to infer the former. It would be a fallacy to infer from the conditional: "If a state would remain free, then the people must be armed, that the only desirable end for which an armed people is a necessary condition is the maintenance of a free state. If the militia clause totally restricts the right to keep and bear arms, it must be on the basis of an historical argument that is what the Framers intended and not because the logic of the Constitutional language requires such an interpretation.

It is entirely reasonable to think that the farmers had at least two related concerns in mind when the Second Amendment was written. One having to do with the communitarian interest in maintaining a free state by means of a well-regulated militia (rather than a standing army) and the other having to do with the republican idea that arms bearing is a mark of full citizenship.

Joyce Malcolm, in her chapter "The Right of the People to Keep and Bear Arms," argues persuasively that these aims were not really distinct in the republican tradition with which the Framers identified. In theory, the political ideal was the citizen warrior who possessed his own arms and stood every ready to defend his state against foreign aggression and to defend his community against felonious persons. In practice, it was a longstanding tradition in England that every able bodied own arms, be proficient in their use. Armed citizens were required to be available to assist in the pursuit and apprehension of criminals. Thus arms bearing was not so much a right of Englishmen, but was rather a duty owed to fellow citizens and to the Crown. Over time, there came to be an interest in asserting a right to arms because Kings with tyrannical impulses viewed an armed citizenry as an obstacle to their desires. As Kings showed an interest in disarming law-abiding citizens, partisans for republican interests came to assert a right of the people to keep and bear arms. This proviso does not invalidate Halbrook's argument for an individual right to keep and to bear arms, on the contrary, it is consistent with Halbrook's view. However, as Halbrook tells it, the Framers had an unclouded, non-contentious view of their republican heritage, knew precisely what they wanted to do in writing the Second Amendment, and chose just exactly the words which would do that task, that task being to articulate an individual right against the federal government to keep and bear arms. One may reasonably doubt that any collection of persons, even the near-sainted Framers, could be characterized accurately in this way.

Although a reviewer should not complain that an author did not write precisely the book the reviewer would like to have read, it would have been good had Halbrook critically discussed the idea that, in extremis, each adult person properly bears the burden of defending

his or her own life and may use any reasonable means to do so. This idea provokes many of our contemporaries who think that the state through its police bear this burden. To their dismay, courts have consistently held that there is no individual right against the police to be rescued from violent attack. The duty of the police is owed to the community as a whole. A citizen who is harmed because the police fail to answer her pleas for rescue has no claim against her public servants.<sup>20</sup>

Halbrook's book severely challenges two major tenets of the gun myth, viz., that there is no historical basis for thinking that the Second Amendment confers an individual right to keep and bear arms; that the Supreme Court has never interpreted the Constitution in a manner congenial to an individual rights interpretation. Halbrook meticulously analyzes the relevant decided cases and persuasively argues that they are consistent with an individual right interpretation of the Second Amendment. Why merely "consistent with" rather than outright "affirming" such a right? For the simple reason that the Supreme Court has never decided a case in which the specific issue of an individual versus a collective right to arms was central "To date, then, the Supreme Court has never held or even suggested that the Second Amendment guarantees merely a "collective" right for members of the National Guard to have governmentally owned arms while on duty . . . [on the contrary] The Court's language clearly implies that it considers possession of a firearms in the hand of a law-abiding citizen as a "fundamental" right." Probably soon, the Court will find it necessary to rule whether the Second Amendment guarantees an individual right to keep and bear arms and to what extent the states may regulate this right consistent with the Fourteenth Amendment, Halbrook's book is a powerful brief toward this end.

Together with Joyce Malcolm's chapter "The Right of the People to Keep and Bear Arms," in *Firearms and Violence*, Robert Shalhope's "The Ideological Origins of the Second Amendment,"<sup>21</sup> and Don Kates' "Handgun Prohibition and the Original Meaning of the Second Amendment,"<sup>22</sup> Halbrook's *That Every Man Be Armed* is the beginning of wisdom for anyone who seeks genuine understanding of the origins of the American relationship with guns. Perhaps that relationship should be changed but debate about it should reflect an accurate understanding of what that relationship was and how it came about.

