





# Journal on Firearms and Public Policy

## VOLUME 17

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

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

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# Evaluating Canada's 1995 Firearm Legislation

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## INTRODUCTION

In 1995 Canada amended its firearms law to require owner licences and to create a universal firearm registry. Despite costing at least C\$ 1 billion so far, the firearms program has failed to win the trust of the public or the police. This article examines the organizational problems of the firearms program and evaluates its effectiveness in improving public safety. Years after its inception, with virtually unlimited budgets, the firearms registry remains significantly incomplete and contains an unacceptably high number of errors. The most appropriate ways to evaluate public safety are general measures, such as homicide, suicide, or violent crime rates, not gun deaths or gun crime. There is no discernable impact on public safety by the firearm program. It is recommended that efforts be focused on more serious threats to public safety, such as terrorists or violent criminals, not normal citizens who own firearms.

It has been almost ten years since Canada introduced the still controversial 1995 Firearms Act. Among other changes, the law required firearm owners to obtain a licence and created a registry of long guns, i.e., rifles and shotguns. Despite promises at the time that the registry would not cost over C\$ 2 million, the Auditor General (2002) estimated that universal firearm registration would cost taxpayers at least C\$ 1 billion by 2005. This is necessarily an underestimate as the Auditor General was restricted to examining only the expenditures of the Department

of Justice. When the full scope of this sprawling program is included, specifically those of other federal departments as well as the provincial expenditures reimbursed by the Federal Government, I estimate that the full cost to the taxpayer will exceed more than C\$ 2 billion by 2005. This is 1,000 times more than was originally budgeted. Unfortunately, the actual costs remain unknown as many expenditures related to this program are still considered 'cabinet secrets'. Note that this estimate excludes prosecutorial and correctional costs, even though noncompliance is widespread.

As with most controversies, opponents and supporters seem to compete with each other in emotional hyperbole and in cherry-picking facts to support their claims. It is time for a rational assessment. The key question to ask is whether licensing and registration comprise the best possible approach to improving public safety. This is of course an exceptionally difficult question, but it must be asked. In this article, I will make a preliminary evaluation of the effectiveness of the firearm registry, assess the problems faced by Ottawa in designing and implementing the information system, and, finally, explore a few alternative approaches to a universal firearm registry. But first, a brief review of Canada's gun laws is necessary.

#### HISTORY OF FIREARMS LEGISLATION IN CANADA

Canada has long had strict firearm legislation. The criminal law is a federal responsibility, and it includes the misuse of firearms. The 1995 Firearms Act is not the first time firearms have been registered in Canada. Handguns have been registered since 1934, and long-guns were temporarily registered during World War II.<sup>2</sup> Prior to the current firearms legislation, the firearms law was extensively amended in 1977 and again in 1991.<sup>3</sup>

The basic framework for modern Canadian firearm legislation was established in 1977 as part of a Parliamentary agreement that ended the death penalty.<sup>4</sup> The 1977 legislation required a police permit for the first time in order to purchase any firearm (the Firearm Acquisition Certificate), defined three classes of firearms (restricted, non-restricted, and prohibited), introduced a requirement for safe storage of firearms, and banned certain types of firearms.

In 1991 Canada amended its firearm law in reaction to a horrific crime in the University of Montreal.<sup>5</sup> A number of semi-automatic rifles were banned as well as so-called high-capacity magazines. Stringent new requirements were added to the process of purchasing a firearm; including a firearm safety course, a mandatory 28-day waiting period, two character references, one of which must be from the applicant's spouse, a passport-type photograph, and a long series of personal questions. In addition, specific regulations were introduced covering safe storage, handling, and transportation of firearms.

In 1995, the government of Canada again amended the firearms laws. This legislation made extensive changes to the previous firearms law; including: (1) introducing owner licensing, (2) requiring the registration of all rifles and shotguns, and (3) banning more than half of all currently registered firearms. The provisions for licensing owners and registering long guns were phased in between January 1, 1998 and July 1, 2003.

The 1995 Firearms Act was passed by the Liberal Party as a way to appeal to feminists and met stiff opposition in Parliament.<sup>6</sup> Three of the four opposition parties (Reform, Progressive Conservatives, and New Democrats) despite their mutual antipathy were united against Bill C-68. Several provincial governments actively opposed the legislation. Almost all provinces (including Ontario, the largest province in Canada) backed a constitutional challenge to the legislation. When the appeal was finally rejected by the Supreme Court of Canada in 2000, eight of ten provinces declined to cooperate with the Federal Government in enforcing the new law.<sup>7</sup>

#### ORGANIZATIONAL PROBLEMS

It is not an easy task to create a large information database<sup>8</sup>. Creating and managing the firearms registry posed particularly challenging problems that were underestimated by the Canadian Government. The Department of Justice failed to develop a clear understanding of the project's scope and to plan for the level of inter-governmental and inter-agency cooperation that would be needed. Apparently, no one in the Department of Justice had experience with designing and implementing an information technology project of this size or scope. Another reason is that firearms are uniquely complex, and this complexity

is reflected in the different agencies' widely differing information needs.

Perhaps the best example of mismanagement is the department's failure to understand that the standards for data quality varied across the agencies involved, and this created virtually insurmountable obstacles to the development of an accurate and common database. Freedom-of-Information requests have revealed that the Royal Canadian Mounted Police (RCMP) continue to have serious doubts about the validity and usefulness of the information the database contains.<sup>9</sup>

The originally modest information technology project grew rapidly in the face of numerous demands for change. Five years after the contract for the project was awarded, the development team had dealt with more than 2,000 orders for changes to the original licensing and registration forms or to the approval processes. Many of these changes required significant additional programming rewrites. As the public learned about its problems, the quixotic nature of the firearms registry was revealed.<sup>10</sup>

The cost-overruns were caused by the failure of the Government to anticipate the complexities of creating and maintaining the firearm registry. The Canadian Government was aware of the New Zealand government decision to abandon a firearm registry, but these warnings were ignored. Unwilling to admit its failure, the government resorted to financing the ever-growing project through supplementary estimates that avoided reporting requirements.<sup>11</sup>

The problems in the Department of Justice became public when, Auditor General Sheila Fraser (2002) released a scathing report: "This is certainly the largest cost overrun we've ever seen in this office", she said.<sup>12</sup> The Auditor General also complained that the registry audit was the first time her office had had to discontinue an audit because the Government prevented the Auditor from obtaining the necessary information.

The Auditor General was reported as being appalled not only at the "astronomical cost overruns" but also by the flaws in the system that made it impossible for her to know the real costs.

The Auditor General's damning report did not include the costs of the other governmental agencies that were working with the Department of Justice to implement licensing and firearm registration. Member of Parliament (MP) Garry Breitkreuz (Saskatchewan) estimated that together these cooperating

agencies have spent almost as much as Justice on registration, and he has shown that if all these costs are considered, the total will top two billion dollars by 2005.<sup>13</sup>

Sheila Fraser saved her strongest criticism for the way the Government deliberately misled parliament: “The issue here is not gun control. And it's not even astronomical cost overruns, although those are serious. What's really inexcusable is that Parliament was in the dark.” The government knew about the mismanagement problems in the firearm registry years ago, but stonewalled questions from MPs such as Breitzkreuz whose requests for financial information were repeatedly refused on the grounds of ‘cabinet secrecy’.

Despite the independent assessment, solutions remain elusive. In February 2003, Martin Cauchon, then Minister of Justice, relocated the registry in the Ministry of the Solicitor General along with the RCMP. The term ‘registry’ will be used as shorthand to refer to owner licensing and firearm registration together.

Early in 2004, when Paul Martin became Prime Minister, the firearm program got another Minister. Because of heightened concerns about budgetary concerns, the firearms program is in an awkward position with regard to managing the firearm registry. Tight budgetary restrictions have led to complaints that the program has reduced the quality of service. Long waits are normal, and errors frequent. Nevertheless, the registry is ineffective in tracking stolen firearms, due to duplicate serial numbers and inadequate descriptive information.<sup>14</sup> The failures reflect the inherent difficulty of the task.

Budgetary restrictions also compromise data quality. Unfortunately, one of the cost-cutting decisions was to reduce efforts to verify descriptive information submitted about firearms. Many applicants for firearm permits appear not to have been as thoroughly screened as the government claims. The screening is so poor at the firearms registry that one imaginative Canadian even managed to register a soldering gun without the officials in Ottawa knowing that it was not a ‘firearm’ under the Canadian criminal code.<sup>15</sup> This example not only illustrates the level of screening given the firearm registry, but it also demonstrates contempt. Few now take seriously claims that the registry has any real use.

The 2004-2005 budget eliminated funding for firearms safety

programs altogether, even though it maintained the public relations budget.<sup>16</sup> Despite the huge expenditures, the firearms registry is plagued with errors. Millions of entries are incomplete or incorrect. Fraser (2002) also reported that the RCMP in 2002 announced that it did not trust the information in the registry.<sup>17</sup> As the New Zealand Police discovered decades ago, it is exceptionally difficult to maintain a firearm registry.<sup>18</sup> If police are to trust using the registry to protect police lives, to enforce court orders, or to testify in court, the data contained in the registry must be both accurate and complete. An inaccurate registry becomes a self-defeating exercise and cannot be useful in aiding the police protect the public.

The principle of the registry demands an exceptionally high level of accuracy to guarantee to the police officer knocking on a door that the information s/he has is correct about the number and nature of the firearms owned in the residence. If any percentage of the firearms remain unregistered, it is very likely that the firearms in the hands of the most violent criminals are not registered. If so, police officers cannot trust the information that there are no firearms in a residence. Failure to register a firearm does not mean no firearm exists. Or, if there is only one firearm registered, the officer cannot infer there are no other firearms. In any case, the Canadian registry does not keep track of where the firearm is stored. Practically speaking, the police officer must assume a firearm might be available when s/he knocks on a door, whatever is reported in the registry. Trusting the information in the registry could get police officers killed. Despite its current cost of over one billion dollars, the firearms registry is not useful to the police.<sup>19</sup>

In summary: there have been numerous action plans, four Ministers in charge of the firearms program, and thousands of changes made to the computer system. This is not a recipe for effectiveness or efficiency. Additionally, a registry that only includes a portion of the gun inventory is a guarantee that it only has those firearms that are the least likely to be used in crime.

## COOPERATION

It is difficult to know the level of nonparticipation because there is no agreed number of firearm owners in Canada, nor are there accurate counts of the number of firearms in private

hands. As of November 11, 2004, the Canada Firearms Centre (CFC) claims there are almost 2 million firearm licences, and that almost 7 million firearms have been registered. As of July 1, 2004, there were 406,834 holders of long gun possession licences who had failed to register any long guns, and in addition there are a further 316,837 handgun owners who have failed to re-register or dispose of their handguns.<sup>20</sup>

However, the estimates of the number of firearm owners in 2001 range from the CFC's estimate of 2.2 million to the National Firearm Association's estimate of 7 million. Estimates of non-participation in the registry range from 10% to over 70%. In 2001, the best estimate was that there were 4.5 million firearms owners.<sup>21</sup> If this is correct, then about half of all firearms owners (45%) have a valid firearm licence. However, there is good reason to believe the number of lawful firearm owners has declined since 2001. Thus, the participation rate could be somewhat higher than these figures suggest.

The number of firearm owners may in fact be shrinking since the surveys were conducted in 2001. A failure to continue with the shooting sports bodes ill for wildlife conservation in Canada, as hunters are the mainstay of provincial budgets for wildlife management. The implications are very substantial. Hunters are the driving force behind conservation in North America. Licence fees paid by Canadian hunters total almost \$70 million per year.<sup>22</sup> Canadian hunters also voluntarily contribute over \$33 million annually for habitat protection and conservation projects.<sup>23</sup> In addition, the Canadian Wildlife Service reports that hunters spend almost half (\$2.7 billion) of the \$5.6 billion the Canadian public spends on wildlife-related activities each year.<sup>24</sup>

Estimates of participation rates among Aboriginal Canadians is even lower – less than 25% of residents of First Nation communities are estimated to have complied with the firearms act<sup>25</sup>. One band in B.C. has even decided, in defiance of Ottawa, to issue its own firearm licences.<sup>26</sup>

Estimates of the actual gun supply range from 7.7 million (the government's preferred number) to over 25 million rifles and shotguns in Canada, plus an unknown number of air guns.<sup>27</sup> It is estimated that there were between 12 and 13 million firearms in private hands in Canada.<sup>28</sup>

Thus, the best estimate is that approximately half (56 %) of the private firearm stock is registered. However, this figure, by

the nature of its derivation, introduces a further complication. Obviously, since this is based upon telephone surveys, it excludes any weapons in the hands of criminals, as criminals are extremely unlikely to be contacted, or if contacted, to respond honestly in surveys.

In summary, it is difficult to know the level of nonparticipation among Canadians because there is no agreed number of firearm owners in Canada, nor are there accurate counts of the number of firearms in private hands. There are at least 900,000 firearm owners who do not have a firearm licence, but there may be up to 2.5 million firearm owners who do not. Surveys show that the number of firearm owners has been decreasing since 1995, so the best estimate is approximately half of firearm owners have licences and about half of all firearms are registered.

#### EVALUATION

Evaluating the 1995 Canadian gun control law means assessing its effectiveness in improving public safety. The Canadian government has repeatedly stated that the primary goal of this legislation is to “improve public safety.<sup>29</sup>”

TABLE 1. GUN CRIME IN CANADA, 2003

	Number	Percentage
Illegal possession of a weapon	10,037	47%
Other offensive weapons charges	4,510	21%
Robbery involving a firearm	3,877	18%
Firearm usage	2,256	11%
Homicide involving a firearm	161	1%
Discharge firearm with intent	223	1%
Trafficking	137	1%
Total crimes involving firearms	21,201	100%

Source: Table 2.3. Police reported incidents, 2003, Canadian Crime Statistics, 2003, Cat no 85-205-XIE; Table 7, “Homicide in Canada, 2003,” Juristat, Vol 24, No 8; Wallace, Marnie, “Crime Statistics in Canada, 2003,” Juristat, Vol 24, No 6.

The most appropriate ways to evaluate improvements in public safety are general measures, e.g., the trend in violent crime or total homicide, not just gun crime.<sup>30</sup> There are several reasons for this. First, not all gun crime involves violence. A significant portion (47%) of gun crime consists of permit violations. Thus, trends in gun crime may reflect nothing more than changing levels of bureaucratic activity. This point becomes especially important at a time when legislative changes produce new and more complex licensing and registration requirements that result in more kinds of offences.

TABLE 2. GUN VIOLENCE AND VIOLENT CRIME

	Violent crime involving firearms	Homicide involving firearms	Robbery involving firearms
Australia (2001)	1%	14%	6%
England and Wales (2001)	1%	9%	4%
Canada (2003)	2%	31%	14%

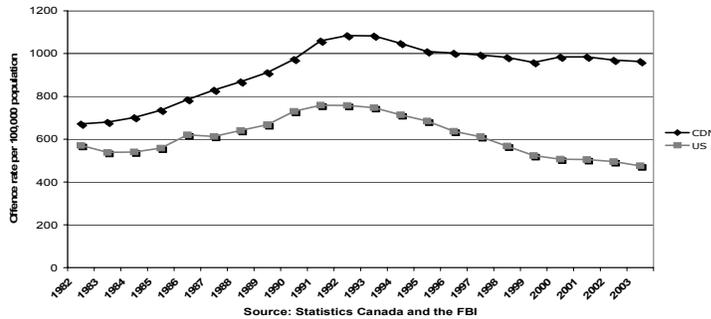
Sources: Sources: Canada, Kwing Hung (March 2004) Firearm Statistics, Updated Tables, Department of Justice; Wallace, Marnie (2003) "Crime Statistics in Canada, 2003," Juristat, Vol 24, No 6; Mouzos, J. (1999) Firearm Related Violence: The Impact of the Nationwide Agreement on Firearms, Trends and Issues 151, Australia Institute of Criminology; Mouzos, J. (2003) Homicide in Australia 2001-2002, Research and Public Policy Issues 46, Australia Institute of Criminology; Reuter, P. and Mouzos, J. (2002) "Australia: A Massive Buyback of Low-Risk Guns," paper presented at the American Society of Criminology, Chicago; England and Wales, Home Office (2001) Criminal Statistics, England and Wales (2000), Norwich, England.