Civil Libertarians too will find fascinating material in Halbrook's book. Halbrook shows that firearms legislation adopted in many southern states after the Civil War should be viewed as a piece with the "Black Codes" both were motivated by a desire to deny blacks their Constitutional rights. This historical argument has important bearing on interpretational controversies over the Fourteenth Amendment, viz., whether it fully incorporates the first eight amendments against the states. Halbrook adopts the "full incorporation thesis" and argues that no one can seriously maintain otherwise:

[R]ather than predicating the right to keep and bear arms on the needs or existence of an organized militia, the framers of the Fourteenth Amendment and of the civil rights acts of Reconstruction based it on the right of the people individually to possess arms for protection against any oppressive force: including racist or political violence by the militia itself or by other state agents, such as sheriffs." (p. 153).

But, Halbrook's reading of the record notwithstanding, others have seriously maintained that the "full incorporation thesis" is false.<sup>23</sup> The Supreme Court has never ruled on the "incorporation controversy" as such and, given the sweep of the thesis, likely will not do so. The Court may someday address the more limited question whether the Fourteenth Amendment incorporates the Second. Should it take occasion to do that, all of the justices would feel the persuasive power of Halbrook's argument because they all subscribe to the principle that the Constitution should be construed as those who framed the words intended. However, no justice holds this as the sole principle of constitutional interpretation. All the justices now on the Court, while subscribing to the "original meaning" principle, supplement it with, and, depending upon the case, trade it off against the requirements of at least one additional principle which might be called the "contemporary circumstances and needs" principle. How these might be balanced off against each other in particular cases notoriously provides the occasion for much spilt ink.

### **More Guns, More Gun Violence**

Good slogans are easy to remember. That's part of what makes them good. Good slogans threaten to drive out good thinking because they bid to take its place. Untangling casual relationships in society is taxing work. Those who do it best know that careful investigation rarely supports sweeping, easy-to-remember assertions. This is not happy news for people who are anxious to undertake ambitious policy initiatives to eliminate social evil. Often, good slogans are better suited to this interest than good thinking. The relation between guns and violence is a case in point.

There is a tendency to think that "More guns, more gun violence" expresses common sense. Consider the following:

1. No guns, no gun violence.
2. More guns, more gun violence.
3. Fewer guns, less gun violence.

For a careless thinker, the second and third may seem to follow logically from the obvious truth of the first. The careless thinker should think again. The first expresses a tautology and is, therefore, empirically empty. The second and third suggest a direct, causal, empirically verifiable relationship between guns and violence. The second and third are logically independent from the first, not corollaries of it. If the second and third express truths, it is because of causal relations that exist in the world, not because they follow logically from a tautology.

What empirical relation, if any, holds between increases in firearms ownership and crime rates? If it were true that everybody is violence-prone or that guns make people violent, then it would make sense to think that more guns would lead to more violence. This is valid reasoning. The conclusion, "more guns, more gun violence," follows if the premises are true. But the premises are not obviously true. If not everyone is violence-prone or if guns do not make people violent, in short if the violence prone constitute an identifiable sub-population, and if

the massive majority of gun owners never commit a violent act, then marginal additions to the private stock of guns forebodes evil just in case the armament of that violence-prone subpopulation increases and nothing reduces incentives to criminal use. England and Japan are commonly cited for both their low crime rates and their low rates of private arms possession. Although not argued for, the suggestion conveyed by juxtaposing these facts is clear. These countries enjoy comparatively low violent crime rates because they have been wise enough to severely restrict private possession of firearms. Carelessly juxtaposing such facts might equally well (or equally poorly) support the opposite thought. Switzerland and Israel enjoy very low crime rates. Rates of private arms possession are high. In fact, law-abiding citizens in both countries have ready access to automatic weapons. Should we infer recklessly that their low crime rates are causally linked to ready availability of guns in these societies? Or should we think that the relation between crime rates and firearms is rather more complicated?

According to the gun myth, the violence-prone are not an identifiable sub-population. The person who becomes provoked, seizes an all-too-available gun and shoots an acquaintance is indistinguishable from the rest of us, The availability of a gun catalyzes with common anger transforming an enraged citizen into an agent of death. Ordinary gun owning citizens are only a provocation away from homicide.

But in fact, very few killings are committed by persons who have no previous record of violence. Today's killer is more often than not yesterday's assaulter and batterer. That this is not more generally appreciated owes in some measure to media treatment of violence. For example, in news coverage of the Texas Tower killer, Charles Whitman, the media made much of the fact that as a youth, Whitman had been a choir boy and an Eagle Scout. They neglected to similarly highlight that he had been raised in a violent home, had repeatedly beaten his wife, and, when he was a Marine, had been courtmartialled for fighting. Violence which suddenly grabs media attention not infrequently is caused by individuals who have been violent in the past. Recent studies show that most arrested killers have police records for previous violence. Approximately 70% of homicide offenders have been previously arrested for violence and approximately half of homicide offenders have been previously convicted.<sup>24</sup>

Media treatment of violence skews popular assessments of its risks. A recent study showed that newspaper coverage seldom reflects the comparative frequencies of causes of death. Although diseases like diabetes, cancer, and heart disease kill approximately 1000 times the number of persons as homicides, newspapers run three times as many stories about homicide. This leads people to overestimate the role of violence as a cause of death. For example, people incorrectly estimated that homicide takes more lives annually than diabetes, stomach cancer, and stroke. Yet strokes alone take 10 times as many lives as homicides.<sup>25</sup>

Another fact raises a difficulty for the "more guns, more gun violence" tenet of the gun myth. The private stock of guns has expanded considerably over the past decade but the number of violent crimes has not increased with it. In fact, for some crimes, (e.g. homicide) the rate has actually declined slightly.

How many guns do private citizens own? Estimates vary widely. Some estimate the number at 160,000,000. Wright et, al. estimate the number at 120,000,000 give or take

20,000,000. They used two methods to arrive at the estimates. We have figures for domestic manufacture and for importation. We have figures from national surveys containing a firearms ownership question. Both methods, as Wright notes, are not very satisfactory. First, we do not know the rate at which firearms are removed from use. Second, we must be suspicious that the polling data are corrupted by an unwillingness of respondents to admit to owning firearms. Because of these methodological problems, Rossi admits that his estimate may be off by 20,000,000 or more. Nevertheless, the estimates, for all their inaccuracy, show that the total number of weapons in private hands has increased sharply over the past decade. Wright et. al. estimate the increase at perhaps 40 million (although they acknowledge that their estimate may be off by an order of magnitude).

But aren't the figures alarming all by themselves even allowing for inaccuracy in the estimates? What could Americans want with all those weapons? Why have they acquired so many more over the last ten years? Are they so fearful of violent crime that they are arming themselves to the teeth in preparation for a shoot out with their fellow citizens? With their government?

Not a great deal is known about what motivates people to acquire guns. Many theories are possible. Of greater interest is use. What do people do with the guns they acquire? Of the uses to which they put them, what is the rate of criminal use?

Wright et. al. investigate whether a domestic arms race is under way and to what extent it is necessary to postulate motivation of "fear and loathing" to explain the increase. The "fear and loathing" hypothesis speculates that citizens have increased their gun holdings from fear of violent crime and from loathing of those perceived as threats. However, Wright et. al. conclude that when benign factors like population increase, police acquisitions, increase in recreational use are taken into account; there is nothing left for the "fear and loathing" hypothesis to explain. They are quick to admit that this does not refute the hypothesis, only that it is unnecessary to postulate it.

### **The Popular Demand for "More Gun Control"**

For years, pollsters Gallup and Harris have reported strong popular support for more legal restrictions on firearms, especially handguns. For example, in 1938 Gallup poll revealed that 79% of the public said they favored "gun control." Most surveys since have shown similar results. However, given the vagueness of the term, as illustrated above, what should one infer from this? A more specific question was instituted by Gallup in 1959. It asks: "Would you favor or oppose a law which would require a person to obtain a police permit before he or she could buy a gun?" In 1959, 78% of Americans favored such a requirement, a pro-attitude which has fluctuated between 68% and 78% ever since. Should one conclude that Americans favor a crack down on guns? If one should conclude this, how does one explain why there has been no such crack down?

An early attempt at an explanation was provided by Hazel Erskine in 1972 in *Public Opinion Quarterly*. The "gun lobby" (spearheaded by the NRA) was the obstacle to effective action on this democratic sentiment.