Second, gun violence is a very small percentage of violent crime, typically under 5%. While gun misuse is important, the more important goal is to reduce the overall level of criminal violence.

Figure 1 shows that, after a slight decline in the early 1990s, violent crime rates have remained steady ever since. There is no discernible impact from the firearms program. General legislation focused on normal people who own firearms does not result in reducing death or violence. Apparently, firearm restrictions simply motivate criminals to substitute other weapons to commit violent crimes. In fact, violent crime is

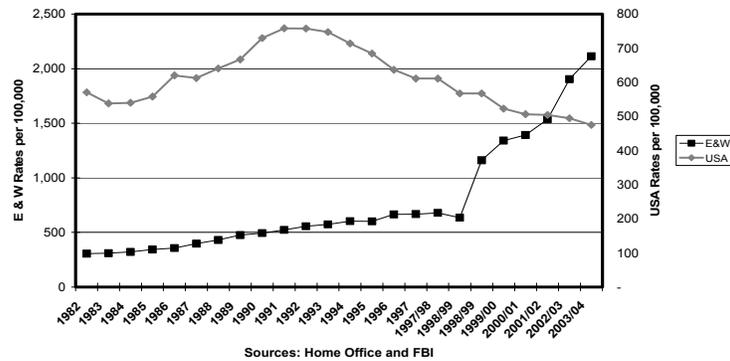
falling faster in the United States than in Canada. It is particularly important to note that violent crime has increased in several countries where very large sums have been spent on regulating firearms, such as Great Britain and Australia<sup>31</sup>.

**Fig. 1. Violent Crime Rates in Canada and USA**



Allan Rock, the Justice Minister who was responsible for introducing the Canadian firearm legislation, claimed that the reason for the gun registry was to save lives<sup>32</sup>. This criterion is also implied in the 2003 Report of the Commissioner, which stated that the Canadian Firearms Centre will work primarily to increase public safety by “helping reduce death, injury and threat from firearms through responsible ownership, use and storage of firearms.”<sup>33</sup>

**Fig. 2. Violent Crime Rates in England and Wales and USA**



**Fig. 3. Violent Crime Rates in Australia and USA**

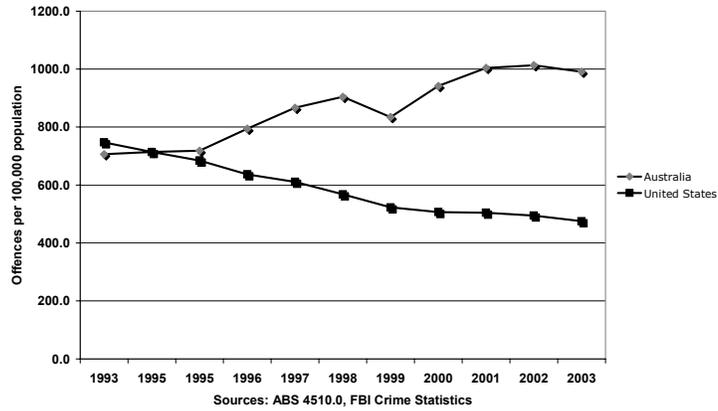


TABLE 3. HOMICIDE IN AUSTRALIA

	1996	1997	1998	1999	2000	2001	2002	2003
Homicide Rate	1.7	1.7	1.8	1.8	1.6	1.9	1.6	1.6
% Firearm	33.5	25.3	16.7	14.4	18.8	12.6	13.2	12.6

Sources: Mouzos, Jenny and Catherine Rushford, Firearms Related Deaths in Australia, 1991 - 2001, AIC Trends and Issues # 269, Nov 2003. Australian Bureau of Statistics, Recorded Crime, 1993-2001, May 2001, #4510.0; plus ABS updates in Recorded Crime, 2002, 2003, #4510.0.

TABLE 4. ARMED ROBBERY IN AUSTRALIA

	1996	1997	1998	1999	2000	2002	2003
Armed Robbery Rate	6256	9054	10850	9452	9474	7817	7162
% Firearm	25.3	24.1	17.6	15.2	14.0	14.9	15.5

Sources: Australian Bureau of Statistics, RECORDED CRIME, 1993-2001, May 2001, #4510.0; plus ABS updates in Recorded Crime, 2002, 2003, #4510.0.

While it may seem reasonable for the Canadian Firearms Centre to focus on reducing deaths involving firearms, it is misleading and untrue to claim that gun death *per se* is central to public safety. As can be seen in the table, gun deaths are primarily suicides.

TABLE 5. CANADIAN GUN DEATHS

	Homicide	Suicide	Total
1991	271	1108	1379
1995	176	916	1092
1998	151	818	969
2001	171	651	822

Source: Kwing Hung, "Firearm Statistics, Updated Tables," Research and Statistics Division, Department of Justice, March 2004.

The category, gun death, is a mixture of violent ways to die, linked, as the name suggests, only by the tool used for killing the individual. Thus, to the extent that restrictions on firearm availability are effective, people may find and use other tools. Unfortunately, alternative means of committing murder or suicide are all too readily available.

TABLE 6. CANADIAN SUICIDE TRENDS

	Firearms Suicides	Hanging Suicides	Total Suicides
1991	1110	1034	3593
1995	916	1382	3968
1998	818	1434	3698
2001	651	1509	3688

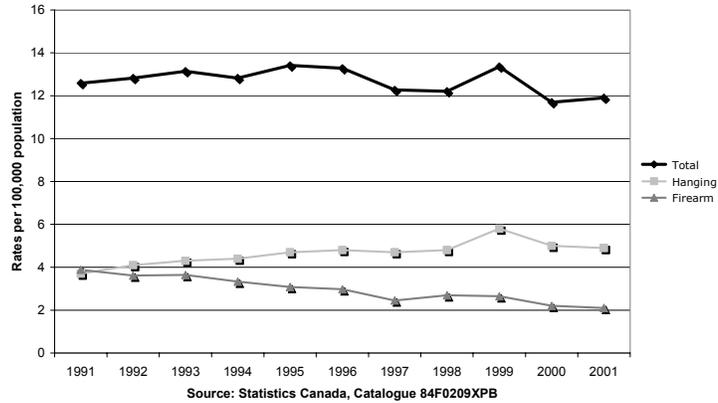
Source: Kwing Hung, "Firearm Statistics, Updated Tables," Research and Statistics Division, Department of Justice, March 2004.

In evaluating public safety, we need to avoid being misled by overly simple concepts like gun death. This concept is too heterogeneous to be useful in guiding policy. To avoid confusion, we need to consider the components of gun death separately or else we end up considering an irrelevance and calling it germane. First, consider suicide. Unfortunately, while

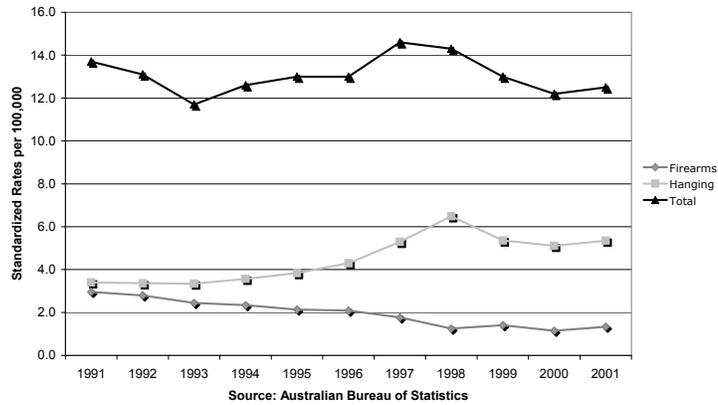
gun suicides have declined since 1995, it is illogical to credit the firearms program with saving any lives. See Figures 4 and 5.

While it is true that fewer people have used firearms to commit suicide since 1995, it is also true that there has been an almost identical increase in suicide by hanging and other means. Similar trends can be seen in Australia where the firearms laws of 1996 have not had any discernible impact. It is impossible to claim that the gun law has saved any lives by reducing suicide rates.

**Fig. 4. Canadian Suicide Rates**



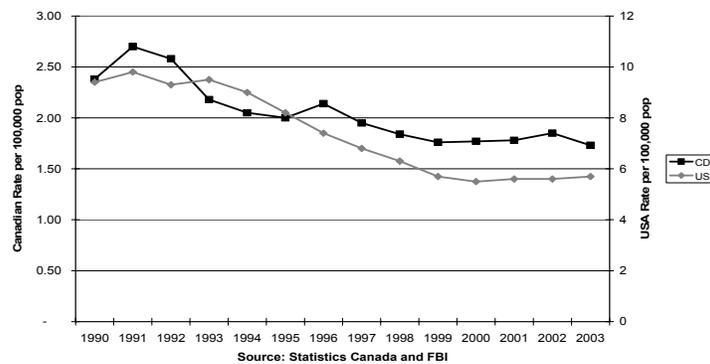
**Fig. 5. Suicide Rates in Australia**



The second largest category of gun deaths is homicide. As

with suicide, we can see that deaths involving firearms have declined also in the past decade. Also, unlike suicide, the homicide rate has fallen appreciably. This decline has led some to claim that the firearms program has been successful. Unfortunately, upon closer scrutiny, this argument appears implausible. The first clue is that, as with suicide, the downward trend began well before the 1995 law was operational. It took three years for the regulations to be drafted so the law could be put into effect. Firearm owners were not required to get licences until 2001, and, as observed earlier, firearm registration did not begin until 1998, and all firearms were not required to be registered until 2003. Second, the homicide rate is declining faster in the United States – where there is no firearm registry – than they are in Canada. Again, it does not appear logical to credit the decline in homicide rate to the firearms program.

**Fig. 6. Homicide Rates In Canada and USA**

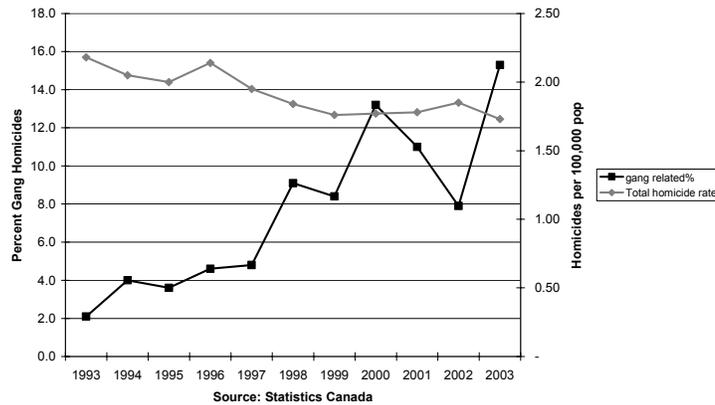


Third, a closer analysis of the homicide data does not show much support for a link between the declines in firearm homicides and total homicides. The percentage of homicides involving firearms has remained fairly constant for the past decade. It was 31% in 1993, and 29% in 2003<sup>34</sup>. Moreover, while the number of family homicides appears to be declining, the proportion involving firearms has remained surprisingly constant, at around 24%<sup>35</sup>.

In contrast, the number of homicides that are related to gang activity is increasing. These typically involve handguns. Although, handguns have been registered since the 1930s, this

has not acted to reduce the criminal misuse of firearms.

**Fig. 7. Gang Related Homicides In Canada**



CONCLUSION

The 1995 Firearms act was never justifiable on policy grounds, as it was entirely partisan. Ten years after passage, it can now be shown to have failed to improve public safety or to save lives. As New Zealand discovered decades ago, a firearms registry is not worth the effort, as such a data base is exceptionally difficult to maintain, outrageously expensive, and any benefits are all but impossible to demonstrate.

Ten years after the legislation was passed, the firearms registry has failed to win the trust of the public or the police. It is difficult to assess the percentage of firearms owners who are participating, but between 900,000 and 2.5 million gun owners have failed to get a licence or register a firearm. Despite its limitations, or possibly because of them, the legislation may have contributed to the decline in the number of people who own firearms and who hunt. While the drop in firearm owners may contribute to the drop in firearm deaths, this has not caused any reduction in homicide or suicide rates. Unfortunately, the decline in firearm owners has hurt the economy of rural Canada and harmed conservation efforts. These effects are simply never considered in relation to gun legislation, yet, paradoxically, they are more relevant than the ones which are usually considered, and through which officials continue to wish vainly for a drop in

criminal violence.

Ten years later, the firearms registry is incomplete and replete with errors. It is difficult to imagine that it could be more successful given another ten years. From the evidence, the registry has not been able to demonstrate any successes in reducing homicide, suicide or violent crime rates despite having, in effect, no budgetary limitations. Therefore, it is highly unlikely that the firearm registry will be able to demonstrate greater success in improving public safety in the current political climate where it is being called to account for its fiscal excesses.

It is time to return to the key question, asked in the introduction, whether the focus on licensing and registration is the best possible approach to improve public safety. One might argue that there are more cost-effective steps that could be taken in a bid to do so:

Increase prison sentences for criminals who have been convicted of violent crimes. Reconsider early release programs. Build more prisons.

Increase court budgets to reduce waiting time for trials.

Improve screening procedures at immigration in order to identify people who have records of violent crime.

Improve deportation efforts so we can ensure that immigrants already in the country who have records of violent crime actually leave the country<sup>36</sup>.

The firearms registry is not able to demonstrate its effectiveness at improving public safety. Nevertheless, the government maintains that its goal in this very expensive program remains public safety. One could speculate about why the governmental actors involved in the current firearms program have continued to support a program, with ever increasing budgets, that has not been able to demonstrate results that stand up to scrutiny. The answer may well be rooted in laudable aims, notably the wish to cut down human suffering. Or it may be more political.

If the goal is to improve public safety, then it is time to recognize that three objective tests – violent crime rate, homicide rate, suicide rate – show the firearms program to be ineffective. Consequently the focus on normal citizens should cease and the focus should instead be on violent criminals. Budgets are limited, and it is wise to focus efforts on those threats that are the most serious. The RCMP admits that its

budget is so tight it cannot afford to fight terrorism<sup>37</sup>.

END NOTES

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# Citizens in Arms: The Swiss Experience

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## I. INTRODUCTION: THE CULTURAL EXPERIENCE

Zurich, Switzerland's largest city, has two unique holidays: *Sechseläuten* (Spring festival) and *Knabenschiessen* (boys' shooting contest), which takes place on the second weekend of September every year.<sup>2</sup> The later dates to the year 1657 and today both boys and girls shoot in the *Knabenschiessen* with the *Sturmgewehr 90*—military assault rifle model 1990—and also play at such activities as bumper cars, albeit not at the same time.<sup>3</sup>

At the 2002 *Knabenschiessen*, 5372 teenagers—more than a quarter of them girls—participated.<sup>4</sup> The first place winner was crowned the "*Schützenkönig*"—the shooting king.<sup>5</sup> (It is said that Switzerland has never had any kings other than shooting and wrestling kings.) The second place winner was the "*bestes Mädchen*," the best girl.<sup>6</sup> When the winners were announced, the two seventeen year-olds were swarmed by politicians wanting to shake their hands.<sup>7</sup>

At all major shooting matches in Switzerland, bicycles aplenty are parked outside. Inside the firing shelter, the competitors pay tips to twelve year-olds who keep score. The sixteen-year-olds shoot rifles along with men and women of all ages. This author once attended a shooting match near Lucerne where the prizes—from rifles and silver cups to computers and bicycles—were on display at the local elementary school. You could see the children's art show while you were there.