The Gallup and Harris polls, as well as articles like Erskine's had an effect on the NRA and other gun groups. There was a tendency to take such data at face value and conclude that gun owners were indeed a besieged minority, that those who stood for original American values were an endangered species.

Beginning with the findings of a 1978 poll conducted by DMI (Decision Making/Information), there seemed reason to believe that popular sentiment on actually banning handguns was more closely aligned with the views of the NRA than with those of the National Coalition to Ban Handguns. This startling thesis is argued by David Bordua in a chapter in *Firearms and Violence*. Bordua shows that not only have pollsters Gallup and Harris failed to be neutral in reporting popular attitudes on guns, they actually mislead firearms prohibitionists to think that they would enjoy smashing victories if the wheeling and dealing of ordinary legislative process were abandoned in favor of the unfiltered voice of the people.

Massachusetts provided the first testing ground for this new prohibitionist strategy in 1976. A proposal to ban private ownership of handguns was placed before the electorate.

Things looked very bright for the prohibitionists. Early polls seemed to support their optimism. Gun ownership rates were comparatively low. The ban enjoyed the support of the *Boston Globe*, the *Christian Science Monitor*, the *Washington Post* and the *New York Times*. Massachusetts, in virtue of being the only state going for McGovern in 1972 had won the label "the most liberal state in the union."

The vote was not close. By a ratio of 2.25 to 1, the unfiltered voice of the electorate, which the prohibitionists sought so hard to hear, rejected the ban. A second referendum defeat, by a similar margin, came in California in 1984.

Reading elections for deep attitudes and trends is treacherous business. But elections and referenda impose upon opinion polls a point of contact with the real world. First, because such contests may reveal true preferences more clearly than polls. Second, because elections and referenda register intensity of preference in a way that polls may not. These strategic

miscalculations have left those with strong prohibitionist preferences offering expenditure-explanations for their resounding electoral defeats. Rather than discuss the expression of the popular will, prohibitionists focus upon the huge "war chests" amassed by their opponents. The electoral defeats seem to have redirected the efforts of the prohibitionists toward the courts (ironically, the least democratic part of our political process) and product liability suits.

Should one conclude that Americans are opposed to "gun control?" Pro-gun forces might like to think so. But as usual, the real story is more complicated. After meticulously analyzing all the public opinion literature concerning legal restrictions on guns, Wright et. al. argue cogently that the following inferences are justified:

\*That a large majority favors any measure involving registration or licensing of handguns, both for new purchases and for handguns presently owned.

\*That the public would not favor such measures if their costs were astronomical.

\*That a large majority believes that such measures must be uniform across state lines if they are to be effective. That there is little popular support for an outright ban on private ownership of handguns.

\*That a majority would favor a ban on the manufacture and sale of Saturday Night Specials.

\*That a large majority believe that they have a right to own guns and that the Constitution guarantees that right.

\*That a large majority feel that a licensing requirement for handguns would not violate their right to gun ownership.

\*That nearly everybody favors strict, mandatory sentences for persons using guns to commit crimes.

Wright et. al. conclude their discussion saying "so far as public opinion on such a complex issue can be summarized at all, the thrust of majority thinking on gun control seems to be that the government should be just as careful about who is allowed to own and use a firearm as it is about who is allowed to own and use automobiles or other potentially hazardous commodities." That this statement is not quite correct shows how difficult it is to summarize popular opinion about guns. We are taught early in driver's education that driving an automobile is a privilege not a right. To the extent that Americans believe this, they view guns differently. They think that they are entitled to gun ownership under the Constitution.

### **The Wonderful World of Gun Prohibition**

Wouldn't the world be a better place if guns were prohibited nonetheless? Wouldn't the passage of prohibitionist legislation express a noble vision - a society which had no place for guns? Whatever the political realities, shouldn't a rational person favor a total ban on private ownership of firearms, or at least handguns?

Don Kates, Jr., editor of *Firearms and Violence*, has done more to make our thinking on these questions rational than any other contemporary writer. In journal articles, op. ed. pieces, and books, Kates has tirelessly urged that our thinking on guns be shaped by historical understanding, by social tolerance, by an appreciation of how the civil rights of the poor and politically powerless are imperiled by prohibitions of whatever sort, and by the criminological implications of handgun bans. But above all, Kates has stood for the proposition that our thinking about guns be realistic and not utopian.