For quality of life, Zurich rates as the best city in the world, followed by Vancouver and Vienna.<sup>8</sup> The best cities for personal safety are ranked as Luxembourg, Berne, Geneva, Helsinki,

Singapore, and Zurich.<sup>9</sup> The least safe cities in Western Europe are Milan, Athens, and Rome, while Washington, D.C., gets the worst safety rating in the United States.<sup>10</sup> The worst cities worldwide, not surprisingly, are violence-prone areas in the underdeveloped world.<sup>11</sup>

Professor Marshall Clinard writes in *Cities With Little Crime*, “Even in the largest Swiss cities crime is not a major problem. The incidence of criminal homicide and robbery is low, despite the fact that firearms are readily available in most households.”<sup>12</sup> The low crime rate is even more remarkable in that the criminal justice system is relatively lenient. As Clinard says, “The Swiss experience indicates the importance of factors other than gun control in violent crimes.”<sup>13</sup>

With its population of 7.3 million (which includes 1.4 million foreigners, about 20% of the total), Switzerland experiences an extremely low crime rate. Regarding willful homicide offenses, in 2001 there were 86 actual homicides and 89 attempted homicides, for a total of 175.<sup>14</sup> The methods used for the homicides carried out or attempted were firearms 47, cutting and stabbing weapons 51, strangling 11.<sup>15</sup> Unfortunately, the data regarding weapon types do not distinguish between actual and attempted homicides; nor is it indicated whether the firearms were legal or illegal.<sup>16</sup> However, the data does indicate that foreigners committed a total of 96 of the 175 actual or attempted homicides.<sup>17</sup>

There were 5,768 simple and aggravated assaults, 2,615 of which were committed by foreigners.<sup>18</sup> Some 43 were committed with firearms and 388 with edged weapons. Data concerning rapes do not specify weapon use.<sup>19</sup>

There were 2,256 robberies, 790 of them committed by foreigners.<sup>20</sup> Weapons used included 321 firearms, 394 edged weapons, and 642 other methods.<sup>21</sup>

The overall crime rate committed by foreigners stood at 49.7% of the total.<sup>22</sup> The Swiss call the perpetrators “criminal tourists.”

The above rates compare favorably with other European countries with very restrictive firearms laws.<sup>23</sup> Estimating the number of firearms in Swiss households would be perilous.<sup>24</sup>

Any consideration of Swiss firearms law must recognize that the people are free to come and go to shooting competitions throughout the country, and competitors are commonly seen

with firearms on trains, buses, bicycles, and on foot. Assault rifles are hung on hat racks in restaurants and are carried on the shoulder on the sidewalk. While a rifle with a folding stock may be carried in a backpack—its telltale barrel with flash suppressor sticking out of the top—rifles are otherwise just carried without cases.

Furthermore, every village has a shooting range, but few have golf courses. Except in winter, matches are held throughout the year at the local, cantonal, regional, and federal levels.<sup>25</sup> There are historical shooting festivals commemorating medieval victories against great armies.<sup>26</sup> Every year throughout the country, men shoot the *Obligatorisch*—obligatory shoot for all men in military service—and the *Feldschiessen*—literally “field shooting”, which is shot frequently in cornfields or cow pastures.<sup>27</sup> One sometimes hears a melody of cowbells and rifle fire. These are family affairs offering good food and drink and entertainment, and are important community events in which the politicians give speeches.<sup>28</sup>

Once every five years is the *Eidgenössisches Schützenfest* or *Tir federal*—the federal shooting festival.<sup>29</sup> In 2000, some 56,000 shooters fired 3.5 million cartridges over a three-week period.<sup>30</sup> (By comparison, the National Matches in the United States attract only 2000-3000 competitors.) There are special competitions for youth aged thirteen to fifteen, for Swiss living abroad, for the press, and for the military.<sup>31</sup> For the first time ever, a woman won the overall championship for the current service rifle.<sup>32</sup>

While precision bolt-action sport rifles are in use, most competitors use three service rifles: the *Karabiner 31* (K31 or bolt action carbine model 1931), *Sturmgewehr 57* (Stgw 57 or assault rifle model 1957), and the *Sturmgewehr 90* (Stgw 90 or assault rifle 90).<sup>33</sup> The assault rifles are selective fire, meaning that they may be set for either fully automatic or semiautomatic fire.<sup>34</sup> At competitions, a device is installed so that they will fire only in the semiautomatic mode.<sup>35</sup> While all rifle competitions are shot at the considerable distance of 300 meters, the prone position is mostly used, with the kneeling position sometimes used.<sup>36</sup>

Pistol competitions are shot at twenty-five and fifty meters.<sup>37</sup> The pistols in use include the Sport pistol in .22 rim-fire caliber and Olympic design, and 9mm military pistols, from the older Swiss Luger to the models 1949 and P75 service pistol—in its

SIG 210 series configurations, which are the most accurate 9mm pistols in the world.

Since the founding of the Swiss Confederation in 1291, every man has been required to be armed and to serve in the militia army.<sup>38</sup> Today, every male when he turns twenty years old is issued a *Sturmgewehr 90* military rifle and required to keep it at home.<sup>39</sup> When one is no longer required to serve—typically at age forty-two—he may keep his rifle (converted from automatic to semi-automatic) or pistol (in the case of an officer or specialized unit).<sup>40</sup>

Of the pervasive rifle in the pantry of the typical Swiss home, one observer quipped: “When the Swiss housewife cleans the closets, she takes her husband’s rifle and polishes that too. There may be shinier soldiers than the Swiss, but truly there are no shinier rifles than those of the Swiss.”<sup>41</sup>

The formalities of Swiss firearms laws are based on the above shooting culture and militia traditions. Even though they speak four different languages—German, French, Italian, and Romansh (a dialect of ancient Latin)—the crime rate is very low because the Swiss people share common values. This is in part because of, not in spite of, the high rate of firearm ownership.

Switzerland is a confederation in which the federal government has strictly defined and limited powers and the cantons (like the states of the United States) have more general powers to legislate. Additionally, the citizens exercise direct democracy in the form of the initiative and the referendum. Under these institutions, citizens vote directly on many laws, rather than politicians deciding issues.

## II. THE LEGAL EXPERIENCE

For centuries, the cantons had no restrictions on keeping and bearing arms, although every male was required to provide himself with arms for militia service.<sup>42</sup> At the turn of the century before World War I, the American military sent observers to Switzerland in hopes of emulating the Swiss shooting culture.<sup>43</sup>

By the latter part of the twentieth century, some cantons required licenses to carry pistols, imposed fees for acquisition of certain firearms (which could be evaded by buying guns in other cantons), and otherwise passed restrictions on paper—albeit never interfering with the ever present shooting matches.<sup>44</sup> In

other cantons—in fact, those with the lowest crime rates—one did not need a police permit for carrying a pistol or buying a semi-automatic, look-alike Kalashnikov rifle, but only for obtaining a machine gun.<sup>45</sup> Silencers or noise suppressors were unrestricted.<sup>46</sup> Indeed, the Swiss federal government sold to civilian collectors all manner of military surplus, including antiaircraft guns, cannon, and machine guns.<sup>47</sup>

Handguns, (pistols and revolvers) when bought from the gun dealer, needed a purchase permit in all cantons from about 1960 onward.<sup>48</sup> Berne was the last canton to require a purchase permit.<sup>49</sup>

In 1996, the Swiss people voted to allow the federal government to legislate concerning firearms and to prohibit the cantons from regulating firearms. Some who favored more restrictions like those in other European countries saw the referendum as a way to pass gun control laws at the federal level, while those who objected to restrictions in some cantons saw the law as a way to preempt cantonal regulation.<sup>50</sup>

The result is the Federal Weapons Law of 1998.<sup>51</sup> It imposes certain restrictions, but leaves virtually untouched the ability of citizens to possess Swiss military firearms and to participate in competitions all over the country. The federal law became effective in 1999, and the highlights of the law and regulations follow.

The law's stated reason is to curtail inappropriate use of arms.<sup>52</sup> It regulates import, export, manufacture, trade, and certain types of possession of firearms.<sup>53</sup> The right of buying, possessing, and carrying arms is guaranteed with certain restrictions.<sup>54</sup> It does not apply to the police or to the militia army, in which almost all adult males are members.<sup>55</sup>

The law forbids fully automatic arms and certain semiautomatics "derived" (whatever that means) therefrom, but Swiss military "assault rifles" are excluded from this prohibition.<sup>56</sup> This exclusion makes the prohibition seem meaningless. Further, collectors may obtain special permits for the "banned" arms, such as submachine guns and machine guns.<sup>57</sup>

A permit to purchase a firearm from a licensed dealer is required for certain firearms (handguns and some semiautomatic rifles), excluding single shot and multi-barrel rifles, Swiss bolt action military rifles, target rifles, and hunting rifles.<sup>58</sup> Permits

must be granted if the applicant is at least eighteen years old and has no disqualifying criminal record.<sup>59</sup> Authorities may not keep any registry of firearms owners.<sup>60</sup> Private persons may freely buy and sell firearms without restriction, provided they retain a written agreement and the seller believes that the purchaser is not criminally disqualified.<sup>61</sup>

Previously, only half the cantons required a permit to carry a handgun. The new federal law makes a permit mandatory.<sup>62</sup> One must pass a test and prove a special need to qualify for a permit.<sup>63</sup> So far, the law is being applied restrictively.<sup>64</sup> Still, one can freely carry a handgun or assault rifle to a shooting range, and there is one in every village, nook, and cranny.<sup>65</sup> About 3000 shooting ranges exist in Switzerland.<sup>66</sup> Whether large or small, these ranges typically have twenty-five and fifty-meter pistol targets along with 300-meter rifle targets.<sup>67</sup>

A permit was already required for manufacture and dealing in firearms, but there are now more regulations. Storage requirements exist for both shops and individuals.<sup>68</sup> Again, one wonders whether the new law changes the culture that much. For instance, during the Cold War the Confederation required every house to include a bomb shelter, which typically provides safe storage for large collections of firearms and doubles as a wine cellar.<sup>69</sup> Thus, most Swiss already safely stored their firearms.

Criminal penalties within the law depend on one's intent.<sup>70</sup> Willfully committing an offence may be punished by incarceration for up to five years, but failure to comply from neglect or without intent may result in just a fine or even no punishment at all.<sup>71</sup> Many law-abiding Swiss are so accustomed to possessing firearms that the future will test whether the law punishes good citizens for harmless paper violations.

The new federal law creates uniform rules, but is a double-edged sword. It disallows more restrictive approaches such as the former requirement in Geneva of a permit for an air gun.<sup>72</sup> However, it imposes other restrictions that previously did not exist in half the cantons.<sup>73</sup> The Swiss are an extraordinarily peaceable people, particularly the extremely high proportion of the population who are firearm owners. The latter feel that they are losing traditional freedoms that are interconnected with the citizens' liberties and the Swiss Confederation's defense and independence.

## III. POLITICAL CONSIDERATIONS

Restrictions on peaceable firearm possession and use are often opposed by three groups: members of the militia army, which is headed by the *Eidgenössisches Departement für Verteidigung, Bevölkerungsschutz und Sport* (the Federal Department for Defense, Civil Defense, and Sport); the *Schweizer Schiesssportverband* (SSV or Swiss Shooting Federation), which is the umbrella organization for all the local shooting associations; and ProTell (named after William Tell, the archer of folklore), which promotes legislative and legal measures in support of a liberal firearms law. The allies of these groups are the political parties that support free trade, federalism, and limited government.<sup>74</sup>

Supporters of firearm restrictions tend to be socialists and various leftists, including those who wish to abolish the militia army, to strengthen the central government to be more like Germany, and to join the European Union.<sup>75</sup> Ironically, the Swiss Socialist Party was similarly pacifist when Adolf Hitler came to power.<sup>76</sup> However, the Swiss socialists eventually recognized the danger, and in 1942, when Switzerland was completely surrounded by the Axis dictatorships, the Socialist Party resolved, “the Swiss should never disarm, even in peacetime.”<sup>77</sup>

Much of Europe today is peaceable, but danger emanates from the Balkans (the former Yugoslavia and Albania) not to mention the chaos erupting from the breakup of the Soviet Union and the rise of Islamic terrorism. Political terrorists and organized criminals are swamping Europe. The new Swiss federal weapons law is in part a reaction to this turmoil, in that it seeks to deny firearms acquisition by participants in these struggles. The future will tell whether these concerns will repress not just the traditional Swiss shooting sports and freedom to possess firearms, but also the 700-year old tradition of a militia composed of the people in arms.

On September 27, 2001—just days after Islamic extremists hijacked aircraft and attacked the United States—a crazed fifty-seven year-old man named Friedrich Leibacher wearing a “Polizei” jacket went on a rampage at a session of the government of the Canton of Zug, killing fourteen elected

officials and wounding fourteen.<sup>78</sup> He used a semiautomatic SIG PE 90 rifle—a target rifle, not an army rifle—and an explosive.<sup>79</sup>

The murderer had never served in the militia army.<sup>80</sup> In 1970, he was sentenced to eighteen months in prison for sexual offenses against children, was investigated for various crimes in the 1980's, and threatened a bus driver with a revolver in 1998.<sup>81</sup> Despite his past, Leibacher's criminal record was expunged and police approved him to buy firearms.<sup>82</sup> He was known to be unstable, but had not been treated.<sup>83</sup> He even brought several frivolous charges against public officials, all of which were dismissed.<sup>84</sup>

In the assembly where the killer ran amok, no one else had a firearm, and probably none would have qualified under the new law for a permit to carry a pistol for defense. Zug was not a canton where a permit to carry a handgun (*Waffentragschein*) was available.<sup>85</sup> Swiss historian Jürg Stüssi-Lauterburg, Ph.D., wrote to the author, "The mental climate of Zug was entirely peaceful. While I would—before the outrage—not have been surprised at all to learn that in the Uri or Ticino or the Grisons assembly there were members carrying arms, in Zug I would have been surprised indeed. This is exactly what the mad felon exploited, a state of mind. There are more parallels between the hideous September crimes than first meet the eyes!"<sup>86</sup>

Similar killings had previously occurred in England, where virtually all firearms but sporting shotguns are banned.<sup>87</sup> These atrocities would soon occur in Germany and France, which also severely restrict firearms. In the same period, a Swiss nurse confessed to killing twenty-seven patients as acts of "mercy"—firearms were not used. Just days before the Zug massacre, terrorists murdered approximately 3000 people in the United States using box cutters and hijacked aircraft as weapons. Evil lurks in the world, and it uses many types of weapons.

Because the Swiss people are universally armed, they enjoy a low crime rate and avoided being pulled into the two World Wars, saving untold numbers of lives in the twentieth century alone. The horrific but isolated multiple slayings in Zug should not counsel any radical changes, and, if anything, should suggest reforms allowing law-abiding citizens to carry handguns for self-defense.

Revisions of the federal law proposed by the government in 2002 include stricter regulation of both commercial and private

firearm sales (which would require police approval), a ban on sales through newspaper advertisements and the Internet, a prohibition on imitation and soft air guns, and a ban on baseball bats (!) and other dangerous objects in public places.<sup>88</sup> Social Democrats propose not allowing soldiers to retain their firearms when ending their active service.<sup>89</sup> Pacifists, having failed in earlier years in proposed referenda to ban the militia army altogether, would not allow soldiers to keep their rifles at home.<sup>90</sup> Adoption of such proposals ranges from the problematic to the highly unlikely.

None of the above passed. However, in 2003, Swiss Justice Minister Ruth Metzler proposed a requirement that all firearms be registered.<sup>91</sup> She was soundly voted out of office, only the first time in 131 years that a Federal Councillor was not reelected. New Justice Minister Christoph Blocher quickly scrapped the registration scheme.<sup>92</sup>

#### IV. EVALUATING A CRITIQUE OF THE SWISS EXPERIENCE

On the subject of crime and firearms law, the work of Martin Killias, a professor at the University of Lausanne and a reserve judge in Switzerland's Supreme Court, should be mentioned. Professor Killias' 1990 article, while predating the federal firearms law, contains arguments often repeated to show that the Swiss experience does not counter the premise that firearms cause crime.<sup>93</sup> Killias set forth nine propositions, which were, and remain, contrary to reality:

(1) Killias asserts: "All cantons require a permit for the purchase of a gun. In general, citizens without history of conviction or violence are eligible for such a permit, but police have considerable discretion in this area."<sup>94</sup> In fact, canton regulations requiring a permit applied only to handguns, not to rifles and shotguns.<sup>95</sup> Even under the new federal law, private transfers do not require a permit.<sup>96</sup> Obviously, no permit has ever been required for keeping one's military-issue rifle and pistol at home.

(2) Killias claims: "Most cantons require a second permit to carry weapons outside one's home. Such permits are given only to persons who are exceptionally exposed to serious risks i.e. such permits are hardly ever issued."<sup>97</sup> In actuality, fifteen

cantons required a carry permit while eleven cantons did not, and the latter did not have a higher crime rate.<sup>98</sup> While the new federal law requires a permit, it exempts transport to and from target ranges—something that one could be doing any time in Switzerland.

(3) Killias states: “Automatic weapons may be purchased only under extremely restrictive conditions.”<sup>99</sup> It is true that collectors are required to obtain permits in order to obtain submachine guns and machine guns, but the availability of automatic firearms bespeaks a liberal firearms law.

(4) Killias alleges, “Ammunition may be sold only to holders of a permit.”<sup>100</sup> This is simply untrue. Ammunition may be purchased at gun shops. Ammunition in military calibers may be purchased at subsidized prices at shooting ranges. Enormous quantities of military ammunition are expended at shooting matches, most of which are voluntary and at least one per year is compulsory for persons in service.<sup>101</sup> I have bought ammunition many times at shooting matches and no one ever asked to see a permit.

(5) Killias maintains, “When only private weapons are considered, gun ownership is not more widespread in Switzerland than in neighboring countries.”<sup>102</sup> Considering “only” private weapons misses the big picture: Switzerland is the only country where every male, on reaching age twenty, is issued an assault rifle and required to keep it at home. When he retires from service at age forty-two, the firearm belongs to him. Given that this arrangement dates at least to the Constitution of 1874,<sup>103</sup> countless private military firearms are now in existence. Moreover, target pistols and rifles and other sporting arms are in widespread use by women and men, young and old, and are not subject to restrictions or prohibitions such as exist in Germany or England.

Professor Killias reflects about the above points: “These regulations may be less strict than those in other countries, but they are definitely not among the most liberal in Europe.”<sup>104</sup> This statement was as incorrect then as it is now under the new federal firearms law. He referred to no country with more liberal regulations because there were and are none.

(6) Killias returns to his points: “The automatic army rifle is very heavy and far too long to be concealed under a coat or in a case. It offers some advantages in fighting light tanks, but it is

definitely not suitable in holdups or violent crimes—except those that occur in a domestic setting.”<sup>105</sup> While the assault rifle model 1957 (Stgw 57) then in service was long (110 cm) and heavy, the model 1990 (Stgw 90) was already taking its place, and it is short (77 cm with stock folded) and light in weight. One would not want to fight a “light tank” with either rifle. Killias blurs over the truly phenomenal aspect of entrusting every male citizen with selective-fire rifles.

(7) Killias notes, “The ammunition the soldiers take home is in a sealed box. At every inspection (i.e. once a year, as a general rule), the seal is checked.”<sup>106</sup> The militia soldier has always been required to keep a minimum supply of ammunition at home in event of a mobilization or foreign attack. This ammunition is issued by the military, and the inspection is to ensure that the soldier is prepared. It seems rather trite to insinuate that one refrains from committing murder with the rifle because some day an officer will check the seal on the box of ammunition. At any rate, one is free to buy and store his own ammunition for personal use.

(8) Killias then asserts, “The ammunition for the automatic army rifle is not for sale in any arms shop.”<sup>107</sup> While the ordnance cartridges manufactured under the auspices of the military department are not sold at gun shops, they are freely sold at reduced prices at every shooting range, and no one searches the buyer’s bags to see if any is taken home. If one wishes to pay higher prices for ammunition at gun shops, the 5.56mm NATO (.223 Remington) cartridge can be used instead of the 5.6 Swiss cartridge in the Stgw 90 rifle, and the 7.5 Swiss cartridge manufactured by Norma of Sweden is available for the Stgw 57 rifle. Ammunition is freely available.

(9) Finally, Killias claims: “Only officers, senior non-commissioned officers, and a few specialists get handguns. Since these are designed for use over a relatively long distance (i.e. fifty meters and more), they are long and heavy and, therefore difficult to conceal. Significantly, the police use smaller and less heavy types of handguns. A military handgun is, therefore, of limited use in predatory crime.”<sup>108</sup> Swiss military pistols evolved from the Luger and the SIG 49 (in both 7.65mm and 9mm) to the SIG-Sauer Model 75 and P220 series 9mm pistols. These pistols are neither long nor heavy, and in shooting matches are shot at twenty-five and fifty meters. Various versions of the SIG

49, produced commercially as the SIG 210 series, are popular in competitions. It seems frivolous to suggest that Swiss who possess such pistols do not use them in “predatory crime” because the pistols would have only a “limited use” for such purpose. The more likely answer is that ordinary Swiss people who own firearms are not criminals.

Professor Killias has continued to publish studies concerning firearms and violence, and has even conceded in a recent statistical study that, “no significant correlations [of gun levels] with total suicide or homicide rates were found.”<sup>109</sup> Nevertheless, the untenable arguments set forth in his 1990 article remain uncorrected.

#### V. A HISTORICAL PERSPECTIVE

The Swiss tradition of arms-bearing and a militia army should be put in historical perspective. The Swiss Confederation was founded in 1291 by men from three Cantons who swore mutual support and protection. In the ensuing historical epochs, smaller numbers of armed Swiss peasants defeated some of the most powerful armies of Europe.<sup>110</sup> The myth of William Tell entailed not just shooting the apple off his son’s head, but also of shooting the arrow through the tyrant’s heart.<sup>111</sup> The armed citizen who defends the freedom of his own family and his neighbors was, and remains, the hallmark of the Swiss experience.

Machiavelli, who actually traveled through the Swiss Cantons and observed their militias, noted in *The Prince* (1532) that “the Swiss are well armed and enjoy great freedom.”<sup>112</sup> In *The Art of War* (1521), Machiavelli described the arms used by the Swiss as including pikes, broadswords, and the harquebus, a short matchlock shoulder arm.<sup>113</sup> He continued:

These arms and this sort of armour were invented and are still used by the Germans, particularly by the Swiss; since they are poor, yet anxious to defend their liberties against the ambition of the German princes – who are rich and can afford to keep cavalry, which the poverty of the Swiss will not allow them to do – the Swiss are obliged to engage an enemy on foot, and therefore find it necessary to

continue their ancient manner of fighting in order to make headway against the fury of the enemy's cavalry. This necessity forces them still to use the pike, a weapon enabling them not only to hold the cavalry off, but also very often to break and defeat them . . . .<sup>114</sup>

Jean Bodin, the French absolutist, dwelt in *Six livres de la République* (1576) on the means for preventing commoners from wresting political control from the monarch. Besides suppression of oratory, “the most visual way to prevent sedition is to take away the subject's arms.”<sup>115</sup> The practice of wearing a sword in peacetime, Bodin wrote, “which by our laws, as also by the manners and customs of the Germans and Englishmen is not only lawful; but by the laws and decrees of the Swiss even necessarily commanded: the cause of an infinite number of murders, he which weareth a sword, a dagger, or a pistol.”<sup>116</sup>

No doubt, there was considerable violence in rustic Switzerland, but the armed character of the populace preserved democracy and served to prevent governmental violence against its own unarmed subjects. Bodin's absolutist model failed to take account of the murders, on a massive scale, of subjects by rulers.

The Swiss system of militia and democracy were well known to English republicans in the seventeenth and eighteenth centuries.<sup>117</sup> Andrew Fletcher, in *A Discourse of Government with Relation to Militias* (1698), advocated “well-regulated militias” to defend the country.<sup>118</sup> Fletcher wrote:

The Swisshes at this day are the freest, happiest, and the people of all Europe who can best defend themselves, because they have the best militia . . . And I cannot see why arms should be denied to any man who is not a slave, since they are the only true badges of liberty . . .<sup>119</sup>

Abraham Stanyan's *Account of Switzerland* (1714) described, “a well regulated Militia, in Opposition to a standing Army of mercenary Troops, that may overturn a Government at Pleasure.”<sup>120</sup> He portrayed the Bern militia as consisting of “the whole Body of the People, from sixteen to sixty,” explaining:

Every Man that is listed, provides himself with Arms at his own Expence; and the Regiments are all armed in an uniforme manner, after the newest Fashion; for which Purpose, there is an Officer called a *Commissioner of Arms*, whose Business it is, to inspect their Arms and Mounting, to take Care they be conformable to the Standard, and to punish such as fail in those Particulars.<sup>121</sup>

The Swiss experience figured prominently in the American Revolution and afterwards in American constitution building.<sup>122</sup> In his *Defence of the Constitutions* (1787), a survey of ancient and modern republics and other political models, John Adams divided the Swiss cantons—regardless of whether they were “democratical” or “aristocratical”—as having two institutions of direct democracy: the right to bear arms and the right to vote on laws. Bern had a democratic militia system: “There is no standing army, but every male of sixteen is enrolled in the militia, and obligated to provide himself a uniform, a musket, powder, and ball; and no peasant is allowed to marry, without producing his arms and uniform. The arms are inspected every year, and the men exercised.”<sup>123</sup>

Switzerland was overrun during the Napoleonic epoch, to the great dismay of the Americans, who saw her as the “Sister Republic”—a democracy in an otherwise despotic Europe.<sup>124</sup> This was the only successful invasion in the history of the Confederation, which quickly regained her martial prowess. Instrumental in this process was the founding of the *Schweizerischer Schützenverein* (SSV, or Swiss Shooting Federation) in 1824. Article I of its constitution stated:

To draw another bond around the hearts of our citizens, to increase the strength of the fatherland through unity and closer connections, and at the same time to contribute, according to the capacity of each of our members, to the promotion and perfection of the art of sharpshooting, an art beautiful in itself and of the highest importance for the defence of the confederation.<sup>125</sup>

The threat from Germany following the Franco-Prussian War pushed the Swiss to unify the armed forces in the federal system. The Federal Constitution of 1874 provided that military instruction, armament, and equipment were in the federal domain.<sup>126</sup> Article 18 provided: “Every Swiss is liable to military service.”<sup>127</sup> Rather than the citizen providing his own arms, as was the tradition, it further provided that “servicemen shall receive their first equipment, clothing, and arms without payment. The weapon shall remain in the hands of the soldier, subject to conditions to be determined by Federal legislation.”<sup>128</sup> Even when no longer liable for service, the soldier would keep his arms.<sup>129</sup>

From the turn of the century until the Great War, the Americans were intensely interested in the Swiss militia and marksmanship culture. In a 1905 study, U.S. Army Captain T.B. Mott contrasted the low standards of the militias of America and England with those of the Swiss.<sup>130</sup> The law encouraged cadet corps aged eleven to sixteen and preparatory military corps aged sixteen to twenty to acquire marksmanship skills.<sup>131</sup> “The little boys are supplied with a safe and serviceable light gun and the big ones with the regulation musket; Army officers teach them to drill and shoot and public ranges are given them to practice on.”<sup>132</sup> Mott added, “Shooting clubs in Switzerland take the place of our baseball teams.”<sup>133</sup> He explained: “In 1904 there were 3656 shooting clubs under Federal control or encouragement, with a membership of 218,815 ... The total population of Switzerland is only about 3.5 millions. If shooting clubs existed in similar proportion in the United States the membership would attain nearly 5 millions.”<sup>134</sup>

Furthermore, noted Mott, in 1904 the Swiss Army shot almost three million cartridges, and the shooting clubs fired over 21 million cartridges with the military rifle.<sup>135</sup> While American customs encouraged just the best shots to participate in competitions, the Swiss system induced the greatest number to shoot. Mott described a competition at Fribourg, with large tents for eating and drinking, holiday dress, and speeches and processions.<sup>136</sup>

The advantage of the shooting festivals was that “nearly the whole population interests itself in shooting and can shoot.”<sup>137</sup> Mott found objectionable the restriction of all matches to 300 meters and the kneeling position, and “the evil attendant upon

all such assemblages of the people, drinking and carousing and the spending of money during sometimes a whole week.”<sup>138</sup> Actually, the party atmosphere may have ensured the survival of the militia system: perhaps the suppression of the “drinking and carousing” which characterized the early American militia musters was a reason for the degeneration of the American militia system.<sup>139</sup>

General George W. Wingate, President of the New York Public Schools Athletic League and a founder of the National Rifle Association, notes in *Why School Boys Should Be Taught to Shoot* (1907): “Switzerland has no regular army, but depends for her defence on her riflemen. Though poor, she spends annually large amounts in developing them, both in and out of the schools.”<sup>140</sup> He repeats Captain Mott’s above statistics, noting that Switzerland’s population was less than that of New York City.<sup>141</sup> In an afterward to Wingate’s book, President Teddy Roosevelt congratulates the New York schoolboy who was the best shot of the year and added that, in time of war, “it is a prime necessity that the volunteer should already know how to shoot if he is to be of value as a soldier.”<sup>142</sup>

## VI. THE SWISS AND WORLD WAR II

The United States would soon end its traditional neutrality in the Great War, but Switzerland maintained her neutrality. Nevertheless, Switzerland was, and remains, an armed neutrality, calculated to dissuade attack by powerful neighbors by making invasion too costly in blood. When Hitler came to power in 1933, Switzerland saw the threat and immediately began strengthening her defenses.

Henri Guisan, who would be Commander-in-Chief of the Swiss armed forces in World War II, described the Swiss shooting culture in a 1939 work as follows:

While traveling around Switzerland on Sundays, everywhere one hears gunfire, but a peaceful gunfire: this is the Swiss practicing their favorite sport, their national sport. They are doing their obligatory shooting, or practicing for the regional, Cantonal or federal shooting festivals, as their ancestors did it with the musket, the harquebus or the crossbow.