In his "Handgun Banning and the Prohibition Experience," a chapter in *Firearms and Violence*, Kates draws attention to an aspect of the gun control issue which has been largely ignored. Suppose, asks Kates, that handgun prohibitionists got their way, and a national law banning private ownership of handguns were to become law. How would such a law be enforced? Proponents of handgun prohibition have been surprisingly silent on the issue. Yet our "noble experiment" teaches that prohibiting things does not make them disappear. Kates proposes that we might gain insight into the enforceability question by examining our experience with alcohol prohibition.

This strategic proposal may strike some as a clever poisoning of the well. After all, alcohol prohibition is so widely discredited, so uniformly regarded as a total mistake, that to cast the handgun prohibitionists as modern-day counterparts to the Temperance Movement is rhetorically unfair. Not so, counters Kates, the parallels are not forced. First, the Temperance Movement, like the handgun prohibition movement, also enjoyed the support of most of those who were regarded as socially and politically "progressive." The Movement associated those who resisted them with the liquor industry. (often described as the "liquor lobby") and as such dismissed them as self-interested and reactionary. Mixing religion, high moral purpose, and an accurate perception that alcohol is an ingredient in mortality and crime, temperance advocates claimed that liquor is a major factor in sex crime, robbery, mob violence, and all varieties of homicide. Their claims were not wrong then, nor are they wrong now. Thus Kates argues,

Since the link between handguns and crime is frequently argued as justifying handgun prohibition, it may be instructive to compare the respective degrees of linkage. Over the past fifty years, handguns have been involved in up to 50% of all murders; in comparison, most studies show that up to 86% of offenders have been drinking when the murder was committed . . . Almost 41% of robberies are committed with firearms, primarily handguns; in comparison one study estimates alcohol involvement as high as 72% in robbery offenders. Firearms, primarily handguns, are used as 5% to 12% of rape perpetrators, in comparison, about 50% of rape perpetrators had been drinking before the crime.

Moreover, similar sorts of causal mechanism are adduced to explain the correlations with crime and violence. Both liquor prohibitionists and handgun prohibitionists argue that the things they oppose transform a person's motivational structure, lowering inhibitions against violence and aggression. There is in fact good evidence that liquor has the claimed effect in some people. Regarding the psychological effects of weapons possession, there is, as yet no empirical evidence.

Kates warns against loss of perspective when looking at the data concerning alcohol, guns and crime. By focusing only on criminal behavior, it may be tempting to assert a causal relationship even if there is uncertainty about the precise nature of the causal mechanism. However, when all alcohol users and all handgun owners are considered, the relationship with crime becomes insignificant. Less than 0.018% of handguns are used to murder while the proportion of heavy drinkers who murder is 0.081%. Thus if there is in fact a causal connection between alcohol and violence and handguns and violence, the mechanism is at work in a very small subpopulation. It is reasonable to suppose that prohibition would be most effective with that portion of the population already inclined to be law-abiding. What are the chances that this population would include the violence-prone subpopulation? Handgun prohibition will do no good unless those who are violence-prone are deterred by it. Similarly, liquor prohibition will do no good unless those who are prone to violence under its influence are deprived of it. If we aim at the reduction of violence by criminal handgun and alcohol abusers, we must find ways to identify them and disempower them. Efforts to do either of these things face a thicket of practical thorns plus all the obstacles imposed by a culture and legal system which cherishes individual rights, the latter especially if we propose to disempower "likely offenders" before they have been violent for the first time.