Everywhere, one meets urbanites and country people, rifle to the shoulder, causing foreigners to exclaim: “You are having a revolution!”<sup>143</sup>

Today’s Japanese tourists must think exactly that. At any rate, Guisan added about the armed citizen:

“Enter into any of our farms: one finds there as many rifles as men. There is a saying: ‘Every Swiss enters the world with a rifle!’ The rifle, outward symbol of the dignity of the citizen, of the confidence that the state places in him, is hung on the wall next to the arms of ancient times, shooting prizes, and family portraits.”<sup>144</sup>

As an aside, Guisan’s comment is the equivalent of Charlton Heston, former president of the American National Rifle Association, raising an antique Kentucky long rifle in his hand and exhorting, “From my cold dead hands!”<sup>145</sup>

The federal Schützenfest, which remains today the largest rifle competition in the world, was held in Luzern in June 1939 in conjunction with the world championships of the *Union Internationale de Tir* (UIT).<sup>146</sup> Swiss Federal President Philipp Etter spoke at the event, stressing that something far more serious than sport was the purpose of their activity. Demonstrating the connection between national defense and the armed citizen, he said:

There is probably no other country that, like Switzerland, gives the soldier his weapon to keep in the home. The Swiss always has his rifle at hand. It belongs to the furnishings of his home ... That corresponds to ancient Swiss tradition. As the citizen with his sword steps into the ring in the cantons which have the *Landsgemeinde* [direct democracy], so the Swiss soldier lives in constant companionship with his rifle. He knows what that means. With this rifle, he is liable every hour, if the country calls, to defend his hearth, his home, his family, his birthplace. The weapon is to him a pledge and sign

of honor and freedom. The Swiss does not part with his rifle.<sup>147</sup>

The connection was subsequently reflected in orders rendered by General Guisan when the Swiss mobilized following Hitler's launching of World War II on September 1, 1939.<sup>148</sup> Operations Order No. 2 described critical positions that must be held, and thus, that the soldiers must "continue resistance up to the last cartridge, even if they find themselves completely alone."<sup>149</sup> This was the opposite of the policies of those European countries that would surrender to Hitler with the command that the troops would not resist, or would surrender after a short fight.<sup>150</sup>

After Denmark and Norway fell in April 1940, the Federal Council and General Guisan issued orders for universal resistance against attack: "All soldiers and others with them are aggressively to attack parachutists, airborne infantry and saboteurs. Where no officers and noncommissioned officers are present, each soldier acts under exertion of all powers of his own initiative."<sup>151</sup> The command for the individual to act on his own initiative has been characterized as an ancient and deeply rooted Swiss resistance law that, in Europe at that time, placed a unique confidence by the political and military leadership onto the ordinary man.<sup>152</sup>

The order continued that under no condition would any surrender be forthcoming, and any pretence of surrender must be ignored:

If by radio, leaflets or other media any information is transmitted doubting the will of the Federal Council or of the Army High Command to resist an attacker, this information must be regarded as lies of enemy propaganda. Our country will resist aggression with all means in its power and to the bitter end.<sup>153</sup>

The German Minister in Bern, Otto Köcher, reported to the Foreign Ministry in Berlin that the above order "for mobilization in case of a surprise attack ... is addressed not only to the soldiers, but to the entire population."<sup>154</sup> The Swiss press, he added, was advocating replacement of the Hague Convention on land warfare with "a Swiss national statute on land warfare,

which would legally oppose total war with total defence in which the civilian population would be obliged to take part.”<sup>155</sup> In the militia, the German minister noted, junior officers had organized themselves so that if, “in an invasion, a commanding officer show signs of giving way before overwhelming enemy forces, these officers have mutually pledged themselves to shoot such a commander on the spot.”<sup>156</sup>

Before long the French forces were crumbling before the German blitzkrieg. Guisan now issued a further order:

Everywhere, where the order is to hold, it is the duty of conscience of each fighter, even if he depends on himself alone, to fight at his assigned position. Infantrymen, if overtaken or surrounded, fight in their position until no more ammunition exists. Then cold steel is next ... As long as a man has another cartridge or hand weapons to use, he does not yield.<sup>157</sup>

With the collapse of France, Switzerland was then surrounded by the Axis powers and could be attacked from any side. The militia army built its defenses in the Reduit, the redoubt in the rugged Alps, where mountains were tunneled out like Swiss cheese to hide fortifications.<sup>158</sup> The German Luftwaffe and Panzers could not operate here, and the Wehrmacht infantry could be devastated by snipers behind every rock.<sup>159</sup>

Boys and old men in every village were organized into *Ortswehren* (Local Defence). Those without their own rifles were issued obsolete military rifles; those without an old uniform were simply issued the Swiss armband, hopefully to be protected against treatment as “*Franktireur*” (lone snipers).<sup>160</sup> Official recognition of essentially the people at large as members of the armed forces, it was hoped, would give them status under international law, if captured, as prisoners of war rather than as partisans liable to immediate execution.

In their invasion plans for Switzerland, the Nazis acknowledged that the Swiss were good marksman and that the cost of attack in blood would be high—unlike the easier conquests of the other European countries, whose governments had restricted firearm ownership and certainly did not hand out a rifle for every young man to keep at home.

Nazi invasion plans against Switzerland in August 1940 were prepared by Captain Otto Wilhelm von Menges of the German General Staff to the Army High Command, the *Oberkommando des Heeres* (OKH). The plans were divided into two parts: *Der Deutsche Angriff gegen die Schweiz* (the German attack against Switzerland) and *Der Italienische Angriff* (the Italian attack).<sup>161</sup> Menges commented on the Swiss army: “A functionally organized and quickly mobilized armed force...The individual soldier is a tough fighter and a good sharpshooter. The mountain troops are said to be better than those of their southern neighbour.”

The blitzkrieg plans against Switzerland continued to be developed. General Franz Halder of the OKH High Command of the Army, General Staff, Army Headquarters, on August 26, noted in his directive to Army Group C, which would be the attacking force: “Switzerland is determined to resist any invasion by exerting all its strength.”<sup>162</sup>

Another invasion plan was presented by General Staff Major Bobo Zimmermann to *Armeeoberkommando 1* (OAK 1, the High Command of the First Army) entitled “*Studie über einen Aufmarsch gegen die Schweiz aus dem Raume der 1. Armee*” (Study Over a Deployment Against Switzerland from the Zone of the First Army).<sup>163</sup> The plan noted that not all Swiss forces were mobilized, but added: “There is no doubt that the entire Swiss army will be under arms in these days of tension. We should therefore expect to face the entire Swiss army.”<sup>164</sup> After analyzing specific Swiss units that the Wehrmacht would encounter, Zimmermann wrote:

There is no doubt that the Swiss army has *fighting power and spirit*, especially regarding the defence of the country. The army makes good use of the particularities of the territory and is very skilled in guerrilla warfare. The Swiss army also has considerable technical skills. We would therefore run into *tough resistance*, but would probably not have to expect any attacks.<sup>165</sup>

Fortunately for the Swiss, Hitler faced distractions elsewhere in the Battle of Britain, the operations in Greece and Yugoslavia, and most of all Operation Barbarossa—the attack on the Soviet

Union. Yet the Nazi hierarchy kept an eye on the irritating Alpine democracy and continued to plan subversion and attack.<sup>166</sup>

The intelligence report *Kleine Orientierungsheft Schweiz* (Concise Reference Work Switzerland) was issued in 1942 and again in 1944 by the Division for Foreign Armies in the West of the German Army's General Staff.<sup>167</sup> It posed the following evaluation of the Swiss Army's fighting qualities:

The Swiss militia system allows for all of the men fit for duty to be registered at relatively low cost. It serves to maintain the soldierly spirit of the Swiss people and allows it to set up an army that for such a small country is very strong, appropriately organized, and quickly employable.

Swiss soldiers love their country, are hardy and tough. They shoot well and take great care of their arms, equipment, uniforms, horses and pack animals. In particular the German-speaking Swiss and the soldiers from the Alps should be good fighters. . . .

So far there has been no doubt that both the government and the people are determined to defend Swiss neutrality against any and all attackers with armed means.<sup>168</sup>

The report included an analysis of the Swiss military leadership, describing General Guisan as "Intelligent, very cautious. Behind his overt correctness stands his sympathy with the Western powers."<sup>169</sup> Corps Commander Herbert Constam—the highest-ranking Jewish officer in the Swiss military—was described as "*Sehr tüchtig. Nicht-Arier. Deutschfeindlich.*" ("Very capable. Non-Aryan. Enemy of Germany.") As Constam illustrates, Swiss Jews served just like every other Swiss male: every Jewish man was issued a rifle and stood ready to defend the country.

As noted above, virtually the entire male population able to lift a rifle was considered a resource for resistance. In a 1943 message, Federal Councilor Karl Kobelt, head of the Military

Department, encouraged every person to join an official defense organization to be protected by international law:

Every Swiss who is able to fight and shoot can participate in the struggle for our country. But in order not to be regarded as *beckenschuetze* [outlaw sniper], he must join an official military organization, the military service, *Ortswebr* [local defense], or *Luftschutz* [anti-aircraft defence] and be subject to their rules . . . .

The significance of the *Ortswebr* has grown more and more by reason of the war experience. Now it has quite a number of rifles distributed over the whole country, and readiness for shooting any time heightens our safety against surprise attack.<sup>170</sup>

Of course, had a Nazi invasion come, it would have been uncertain whether the Germans would have treated civilians with armbands as prisoners of war or simply shot them.

An invasion plan drafted in late 1943 by SS General Hermann Böhme and intended for execution in summer 1944 was rendered impossible by D-Day.<sup>171</sup> He warned:

The fighting spirit of Swiss soldiers is very high, and we will have to equate it approximately to that of the Finns. . . . The unconditional patriotism of the Swiss is beyond doubt. Despite the militia system, the shooting instruction is better than, for example, in the former Austrian Federal army with 18 months term of service.

The Swiss had studied closely—and gained confidence from—the resistance tiny Finland put up against invasion by the Soviet Union, Nazi Germany's erstwhile ally. In the Winter War of 1939-40, the Finnish army, only half as numerous as that of Switzerland, held out for almost three and a half months against overwhelming Soviet forces.<sup>172</sup> The Finns had only 100 airplanes and 60 obsolete tanks, but like the Swiss, they had few equals in rifle marksmanship.<sup>173</sup> Russian paratroopers were shot in the air, and those missed were shot when they landed on the ground.<sup>174</sup>

Finnish sharpshooters killed or wounded astonishing numbers of Russian troops; in one battle merely three Finns died, as against 1000 Russians.<sup>175</sup> A single Finn, Simo Häyhä, who previously had won numerous marksmanship trophies, is said to have killed over 500 Russian soldiers.<sup>176</sup> Overall, one million Russians perished in the invasion, versus just 25,000 Finns, according to Nikita Khrushchev.<sup>177</sup> Thus, even after suing for peace, the Finns managed to keep most of their territory.

As was with the Finns, marksmanship was a national obsession for the Swiss. The Germans were well aware of the risks posed by sharpshooters. At the Nürnberg war crimes trials, U.S. prosecutor Thomas J. Dodd—later the senator who would sponsor the federal Gun Control Act of 1968—examined the defendant Baldur von Schirach, the first Hitler Youth Leader, about prewar military training among German youth.<sup>178</sup> The following exchange occurred:

*von Schirach:* Switzerland gave her young men a much more intensive rifle training than we did and so did many other countries.

*Mr. Dodd:* Yes, I know.

*von Schirach:* I do not deny that our young men were trained in shooting.

*Mr. Dodd:* I hope you're not comparing yourself to Switzerland, either.

*von Schirach:* No.<sup>179</sup>

Indeed not. While von Schirach was suggesting that pre-war Germany was not militaristic simply because it trained young men to shoot, he obviously could not compare shooting programs within the Third Reich with those of the Swiss democracy. The Nazis would never have handed out rifles to every nineteen-year-old male to take home.

In fact, from the day Hitler seized power it was Nazi domestic policy to seize firearms from enemies of all stripes—first the left, then the democrats, and then the Jews. The Nazis made good use of the 1928 firearms law passed by social democrats in the Weimar Republic. Prewar Nazi gun control culminated in *Reichskristallnacht*—the Night of the Broken Glass, the 1938 pogrom against Germany's Jews—which was a massive search-and-seizure operation to seize firearms from Jews.<sup>180</sup> The

day after the attacks, German newspapers published the notice “Weapons Ban for Jews” as follows: “The SS Reichsführer and Chief of the German police [Himmler] has issued the following Order: ‘Persons who, according to the Nürnberg law are regarded as Jews, are forbidden to possess any weapons. Violators will be transferred to a concentration camp and imprisoned for a period up to 20 years.’”<sup>181</sup>

When the blitzkrieg struck, the Wehrmacht immediately posted signs threatening the death penalty for failure to turn in all firearms within 24 hours.<sup>182</sup> A 1941 decree in occupied Poland provided:

The death penalty or, in less serious cases, imprisonment shall be imposed on any Pole or Jew . . . [i]f he is in unlawful possession of firearms . . . or if he has credible information that a Pole or a Jew is in unlawful possession of such objects, and fails to notify the authorities forthwith.<sup>183</sup>

Executing firearm owners was a routine task. A 1941 Warsaw newspaper randomly picked up by a wood stove a couple of years ago included the following report, which appeared daily in newspapers, with different names, in every occupied country:

#### Three Death Penalties for Prohibited Arms Possession

A special German court in Zamość [near Krakow] sentenced to death 19 year-old Franciszek Pokrywka of Powieki, 27 year-old Iwan Zilnyk and 35 year-old Paweł Huzar, both of Ułazów, for prohibited possession of firearms as well as for violating the duty to report possession of firearms.

Pokrywka had an automatic pistol with six cartridges and, despite the universally-known order about surrendering the arms, he did not give it up. Sometime later he sold the pistol to Zilnyk, who a few days after that offered the firearm for sale to Huzar, who, though he did not buy it, still failed to fulfill his duty to report it to the proper authorities.

The above-mentioned death sentences have already been carried out.<sup>184</sup>

Hitler himself declared in 1942, “The most foolish mistake we could possibly make would be to allow the subject races to possess arms. History shows that all conquerors who have allowed their subject races to carry arms have prepared their own downfall by so doing.”<sup>185</sup>

The reports of the *Einsatzgruppen*, Nazi killing squads, which exterminated two million Jews and others in the East, make clear the significance of being or not being armed. As Raul Hilberg observes, “The killers were well armed . . . . The victims were unarmed.”<sup>186</sup> Six *Einsatzgruppen* of a few hundred members each and divided into *Einsatzkommandos* operated in Poland and Russia.<sup>187</sup> Their tasks included arrest of the politically unreliable, confiscation of weapons, and extermination.<sup>188</sup> For instance, Einsatzgruppe C reported in September 1941 that its operations included, “above all, the fight against all partisan activities, beginning with the well-organized bands and the individual snipers down to the systematic rumour mongers.”<sup>189</sup> Typical executions were that of a Jewish woman “for being found without a Jewish badge and for refusing to move into the ghetto” and another woman “for sniping.” Extensive partisan activity by armed Jews was reported.<sup>190</sup>

The heroic Warsaw ghetto uprising of 1943 demonstrated that even a few Jews with arms in their hands could effectively resist. Simha Rotem, a member of the Jewish Fighting Organization (*Zydowska Organizacja Bojowa*, or ZOB), described the situation:

I and my comrades in the ZOB were determined to fight, but we had almost no weapons, except for a few scattered pistols . . . . In other places, where there were weapons, there was shooting, which amazed the Germans. A few of them were killed and their weapons were taken as loot, which apparently was decisive in the struggle. Three days later, the aktsia [deportations] ceased. The sudden change in their plans resulted from our unforeseen resistance.<sup>191</sup>

ZOB members obtained more pistols and some grenades by the time of the April 19 *aktsia*.<sup>192</sup> Rotem recalled that, despite the Germans' heavy arms, after an SS unit was ambushed: "I saw and I didn't believe: German soldiers screaming in panicky flight, leaving their wounded behind . . . My comrades were also shooting and firing at them. We weren't marksmen but we did hit some."<sup>193</sup>

Dozens of Germans were killed while partisan losses were few. In the first three days not a single Jew was taken out of the buildings. Finally, the Germans resorted to cannon and aerial bombings to reduce the ghetto to rubble. On the tenth day, the ghetto was burned down. Many escaped through the sewers and into the forests. There they continued the struggle in cooperation with non-Jewish partisans. Joseph Goebbels' May 1 diary entry reflects:

The only noteworthy item is the exceedingly serious fights in Warsaw between the police and even a part of our Wehrmacht on the one hand and the rebellious Jews on the other. The Jews have actually succeeded in making a defensive position of the Ghetto. Heavy engagements are being fought there . . . It shows what is to be expected of the Jews when they are in possession of arms.<sup>194</sup>

Of course, the only sizable population of European Jews in possession of arms was in Switzerland. The Wannsee Protocol, the 1942 plan for the "final solution of the Jewish question," listed Switzerland's 18,000 Jews among the eleven million to be eradicated.<sup>195</sup> In addition, Switzerland provided refuge for large numbers of foreign Jews. An American periodical pointed out at war's end that Switzerland provided "temporary shelter during the war for 35,000 Jews. (If we had made a comparable effort, we should have taken in 1,225,000, since our population is 35 times that of Switzerland; actually, we did not take as many as Switzerland.)"<sup>196</sup>

But the Holocaust did not come to Switzerland, in no small part because every man was a potential sniper against any and all invaders, and official policy was that any announcement of surrender would be considered enemy propaganda. Allen Dulles, head of America's OSS spy network operating against Germany

from his base in Bern, wrote: “At the peak of its mobilization Switzerland had 850,000 men under arms or standing in reserve, a fifth of the total population . . . . That Switzerland did not have to fight was thanks to its will to resist and its large investment of men and equipment in its own defense. The cost to Germany of an invasion of Switzerland would certainly have been very high.”<sup>197</sup>

Any discussion of the value or lack thereof of an armed civilian population must consider the abnormal as well as the normal times. As the World II experience dramatically illustrates, governmental policies which disarm civilians in peacetime leave them subject to predatory occupation forces in wartime. While other factors also account in part for Switzerland’s good fortune in avoiding both world wars, this avoidance would have been impossible without her tradition of armed neutrality. And if this tradition of arming every citizen dissuades foreign aggressors, it by no means encourages crime in peacetime.