## **Conclusion**

That none of the tenets of the Gun Myth is true has not diminished their popularity. Why is this? Doubtless, a full explanation would be very complex. But part of the story must be that for many attitudes toward private possession of firearms are linked to, and to some degree follow from, attitudes regarding self-defense, attitudes regarding recreation, theories about crime, in short, follow from their cultural convictions and conceptions of the good rather than from what there may or may not be data to support. If this hypothesis is correct then for many, attitudes toward private possession of firearms may be insulated from what there is good reason to believe on the basis of the evidence. Why? Because the attitudes are not contingent upon the evidence but instead are contingent upon cultural values and a conception of the good. In our culture, beliefs about issues like abortion and guns are not treated as convictions to be held hypothetically, as based upon the best reasons, as just a set of beliefs which one could costlessly give up if the ground for them gives way. Part of one's identity as a person is constituted by beliefs about such matters. Were a person's commitment to such beliefs to flag, his or her colleagues would probably not rejoice that their friend had, on the basis of the best evidence, abandoned some false beliefs. On the contrary, they might think that she had been lost to the forces of social reaction embodied by the NRA. Imagine the reaction if Senator Kennedy were to reveal in the course of some subcommittee hearing that his position on handgun control had changed because it had rested upon beliefs which he now saw to be false and that he now was going to accept campaign contributions from the Second Amendment Foundation.

Our liberal political heritage is built upon the assumption that there are incompatible conceptions of the good life. It further holds that these incompatible conceptions of the good life may yet be fully rational for persons to pursue. If these old liberal assumptions are correct, then public affirmation of a single conception of the good life cannot be expected. If, as I

suspect, there is a very strong component of cultural conflict over the good life and virtue in the political struggle over guns, reason alone will not bring an end to it. For such conflicts, our tradition has urged tolerance and struggled to preserve maximal liberty for each consistent with like liberty for all. It has discouraged campaigns which aim to destroy the liberty which gives us pluralism.

But if reason cannot totally resolve the cultural and political struggle over guns, it can do much more for the conflict than it has to date. It is not uncommon for rational people to support sex education in the schools. They believe, quite rationally, that it is naive to think that teenagers who are more ignorant about sex will be less sexually active. They hope that greater knowledge may breed wisdom (and restraint) and fewer unwanted babies. However their reason evaporates when it is suggested that they should support gun education on the same grounds as they support sex education. People who argue cogently for sex education in school and ridicule their conservative friends for thinking that sex education teaches teenagers how to have sex, oppose gun education because they think such courses would teach their sons and daughters how to shoot people.<sup>26</sup> People who usually are jealous of civil rights, solicitous of the interests of the poor and suspicious of concentrating too much power in the hands of police, favor firearms laws which would compromise privacy if enforced, favor bans on the manufacture of cheap handguns (the only kind the poor might afford), favor a monopoly on handgun possession for the police. We are a long way from rational discussion about guns. These books have moved us a few steps closer.

## Footnotes

In 1984, the number of handgun homicides reported to the FBI was 7,277. Of this number, more than ten percent were judged justifiable. Since 1980, the number of gun murders has declined steadily from 13,650 in 1980 to 9,819 in 1984. Over the same period, total murders have declined steadily as well from 21,860 in 1980 to 16,689 in 1984. The percentage of murders committed with handguns in the period 1975-1984 has ranged from 51% in 1975 to 43% in 1982. In 1984, the most recent year for which figures are available, the percentage of murders committed with handguns was 44%. **Statistical Abstracts of the United States 1986**, p. 171.

2 Quoted in B. Bruce-Biggs. "The Great American Gun War." *The Public Interest* 45, 37-62, (1976), p. 59.

3 Quoted in J. Anderson, **Guns in American Life**, (1984) pp. 13-14.

4. M. Lernet. "Respectable Bigotry" **The American Scholar** (Autumn 1969): p. 608.

5 B. Bruce-Biggs. "The Great American Gun War." **The Public Interest** 45. (1976), pp. 37-62.

6. Where can the "Gun Myth" actually be found? cf. J. Anderson, **Guns In American Life** (1984); R. Hofstadter. "America as a Gun Culture." in *American Heritage* (October 1970); R. Hofstadter and M. Wallace, eds., **American Violence: A documentary History** (1970); E.

Hollon, **Frontier Violence: Another Look** (1974): J. Goskin, "**The Essential American Soul: Violent**" in J. Boskin, eds., **Issues In American Society** (1978); M. Harrington, "The Politics of Gun Control," in P. Whitten, ed., **Readings in Sociology: Contemporary Perspectives** (1979), Newton and Zimring, **Firearms and Violence in American Life** (1969).