#### ENDNOTES

1. Stephen P. Halbrook is an attorney in Fairfax, Virginia. He holds a Ph.D. in Philosophy from Florida State University, and a J.D. from Georgetown University Law Center. His most recent book is *Target Switzerland: Swiss Armed Neutrality in World War II* (1998), which has been translated as *Die Schweiz im Visier* (Verlage Novalis Schaffhausen/Rothenhäusler Stäfa); *La Suisse encerclée* (Editions Slatkine Genève); and *La Svizzera nel mirino* (Coedizione Pedrazzini-Locarno/Alberti-Verbania). “Citizens in Arms” is Copyright © 2003 Stephen P. Halbrook, All rights reserved. Reprinted from *Texas Review of Law & Politics*, vol. 8, Issue 1 (Fall 2003), 142.

2. See generally *Knabenschiessen*, at <<http://www.knabenschiessen.ch>> (last visited Nov. 25, 2003) (noting next Knabenschiessen dates of September 11-13, 2004). For a typical tourist brochure announcing such events, see Local Holidays, *ZÜRICH NEWS*, April 26-May 9, 2003, at 38.

3. Knabenschiessen, *supra* note 2.

4. *Mit Kontaktlinsen zum Erfolg: Fabian Pianzola aus Dietikon wird neuer Schützenkönig* and *Die Besten am Knabenschiessen 2002*, *Neue Zürcher Zeitung*, Sept. 10, 2002, Nr. 209, S. 41 (hereinafter *Mit Kontaktlinsen zum Erfolg*). For this author’s views on the implications of such traditions see Stephen P. Halbrook, “Armed to the Teeth, and Free,” *Wall St. J.*

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5. *See Mit Kontaktlinsen zum Erfolg*, *supra* note 4.

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8. Jason Hopps, *Survey Ranks World's Best, Worst Places to Live*, BBC, Mar. 3, 2003, *available at* <<http://news.bbc.co.uk/1/hi/world/europe/2815625.stm>>.

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12. Marshall B. Clinard, *Cities with Little Crime: The Case of Switzerland* 1 (1978).

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16. *Id.*

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18. *Id.* at 2.

19. *2001 Polizeiliche Kriminalstatistik* PKS, Bundesamt für Polizei, Apr. 2002, at 16.

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22. *Id.* at preface.

23. In 1994, the homicide rate in Switzerland was 1.32 per 100,000 in the population. Of those, 0.58 (44%) involved firearms. Compare this to Italy 2.25 (1.66 firearms), France 1.12 (0.44), and Germany 1.17 (0.22). The Swiss household gun-ownership rate is 27% excluding militia weapons. Contrast this with the household gun-ownership rates (at least for households willing to divulge gun ownership to a government-affiliated telephone pollster) of 16% for Italians, 23% for French, and 9% for Germans. *See* Dave Kopel, Stephen P. Halbrook & Carlo Stagnaro, "Swiss Mess: Homeland defense, the wrong way,"

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25. See Stephen P. Halbrook, “Swiss Schuetzenfest,” *Am. Rifleman*, May 1993, at 46; Halbrook, “Switzerland’s Feldschiessen,” *Gun Digest*, 1996, 50th Annual Edition, at 20; Halbrook, “An Armed Society,” *Am. Guardian*, Jan. 1998, at 40, available at <<http://www.nraila.org/>> (hereinafter collectively referred to as *Halbrook articles*).

26. See *Halbrook articles*, *supra* note 25.

27. *Id.*

28. *Id.*

29. See “Eidgenössisches Schützenfest,” *Neue Zürcher Zeitung*, June 23, 2000, at 14; “Dufaux ‘König aller Könige,’” *Neue Zürcher Zeitung*, July 17, 2000, at 40. On the 1995 federal match, see Stephen P. Halbrook, “The World’s Largest Rifle Shooting Match: Switzerland 1995,” in *The 1996 Precision Shooting Annual* 91 (Dave Brennan ed., 1996).

30. *Id.*

31. *Id.*

32. *Id.*

33. See *Halbrook articles*, *supra* note 25.

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35. *Id.*

36. *Id.*

37. *Id.*

38. See, e.g., *Swiss Army 2000* (Josef Inauen ed., BMP Translations AG trans., 1999).

39. *Id.*

40. *Id.*

41. George Mikes, "Das Gewehr in der Speisekammer," in Andreas Dollfus and Paul Rothenhäusler, *Schweizer Splitter & Sprüche* 56-57 (Rothenhäusler Verlag ed., 1998) (translated by author).
42. See generally Richard Munday, *Most Armed and Free?* (1996).
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44. *Id.*
45. *Id.*
46. *Id.*
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48. *Id.*
49. *Id.*
50. For his own small part, this author urged moderation under the saying "if it's not broke, don't fix it," based on the experiences in the United States with passage of legislation affecting only law-abiding citizens. Stephen P. Halbrook, "Die Fehler der Vereinigten Staaten vermeiden," *Neue Zürcher Zeitung*, March 4, 1997, at 18.
51. "Bundesgesetz über Waffen," *Waffenzubehör und Munition* vom 20. June 1997; see also Stephen P. Halbrook, "Switzerland, Gun Laws," in *Guns in American Society* 569 (Gregg Lee Carter ed., 2002) (summarizing law); Hans Wüst, *Schweizer Waffenrecht* (1999) (treatise on law). For the following analysis, the author wishes to acknowledge the assistance of Hans Wüst, Switzerland's leading authority on firearms law, and Ferdinand Hediger, International Relations, ProTell.
52. "Bundesgesetz über Waffen," *Waffenzubehör und Munition* vom 20. June 1997.
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54. *Id.*
55. *Id.*
56. *Id.*
57. "Bundesgesetz über Waffen," *Waffenzubehör und Munition* vom 20. June 1997.
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63. *Id.*
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67. See, e.g., Halbrook, *Switzerland's Feldschiessen*, *supra* note 25, at 22-23.
68. "Bundesgesetz über Waffen," *Waffenzubehör und Munition* vom 20. June 1997.
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73. See *id.*
74. See, e.g., Fritz Rudolf, "Zur Revision des Waffengesetzes" and Pro Tell, "Ergänzende Vernehmlassung," *Schiessen Schweiz*, Nr. 43, Oct. 23, 2003, at 12-13 (detailing opposition of firearm owners' associations to proposal to register firearms); "Eidgenössische Parlamentarier und Kandidaten haben das Wort," *Schiessen Schweiz*, Nr. 41, Oct. 9, 2003, at 10 (explaining support for firearm owners by leaders of Schweizerische Volkspartei or SVP [Swiss People's Party], and Freisinnig-Demokratische Partei der Schweiz or FDP [Free Democratic Party])
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76. See Halbrook, *Target Switzerland*, *supra* note 1, at 29-30.
77. Alfred Hostettler, "Ein vom Bund aufgezwungener 'Sport,'" *Arbeiterschiesswesen in der Schweiz* 69 (1990).
78. See *Swiss Mess*, *supra* note 23.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. See *Swiss Mess*, *supra* note 23.
84. *Id.*

85. Letter from Jürg Stüssi-Lauterburg, Ph.D., to Stephen P. Halbrook (Oct. 2, 2001) (on file with author)
86. *Id.*
87. See Joyce Lee Malcolm, *Guns and Violence: The English Experience* (2002).
88. Isobel Johnson, *Government sets its sights on gun law*, Swiss Info, Sept. 28, 2002, available at <<http://www.swissinfo.org/sen/swissinfo.html?siteSect=105&sid=1363061>> (last visited Dec. 8, 2003); see also Metzler *calls for tighter gun controls*, Swiss Info, Sept. 21, 2003, at <<http://www.swissinfo.org/sen/swissinfo.html?siteSect=105&sid=4263352>> (last visited Dec. 8, 2003)
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90. *Id.*
91. Eidg. Justiz und Polizeidepartement, *Revision de la loi sur les armes – consultations complémentaire* (Berne, le 22.09.2003).
92. See Morven McLean, A Switzerland braced for Blocher shockwave, Swiss Info, Dec. 10, 2003, at <<http://www.swissinfo.org/sen/swissinfo.html?siteSect=105&sid=4534943>>.
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94. *Id.* at 170.
95. See Bürgel, *supra* note 93
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98. See Bürgel, *supra* note 93.
99. Martin Killias, “Gun Ownership and Violent Crime: The Swiss Experience in International Perspective,” 1 *Security Journal* 169 (1990).
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103. See *infra* text accompanying footnote 125.
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105. *Id.* at 170, 172.
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143. Henri Guisan, *Notre Peuple et son Armée* 26 (Polyg. ed., 1939).
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# The Mechanisms of the Slippery Slope

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In other countries [than the American colonies], the people . . . judge of an ill principle in government only by an actual grievance; here they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance and snuff the approach of tyranny in every tainted breeze.

— Edmund Burke,

*On Moving His Resolutions for Conciliation with the Colonies.*

## I. INTRODUCTION

You are a legislator, a voter, a judge, a commentator, or an advocacy group leader. You need to decide whether to endorse decision A, for instance a partial-birth abortion ban, a limited school choice program, or a gun registration mandate.

You think A might be a fairly good idea on its own, or at least not a very bad one. But you're afraid that A might eventually lead other legislators, voters, or judges to implement policy B, which you strongly oppose—for instance, broader abortion restrictions, an extensive school choice program, or a total gun ban.

What does it make sense for you to do, given your opposition to B, and given your awareness that others in society might not share your views? Should you heed James Madison's admonition that "it is proper to take alarm at the

first experiment on our liberties,” and oppose a decision that you might have otherwise supported were it not for your concern about the slippery slope? Or should you accept the immediate benefits of A, and trust that even after A is enacted, B will be avoided?

Slippery slopes are, I will argue, a real cause for concern, as legal thinkers such as President James Madison, Justice Robert Jackson, Justice William Brennan, Justice John Harlan, and Justice Hugo Black have recognized, and as our own experience at least partly bears out: we can all identify situations where one group’s support of a first step A eventually made it easier for others to implement a later step B that might not have happened without A (though we may disagree about exactly which situations exhibit this quality). Such an A may not have logically required the corresponding B, yet for political and psychological reasons, it helped bring B about.

But, as thinkers such as President Abraham Lincoln, Justice Oliver Wendell Holmes, and Justice Felix Frankfurter have recognized, slippery slope objections can’t always be dispositive. We accept, because we must, some speech restrictions, searches and seizures, and other regulations. Each first step involves risk, but it is often a risk that we need to take.

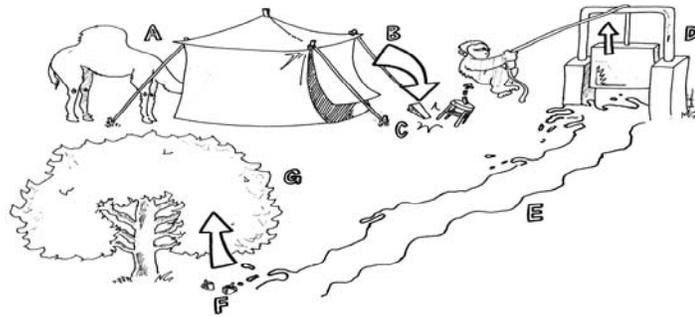
This need makes many people impatient with slippery slope arguments. The slippery slope argument, opponents suggest, is the claim that “we ought not make a sound decision today, for fear of having to draw a sound distinction tomorrow.”<sup>1</sup> Exactly why, for instance, would accepting (for instance) a restriction on “ideas we hate” “sooner or later” lead to restrictions on “ideas we cherish”?<sup>2</sup> If the legal system is willing to protect the ideas we cherish today, why won’t it still protect them tomorrow, even if we ban some other ideas in the meantime? And even if one thinks slippery slopes are possible, what about cases where the slope seems slippery both ways—where both alternative decisions might lead to bad consequences?

My aim here is to analyze how we can sensibly evaluate the risk of slippery slopes, a topic that has been surprisingly underinvestigated.<sup>3</sup> I think the most useful definition of a slippery slope is one that covers all situations where decision A, which you might find appealing, ends up materially increasing

the probability that others will bring about decision B, which you oppose.

If you are faced with the pragmatic question “Does it make sense for me to support A, given that it might lead others to support B?” you should consider all the mechanisms through which A might lead to B, whether they are logical or psychological, judicial or legislative, gradual or sudden. You should consider these mechanisms whether or not you think that A and B are on a continuum where B is in some sense more of A, a condition that would in any event be hard to define precisely.

You should think about the entire range of possible ways that A can change the conditions—whether those conditions are public attitudes, political alignments, costs and benefits, or what have you—under which others will consider B. The slippery slope is a familiar label for many instances of this phenomenon: when someone says “I oppose partial-birth abortion bans because they might lead to broader abortion restrictions,” or “I oppose gun registration because it might lead to gun prohibition,” the common reaction is “That’s a slippery slope argument.”



CAMEL (A) STICKS HIS NOSE UNDER THE TENT (B), WHICH COLLAPSES, DRIVING THE THIN END OF THE WEDGE (C) TO CAUSE MONKEY TO OPEN FLOODGATES (D), LETTING WATER FLOW DOWN THE SLIPPERY SLOPE (E) TO IRRIGATE ACORN (F) WHICH GROWS INTO OAK (G). [ILLUSTRATION BY ERIC KIM, FROM AUTHOR’S IDEA.]

These mechanisms will be the focus of this article. Slippery slopes, camel noses, thin ends of wedges, floodgates, and acorns are metaphors, not analytical tools. The article aims to describe the real-world paths that the metaphors represent—to provide a framework for analyzing and evaluating slippery slope risks by focusing on the concrete means through which A might possibly lead others to support B. This analysis should also help people construct slippery slope arguments (and counterarguments); but the primary goal is understanding the means through which slippery slopes may actually operate, and not simply the rhetorical structure of slippery slope arguments. Specifically, I want to make the following claims, which are closely related but worth highlighting separately:

1. Though the metaphor of the slippery slope suggests that there's one fundamental mechanism through which the slippage happens, there are actually many different ways that decision A can make decision B more likely. Many of these ways have little to do with the mechanisms that people often think of when they hear the phrase “slippery slope”: development by analogy, by changes in people's moral or empirical attitudes, or by “desensitization” of people to earlier decisions.

To illustrate this briefly, consider the claim that gun registration (A) might lead to gun confiscation (B). Setting aside whether we think this slippery slope is likely—and whether it might actually be desirable—it turns out that the slope might happen through many different mechanisms, or combinations of mechanisms:

- a. Registration may *change people's attitudes about the propriety* of confiscation, by making them view gun possession not as a right but as a privilege that the government grants and thus may deny.
- b. Registration may be seen as a *small enough change* that people will reasonably ignore it (“I'm too busy to worry about little things like this”), but when aggregated with a sequence of other small changes, registration might ultimately lead to confiscation or something close to it.
- c. The enactment of registration requirements may create *political momentum* in favor of gun control supporters, thus making it easier for them to persuade legislators to enact confiscation.

- d. People who don't own guns are more likely than gun owners to support confiscation. If registration is onerous enough, over time it may discourage some people from buying guns, thus decreasing the fraction of the public that owns guns, decreasing the *political power* of the gun-owning voting bloc, and therefore increasing the likelihood that confiscation will become politically feasible.
- e. Registration may *lower the cost* of confiscation—since the government would know which people's houses to search if the residents don't turn in their guns voluntarily—and thus make confiscation more appealing to some voters.
- f. Registration may trigger the operation of *another legal rule* that makes confiscation easier and thus more cost-effective: if guns weren't registered, confiscation would be largely unenforceable, since house-to-house searches to find guns would violate the Fourth Amendment; but if guns are registered some years before confiscation is enacted, the registration database might provide probable cause to search the houses of all registered gun owners.

In the registration-to-confiscation scenario, only the latter two mechanisms seem fairly plausible to me; in other scenarios, others may be more plausible. And there are of course mechanisms that may work in the opposite direction, so that decision A may under some political conditions make decision B *less* likely. But being aware of all these phenomena, including the several kinds of slippery slope mechanisms, can help us (as citizens and policymakers) think through all the possible implications of some decision A—and can help us (as advocates) make more concrete and effective arguments for why A would or would not lead to B.

2. As the above example illustrates, slippery slopes are not limited to *judicial-judicial* ones, where one judicial decision leads to another through the force of judicial precedent. They can also be *legislative-legislative*, where one legislative decision leads to another (Madison's concern in his famous *Remonstrance Against Religious Assessments*), *judicial-legislative*, or *legislative-judicial*. (Much of this analysis may also be applicable to administrative decisions

or executive decisions, but I have not focused closely on those matters.)

3. Slippery slopes may occur *even when a principled distinction can be drawn* between decisions A and B. The question shouldn't be "Can *we* draw the line between A and B?" but rather "Is it likely that *other* citizens, judges, and legislators will draw the line there?"

More broadly, the question ought not be "How should society (or the legal system) decide whether to implement A?" Societies are composed of people who have different views, so one person or group of people may want to oppose A for fear of what *others* will do if A is accepted. And these others need not constitute a majority of society: slippery slopes can happen even if A will lead only a significant minority of voters to support B, if that minority is the swing vote.

4. In a stylized world where voters and legislators are fully rational, have unlimited time to invest in political decisions, and have single-peaked preferences (see section II.B), slippery slopes are unlikely. In such a world, if B is unpopular today, it will still be unpopular tomorrow, whether or not A is enacted; enacting A therefore won't cause any slippage to B. The skepticism about slippery slopes may come partly from the common tendency to assume that we are living in this stylized world, an assumption that is often a sensible first-order approximation.

It turns out, though, that the mechanisms of many slippery slopes are closely connected to *phenomena that contradict these simplifying assumptions*: bounded rationality, rational ignorance, heuristics that people develop to deal with their bounded rationality, expressive theories of law, path dependence, irrational choice behaviors such as context-dependence, and multi-peaked preferences. And because these phenomena are common in the real world of voters, legislators, and judges, slippery slopes are more likely than one might at first think.

5. The existence of the slippery slope creates what I call the *slippery slope inefficiency*: decision A might itself be socially beneficial, and many people might agree that it's beneficial; but some swing voters' concern that A will lead to B might prevent decision A from being implemented. One corollary of the inquiry "How likely is A to lead to B?" is the inquiry "How can we make it less likely that A will lead to B, so that we can reach

agreement on A despite some people's concern about B?" I propose a few hypotheses along these lines.

First, substantive constitutional limits on government power can be regulation-enabling, not just regulation-frustrating. A non-absolute constitutional right to get an abortion, to speak, or to own guns can free people to vote for small burdens on the right with less concern that these small steps will lead to broader constraints (see section II.A.6).

Second, constitutional equality rights—under the Equal Protection Clause, the Free Speech Clause, or other provisions—are themselves means by which decision A may lead to decision B, because a court might conclude that implementing A without implementing B would violate the equality rule. Deferential equality tests, such as the current weak rational basis test that applies to many equal protection claims, can thus prevent this type of slippery slope.

Third, legislators may sometimes decrease the risk of certain kinds of slippery slopes—such as political momentum slippery slopes—by enacting proposal A as part of a compromise where each side gets some change in the current policy, so that neither side is seen as the clear winner (see section VI.B).

6. Recognizing slippery slope concerns might lead us to *modify the rules of thumb we use* for evaluating the potential downstream effects of proposals. For example, people often urge others not to make a big deal out of small burdens, and argue that only the foolishly intransigent will fight such modest experiments—an argument often levied against abortion rights or gun rights “extremists.”

But the more we believe that one step now may lead to other steps later, the more we may view such experimentation with concern. We might therefore adopt a rebuttable presumption against even small changes, under which we oppose any proposal A (in certain areas) unless we see it as having great benefits, because even a seemingly modest restriction has the added cost of increasing the chances of undesirable broader restrictions B in the future. And this concern, if it can be persuasively articulated, can provide a response to the “You’re an extremist” argument.

Likewise, we are often cautioned against *ad hominem* arguments and against impugning our political opponents’

motives, and there is much to these cautions. Nonetheless, the existence of some slippery slope mechanisms suggests that what one might call an *ad hominem* heuristic—a policy of presumptively opposing even minor proposals made by certain groups that also support broader proposals, unless the proposals clearly seem to be very good indeed—may be more pragmatically rational than one might think (see sections II.F and IV.B).

7. These heuristics—rules of thumb that people can follow when they lack the time and ability to conduct an exhaustive logical and empirical analysis—may also *shed light on the behavior of advocacy groups* such as the ACLU or the NRA. Public consciousness of the possibility of slippage may help prevent the slippage, either by preventing the first steps or by building opposition to the subsequent ones. One role of advocacy groups is to alert the public to slippery slope risks, partly by trying to instill the heuristics mentioned above. This strategy can be dangerous for advocacy groups because it may make them seem extremist. But, as I discuss throughout and summarize in section VII.B, real slippery slope risks may make such a strategy necessary.

8. Thinking about legislative slippery slopes illuminates two aspects of judicial decision making: *reliance on precedent* (where judicial-judicial slippery slopes may appear) and *deference to the legislature* (where legislative-judicial slippery slopes may operate). These parts of the judicial process, it turns out, are closely connected to analogous processes in legislative decision making (see sections II.D.4.b, III.D, and IV.C).

9. Thus, *slippery slopes present a real risk*—not always, but often enough that we cannot lightly ignore the possibility of such slippage.

\* \* \*

The analysis that follows explores the different kinds of slippery slopes that I have identified, illustrating each with a variety of hypotheticals based on real controversies (Parts II through VI). I hope that readers will find at least some of these illustrations plausible, and will conclude that slippery slopes are

possible (even if not certain) in some of these situations. Part VII then briefly summarizes how we might apply this analysis to (1) evaluating the likelihood of slippage, (2) crafting slippery slope arguments and counterarguments, (3) thinking about ideological advocacy groups, (4) avoiding the slippery slope inefficiency, (5) understanding the operation of judicial precedent, and (6) designing future econometric, historical, or psychological research about slippery slopes.

## II. COST-LOWERING SLIPPERY SLOPES AND OTHER MULTI-PEAKED PREFERENCES SLIPPERY SLOPES

### A. Cost-Lowering Slippery Slopes

1. *An Example.*—Let's begin with the slippery slope question mentioned in the Introduction: does it make sense for someone to oppose gun registration (A) because registration might make it more likely that others will eventually enact gun confiscation (B)? A and B are logically distinguishable, but can A nonetheless help lead to B?

Today, when the government doesn't know where the guns are, gun confiscation would require searching all homes, which would be very expensive; relying heavily on informers, which may be unpopular; or accepting a probably low compliance rate, which may make the law not worth its potential costs. And searching all homes would be both financially and politically expensive, since the searches would incense many people, including some of the non-gun-owners who might otherwise support a total gun ban.

But if guns get registered, searching the homes of all registrants who don't promptly surrender their guns (or at least certain types of guns) would become both financially and politically cheaper. Confiscation has eventually followed gun registration in England, New York City, and Australia. While it's impossible to be sure that registration helped cause confiscation in those cases, it seems likely that people's compliance with the registration requirement would make confiscation easier to implement, and therefore more likely to be enacted. And Pete Shields, founder of the group that became Handgun Control, Inc., openly described registration as

a preliminary step to prohibition, though he didn't describe exactly how the slippery slope mechanism would operate.

Under some conditions, then, legislative decision A may lower the cost of making legislative decision B work, thus making decision B cost-justified in the decisionmakers' eyes. There's no requirement here that A be seen as a precedent, or that A change anybody's moral or pragmatic attitudes—only that it lower certain costs, in this instance by giving the government information.

2. *A Diverse Preferences Explanation for Cost-Lowering Slippery Slopes.*—The cost-lowering slippery slope is driven by voters' having a particular mix of preferences; a numerical example might help show this.

Consider a hypothetical proposal to put video cameras on street lamps in order to help deter and solve street crimes. The plan obviously isn't perfect, but it seems promising: smart criminals will be deterred and dumb ones will be caught.

On its own, the plan might not seem that susceptible to police abuse, at least so long as (for instance) the tapes are recycled every day and the cameras aren't linked to face-recognition software. Under those conditions, the cameras might be effective for fighting low-level street crime, but they wouldn't make it that easy for the police to track the government's enemies. People might therefore support installing these cameras (decision A), even if they would oppose implementing face-recognition software or permanently archiving the tapes (decision B). (I take no position here on which view is substantively best; I am only describing how some people might act to have the best chance of implementing their own preferences.)

But once the legislature implements A and the government invests money in installing thousands of cameras, wiring them to central video recorders or to phone lines, and protecting them from vandals, implementing B becomes much cheaper economically, and thus easier politically. Imagine that, *if* money were no object, voters would have the following (highly stylized) mix of opinions:

- 20% of the public would oppose even decision A, because they don't want the police videotaping street activity at all;

- 20% of the public would support A but oppose B, because they like videotaping only if tapes are quickly recycled and no face-recognition software is used;
- 60% of the public would support B, because they like police videotaping more generally, and would certainly support A if they can't get B.

And imagine that 30% of the second and third groups would nonetheless oppose decisions A and B because they cost too much. The mix of preferences would thus be:

Group #	Preference	Would support in principle <i>and</i> given the cost (e.g., if there are no cameras yet, and we're in position 0)	Would support in principle, if there were no extra cost (e.g., if the cameras are already up, because A was already implemented)
I	0: no cameras	20%	20%
II	A: cameras, no face-recognition and no archiving	14%	20%
III	B: cameras, with face-recognition and archiving	42%	60%

If the people in group II focus only on the vote on A, members of that group who don't mind the financial cost will vote "yes"; and with group II's  $20\% \times 70\% +$  group III's  $60\% \times 70\% = 56\%$  of the vote, A would be enacted. (I assume 56% support suffices for the proposal to win—not certain, but likely.) But a few years later, when someone suggests a move to B at no extra cost, that proposal would also be enacted, since 60% of the public would now support it, given that there's no more fiscal objection.

Thus, the group II people must make a tough choice: do they want A so much that they're willing to accept the risk of B as well, or are they so concerned about B that they're willing to reject A? The one item that is off the table is the one group II most prefers, which is A alone with no danger of B. The cost-lowering slippery slope has eliminated that possibility, at least unless there's a constitutional barrier to B or unless the government intentionally makes B expensive to implement, for

instance by buying cameras that are incompatible with the technology needed for B.

This is, of course, just a hypothetical; obviously, if people's preferences break down differently, the slippery slope might not take place. But it shows that this sort of slippery slope *may* happen under plausible conditions—and that people who support A but not B should therefore consider the possibility of slippage.

3. *Cost-Lowering Slippery Slopes, the Costs of Uncertainty, and Learning Curves.*—The above example involves the cost of tangible items: cameras. But another cost of any new project is the cost of early implementation errors.

People are often skeptical of new proposals (such as Social Security privatization or school choice) on these very grounds. But if the government implements a modest version of the proposal (A), and then after some years of difficulty, the modest version is fine-tuned to work fairly well, some voters might become more confident that the government—armed with this new knowledge derived from the A experiment—can also effectively implement a much broader step B.

For those who support this broader B in principle, this is good: the experiment with A will have led some voters to have more confidence that B would be properly implemented, and thus made enacting B more politically feasible. But, as in the cameras example, those who support A but oppose B in principle might find that their voting for A has backfired.

Some of A's supporters might therefore decide to vote strategically against A, given the risk that A would lead to B. The government, they might reason, ought not learn how to efficiently do bad things like B (bad in the strategic voter's opinion), precisely because the knowledge can make it more likely that the government will indeed do these bad things.

4. *Legal-Cost-Lowering Slippery Slopes.*—Let us briefly revisit the argument that gun registration may increase the chances of gun confiscation. Today, gun confiscation would be hard to enforce, partly because of the Fourth Amendment. Searching all homes for some or all kinds of guns would be unconstitutional, a classic impermissible general search. This is a cost of confiscation—not a financial cost, but a legal cost that keeps confiscation from being performed efficiently.

If, however, guns are first successfully registered, and are later banned, a house-to-house search of the homes of registered owners who haven't turned in their guns may well become constitutional. Your registration as the owner of a weapon may be seen as probable cause to believe that you have it; and one place you're likely to be keeping it is your home. This isn't a certainty, but a magistrate may find that it suffices for probable cause and issue a search warrant that would let the police search your home for the gun.

Again, this scenario doesn't require us to assume that registration (decision A) will be seen as morally indistinguishable from confiscation (decision B), that registration will set a precedent, or that registration will desensitize voters to confiscation. Decision A can make B more likely even if it doesn't change a single voter's, legislator's, or judge's mind about the moral propriety of gun prohibition or confiscation. Rather, the legally significant effect of registration can change the practical cost-benefit calculus surrounding prohibition, thus making prohibition more probable (though of course not certain). Of course, decision B might not be made even if A makes it easier; in some places, voters would oppose handgun bans even if they could be cheaply and legally enforced. But in other places, handgun bans may be popular—handguns are already largely banned in Washington, D.C. and Chicago, for instance—and if gun registration makes confiscation cheaper, it may also make confiscation more likely.

5. *Being Alert to the Risk of Cost-Lowering Slippery Slopes.*—This suggests that decisionmakers—legislators, voters, advocacy groups, or opinion leaders—should consider how proposed government actions would change the costs of implementing future actions, in particular:

- a. How would this government action provide *more information* to the government (for example, who owns the guns), and what other actions (for example, seizing the guns) would be made materially cheaper by the availability of this information?
- b. How would this government action provide *more tools* to the government (for example, video cameras), and what other actions (for example, automated face recognition or videotape archiving) would be made cheaper by the existence of these tools?

- c. How would this government action provide *more experience* to the government in doing certain things, and what other actions would this extra experience make less risky and thus more politically appealing?
- d. How would this government action provide *more legal power* to the government (for example, the power to search people's homes), and what other actions would this extra grant of power make possible or make easier?

Opponents of B thus can't simply console themselves with the possibility that a line between A and B *can logically* be drawn, dismiss the slippery slope concern as being that "we ought not make a sound decision today, for fear of having to draw a sound distinction tomorrow," or argue that

[s]omeone who trusts in the checks and balances of a democratic society in which he lives usually will also have confidence in the possibility to correct future developments. If we can stop now, we will be able to stop in the future as well, when necessary; therefore, we need not stop here yet.<sup>4</sup>

There's a different "we" involved: those who support A but oppose B should fear that if *they* vote for A now, such a vote may lead *others* to vote for B later—and that though a logical line could be drawn between A and B (yes cameras, no archiving, no face recognition), most voters will decide to draw the line on the far side of B rather than on the near side. Even those who generally trust that their society is democratic can therefore rationally oppose a decision that they like on its own, for fear that it will lower the cost of another decision that they dislike and thus make that decision more likely.