7. Firearms and Violence, pp. 72-73.

8. Wright, et. al., p. 3.

9. E. M. Kennedy, "The Need for Gun Control Legislation," **Current History**, 71 (July/August 1976), 26.

10. The Senator seems not to live by the judgments he makes about the security needs of others however. Recently, his personal body guard was arrested in a Senate office building carrying two submachine guns, a pistol and 146 rounds of ammunition in six clips. A spokesman for the Senator said that "The senator's primary concern was leaving the city with adequate protection for himself and his sisters (Jean Smith and Pat Lawford), who are traveling with him." Kennedy reportedly contacted Attorney General Meese personally in an attempt to have the body guard, (whom he has employed on many occasions when traveling abroad), released and have the weapons returned. Rich and powerful individuals with prohibitionist sentiments seem not to be bothered by the inconsistency in availing themselves of the protective benefits that guns provide while urging prohibition for those less well connected and unable to afford the services of professional weapon carriers. (A Washington Post article run in the Charlotte Observer, on Wednesday, January 15, 1986, p. 9A).

11. This point is powerfully made by Joyce Malcolm. See her "The Right of the People to Keep and Bear Arms: The Common Law Tradition," in **Firearms and Violence**. Politicians in the ante-bellum South apparently agreed with Aristotle about citizenship and arms. They denied slaves and "free persons of color" the right to possess arms on the ground that they were not full members of the political community. cf. Halbrook, ch. 4.

13. Aristotle, **Politics**, p. 71.

13. Ibid.

14. Ibid., at p. 79.

15. Quoted in Halbrook at p. 21.

16. G. Wills, **Inventing America: Jefferson's Declaration of Independence**, (1978), p. 64.

17. Thomas Jefferson, **The Papers of Thomas Jefferson** ed. Julian Boyd, vol. 8 (Princeton, N.J.: Princeton University Press, 1953), p. 407.

18. **Writings of Thomas Jefferson** p. 341 (A.A. Lipscomb. ed. 1903).

19. James Burgh. **Political Disquisitions into Public Errors, Defects, and Abuses**, (3 vol., London, 1774-1775). II. 390.

20. That the police have no general duty to protect any assignable individual from violent attack is asserted in both statute and judicial decisions. For example, in two recent cases in New York, citizens sought damages from the City on the grounds that the police had failed to protect them while they were riding the subway (one plaintiff was sexually assaulted, the other robbed and knifed). Juries agreed with the argument that the plaintiffs had a right against the Police to be protected from attack and that the City was liable for damages. However, on appeal, New York's highest court overturned these trial court decisions holding that subway police "have no legal duty to protect [individual] passengers from crime." **Weiner v. Metropolitan Authority**, and **Shernov v. New York Transit Authority**, 55 N.Y. 2d 175. 948 N.Y.S. 2d 141 (1982). Washington, D.C.'s highest court had ruled similarly in 1981. Two women called "911" repeatedly to report that their house was being burglarized and that their downstairs roommate raped. Inexplicably, the police failed to respond. For fourteen hours, the women were held captive. raped, forced to perform sexual acts with each other. In rejecting their demand for damages, the court cited "the fundamental principle of American Law that a government and its agents are under no general duty to provide public services, such as police protection, to any particular citizen." **Warren v. District of Columbia**, 444, A. 2d 1 (1981).

21. R. Shalhope, "The ideological Origins of the Second Amendment," **The Journal of American History**, (December 1982), Vol. 69., No. 3., pp. 599-614.

22. D. B. Kates, Jr., "Handgun Prohibition and the Original Meaning of the Second Amendment," *Michigan Law Review*, (1983), Vol. 82, No. 2, pp. 204-273.

23. For example, see Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" *Stanford Law Review* 2 (December 1949), p. 111.

24. Kleck, Gary and David Bordua, "The Factual Foundation for Certain Key Assumptions of Gun Control." *Law & Policy Quarterly* 5: pp. 271-298 (1983).

23. Allman, "Staying Alive in the 20th Century" in **Science** 85, Vol. 6, No. 8, (October 1985), pp. 31-41 at 34.

26. State Senator H.L. Richardson of California sponsored a bill (SB 1130) which would add training in gun use and hunting to the state's high school curriculum. This bill passed the Senate. Opposition ridiculed the idea, calling it the "Go-to-school, use-a-gun" bill. cf. *San Francisco Examiner*, Sunday, June 9, 1985, Section B, page 1.

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