6. *Constitutional Rights as Tools for Preventing the Slippery Slope Inefficiency.*—The examples above illustrate the slippery slope inefficiency: even if most voters believe decision A (for example, gun registration) is good policy on its own—even some gun rights enthusiasts might think that registration may help solve some crimes without by itself materially burdening people's ability to defend themselves—A may be rejected because enough of those voters fear that A will lead to B (gun prohibition), which they oppose. And the examples point to one possible way of preventing the inefficiency: the recognition of constitutional rights that would prevent B, such as a non-

absolute right to own guns.<sup>5</sup> Once this constitutional precommitment makes B much less likely, opponents of B have less to fear (to the extent they trust the courts) and can therefore support A or at least oppose it less.

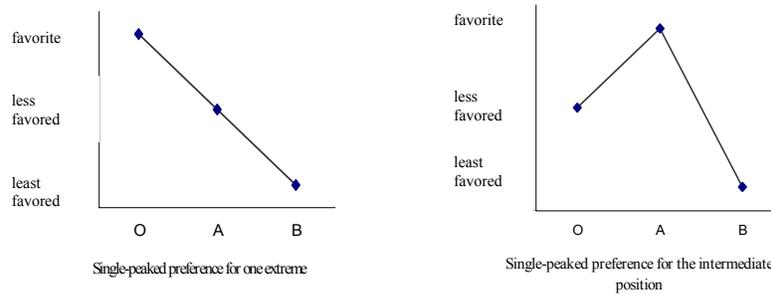
Constitutional constraints are thus not only legislation-frustrating (because they prohibit total bans on guns), but also in some measure legislation-facilitating (because some voters may support more modest gun controls, once they stop worrying that these controls will lead to a total ban). Changing a constitution to secure a right may therefore sometimes help both those who want to moderately protect the right and those who want to moderately restrict it—though much depends on how broad the right would be, and on how much political power the various groups have. Consider the key arguments for the enactment of the Constitution itself: Federalists proposed various checks and balances in the Constitution, and eventually the Bill of Rights, to alleviate concerns that creating even a small federal government would start the country down a slippery slope toward a much more powerful federal government. We have indeed slipped down the slope in large measure, but the Constitution likely did slow the slide, and made possible coalitions that supported various sensible decisions A, because all coalition members could be confident that the constitutional regime would for a while block the potential downslope results B that some members disliked.

On the other hand, as Part III will describe, a constitutional right may also have *attitude-altering* effects that help cause slippage to greater and greater protection for the right. Judicial recognition of a right to bear arms may thus facilitate some compromise gun control proposals (A) because it will diminish some voters' concerns that A will lead to a total gun ban (B)—but recognizing the right to bear arms might eventually lead to A being undone, and to the law shifting back closer to the initial position 0, as judges or voters are influenced by the attitude-shaping force of the constitutional right. The long-term effects of any decision are not easy to predict, though understanding the slippery slope mechanisms should help us investigate the likelihood of such effects.

## B. Cost-Lowering Slippery Slopes as Multi-Peaked Preferences Slippery Slopes

Cost-lowering slippery slopes, it turns out, are a special case of a broader mechanism—the multi-peaked preferences slippery slope.

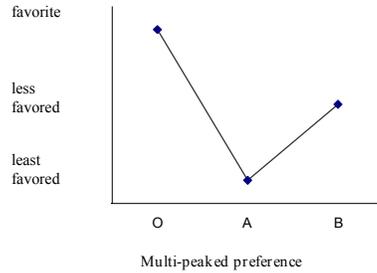
In many debates, one can roughly divide the public into three groups: traditionalists, who don't want to change the law (they like position 0); moderates, who want to shift a bit to position A; and radicals, who want to go all the way to position B. What's more, one can assume “single-peaked preferences”: both traditionalists and radicals would rather have A than the extreme on the other side. We can represent the preferences as follows, which is why the preferences are called “single-peaked”:



If neither the traditionalists nor the radicals are a majority, the moderates have the swing vote, and thus needn't worry much about the slippery slope. Say that 30% of voters want no street-corner cameras (0), 40% want cameras but no archiving and face recognition (A), and 30% want cameras with archiving and face recognition (B). The moderates can join the radicals to go from 0 to A; and then the moderates can join the traditionalists to stay at A instead of going to B. So long as people's attitudes stay fixed (we'll relax this assumption in Part III), there's no slippery slope risk: those who prefer A can vote for it with little danger that A will enable B.

But say instead that some people prefer 0 best of all (they'd rather have no cameras, because they think installing cameras costs too much), but if cameras were installed they would think

that position B (archiving and face recognition) is better than A (no archiving and no face recognition): “If we spend the money for the cameras,” they reason, “we might as well get the most bang for the buck.” This is a multi-peaked preference—these people like A *least*, preferring either extreme over the middle.



Let’s also say that shifting the law from one position to another requires a mild supermajority, say 55%; a mere 50%+1 vote isn’t enough because the system has built-in brakes (such as the requirement that the law be passed by both houses of the legislature, the requirement of an executive signature, or a more general bias in favor of the status quo). We can thus imagine the public or the legislature split into several different groups, each with its own policy preferences and its own voting strength.

Group	Policy preferences			Supports proposed move?			Attitude	Voting Strength
	Most prefers	Next preference	Most dislikes	0 → A	A → B	0 → B		
1	0	A	B				“As little surveillance as possible, either (1) as a matter of principle, or (2) because we prefer surveillance level A as a matter of principle, but think cameras are too expensive”	26% (20% for (1) + 6% for (2))

2	0	B	A		✓		"Cameras are too expensive, but if the money is spent, might as well get as much surveillance for it as possible"	18%
3	A	0	B	✓			"We prefer moderate surveillance level A, and definitely no more"	14%
4	A	B	0	✓		✓	"We prefer surveillance level A, and definitely no less"	0% (in this example)
5	B	0	A		✓	✓	"We want maximum surveillance, but if we can't have that, we'd rather have no surveillance instead of A"	0%
6	B	A	0	✓	✓	✓	"We want maximum surveillance, and cost isn't a concern"	42%

This preference breakdown is exactly the same as in the simpler table on p. 71; and, as in that table, the direct  $0 \rightarrow B$  move fails, because it gets only 42% of the vote (group 6), but the  $0 \rightarrow A$  move succeeds with 56% of the vote (groups 3 and 6) and then the  $A \rightarrow B$  move succeeds with 60% of the vote (groups 2 and 6). Any proposed  $B \rightarrow 0$  move will fail because group 2, which originally preferred 0 over B, no longer prefers it, since the money has already been spent and the cameras bought. As before, members of group 3 must now regret their original vote for the  $0 \rightarrow A$  move, because that vote helped bring about result B, which they most oppose.

Multi-peaked preferences thus make the moderate position A politically unstable—which means that implementing A can grease the slope for a B that otherwise would have been blocked.

### C. More Multi-Peaked Preferences: “Enforcement Need” Slippery Slopes

As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. . . . [T]he First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings.

— *W. Va. State Bd. of Educ. v. Barnette* (1943)  
(Jackson, J).

There are many possible multi-peaked preferences slippery slopes besides the cost-lowering slippery slope; one example is the enforcement need slippery slope.

Imagine marijuana is legal, and the question is whether to ban it. Some prefer to keep it legal (0), others want to ban it but enforce the law lightly (A), and others want to ban it and enforce the law harshly, with intrusive searches and strict penalties (B).

But say also that some people would prefer 0 best of all (they'd rather keep marijuana legal), but once marijuana is outlawed they would think that position B (strict enforcement) is better than A (lenient enforcement). “Laws should be enforced,” they might argue, “because not enforcing them only teaches people that law is meaningless and that they can violate all sorts of laws with impunity.” Obviously, if they thought the law was extremely bad, they would have preferred that it be flouted with impunity rather than strictly enforced. But let's assume they think the law is only slightly unwise, whereas leaving such a law unenforced is very unwise. We again see a multi-peaked preference—people like A *least*, preferring either extreme over the middle.

Let's assume, as before, that it takes at least a 55% supermajority to shift from the status quo, and let's assume—again, as a stylized hypothetical, though I hope a plausible one—the following group breakdown:

Group	Policy Preferences			Supports Proposed Move?			Attitude	Voting Strength
	Most prefers	Next preference	Most dislikes	0→A	A→B	0→B		
1	0	A	B				"Restrict marijuana as little as possible"	10%
2	0	B	A		✓		"Restricting marijuana is bad, but contempt for the law is even worse"	20%
3	A	0	B	✓			"A little restriction is good, but hardcore enforcement is very bad"	20%
4	A	B	0	✓		✓	"A little restriction is good, and having no restriction is very bad"	10%
5	B	0	A		✓	✓	"Marijuana is bad, but contempt for the law is even worse"	10%
6	B	A	0	✓	✓	✓	"Marijuana is bad; do as much as you can to stop it"	30%

Given these preferences, a proposal to shift from position 0 (legal marijuana) to B (a sternly enforced marijuana ban) would fail: it would get the votes of groups 4, 5, and 6—only 50%. But a proposed 0→A shift (to a weakly enforced ban) would succeed, with a 60% supermajority coming from groups 3, 4, and 6. Once A is enacted, a proposed A→B shift would also succeed, with the votes of groups 2, 5, and 6, also 60%.

And then shifting from B back to 0 would be impossible, since such a proposal would only get the votes of groups 1, 2, and 3, just 50%.

In this hypothetical, decision A *wouldn't change anyone's underlying attitudes*; rather, it would lead one small but important swing group (the 20% of the voters in group 2) to vote for B, based on their preexisting preference for B over A, even though that group would have opposed B had the status quo remained at 0. Even when only a minority of voters (30%, groups 2 and 5) exhibits multi-peaked preferences, and an even smaller minority takes the enforcement need view that “we don't much like the law but we dislike people flouting the law even more” (20%, group 2), moving to A can cause slippage to B.

The lesson, then, is for the moderates in group 3, who like A but worry that their support for A would eventually help bring about B, which they dislike most of all. They should ask themselves: “What fraction of our current anti-B coalition will start backing B if we enact A?” If the answer looks high enough—as it is in this hypothetical, and as it may be in many (though far from all) real-world scenarios—group 3 members may want to resist the original move to A, even if they like A on its own.

This analysis suggests that when people consider a proposal A, they should also think systematically about:

1. what enforcement problems might arise after A is enacted;
2. what new proposal B might become more popular as a means of fighting these enforcement problems;
3. whether this new B would be harmful enough and likely enough that the danger of B being enacted justifies opposing A; and
4. whether there's some way of minimizing the risks that B will come about, perhaps by coupling A with some up-front assurances that B will be rejected.

#### D. Equality Slippery Slopes and Administration Cost Slippery Slopes

1. *The Basic Equality Slippery Slope.*—Multi-peaked slippery slopes can happen when a significant group of people

prefers both extremes to the compromise position. One such situation is when A without B seems unfairly discriminatory. Consider the following example:

- Position 0 is no school choice: the state funds only public schools.
- Position A is secular school choice: the state funds public schools but also gives parents vouchers that they can take to private secular schools but not to religious schools.
- Position B is total school choice: the state funds public schools but also gives parents vouchers that they can take to any private school, secular or religious.

And say that voter preferences break down just as in the previous example:

Group	Policy Preferences			Supports Proposed Move?			Attitude	Voting Strength
	Most prefers	Next preference	Most dislikes	0 → A	A → B	0 → B		
1	0	A	B				"As little school choice as possible"	10%
2	0	B	A		✓		"No school choice is best, but better total school choice than discriminatory exclusion of religious schools"	20%
3	A	0	B	✓			"Secular school choice is better than none, but definitely no inclusion of religious schools"	20%
4	A	B	0	✓		✓	"Secular school choice is best, but we can live with including religious schools"	10%

5	B	0	A		✓	✓	"Total school choice is best, but better no school choice than discriminatory exclusion of religious schools"	10%
6	B	A	0	✓	✓	✓	"As much school choice as possible"	30%

Because 30% of the voters (groups 2 and 5) have multi-peaked preferences driven by their hostility to discrimination against religious schools, there is an equality slippery slope. Total school choice would have gotten only 50% of the vote (groups 4, 5, and 6) if it had been proposed without the intermediate step of secular school choice. But proceeding one step at a time, we have a 60% vote for secular school choice (groups 3, 4, and 6), and then a 60% vote for total school choice (groups 2, 5, and 6), driven largely by group 2’s strong preference for equality.

Once the system has gone all the way to total school choice, group 3 will likely regret its original support for A (secular school choice). Total school choice is the worst option from group 3’s perspective, and yet it was group 3’s support for the halfway step of secular school choice that made total school choice possible.

This example illustrates that an equality slippery slope can happen even when A and B are distinguishable. Here, a majority of voters concludes that A and B needn’t be treated equally—but the slippage happens because a minority (here, 30%) exhibits a multi-peaked preference by preferring either form of equal treatment (0 or B) to unequal treatment (A). Thus, even those who support A on its own, and who believe that A and B can be logically distinguished, might be wise to oppose A if there’s enough risk that implementing A will lead *others* to also end up supporting B. And school choice debates are of course just one example; the same phenomenon can happen in many other areas, such as assisted suicide or speech restrictions, and can cause slippage towards greater freedom from restraint or towards greater restrictions.<sup>6</sup>

2. *Administration Cost Slippery Slopes.*—An intermediate position A might also be untenable if it is burdensome to administer. One obvious burden might be the effort required to make and review decisions under a nuanced, fact-intensive rule: for instance, the Supreme Court came within one vote of slipping—for better or worse—down the slope to eliminating the obscenity exception, partly because of the perceived difficulties of administering the obscenity test. Another burden may be the risk of error in applying a complex rule, especially when the rule needs to be applied by many lower courts or executive officials.

The decisions that proposal A would require might also prove burdensome if they are seen as too arbitrary or as involving too much second-guessing of others' judgments. Just to give one of many possible examples, carving out an exception from a criminal procedure rule for especially serious crimes may at first seem appealing; but because courts are properly hesitant to disagree with legislative judgments that various crimes are serious, they may ultimately apply the rule to more and more offenses.

3. *The Relationship Between Equality and Administration Cost Slippery Slopes and Constitutional Equality Rules.*—Equal treatment, of course, is sometimes not just a political preference but also a constitutional command. If a legislature exempts labor picketing from a residential picketing ban (A), then a court will likely strike down the ban altogether (B), because content-based speech restrictions are presumptively unconstitutional. If a legislature enacts a school choice program limited to secular public and private schools (A), a court might conclude that religious private schools must also be covered (B), because of the constitutional ban on discrimination based on religiosity. Some administration costs are likewise seen as unconstitutional, for instance if a proposed rule requires a court to determine which practices are central to a religion's belief system.

This equal treatment command also flows from multi-peaked preferences, though preferences held by judges rather than by legislators. The Justices who created the residential picketing rule, and those who choose to follow it, believe that both 0 (all residential picketing is allowed) and B (all residential picketing is banned) are constitutionally acceptable, but that A

(only labor picketing is allowed) is the worst position of the three, because it is unconstitutionally discriminatory.

Overlaying the multi-peaked judicial preferences with the legislative preferences, which might be single-peaked, thus produces the slippery slope. Legislators who prefer A over both 0 and B (a single-peaked preference) may enact A, but then an equality rule created by Justices who prefer 0 and B over A (a multi-peaked preference) commands a shift to B.

4. *Judicial-Judicial Equality Slippery Slopes and the Extension of Precedent.*

(a) *Simply Following Precedent: A Legal Effect Slippery Slope.*— One of the most common “A will lead to B” arguments is the argument that judicial decision A would “set a precedent” for decision B. This generally means that (1) A would rest on some justification J and (2) justification J would also justify B.

Consider, for instance, the debate about whether the government should be allowed to ban racial, sexual, and religious epithets (beyond those that fit within the existing fighting words and threat exceptions). To uphold such a ban (decision A), the courts would have to give some general justification for why these words should be punishable, essentially creating a new exception to First Amendment protection.

If this justification J were that “epithets add little to rational political discourse and are thus ‘low-value speech,’ which may be punished,” then courts could likewise use this J to uphold bans on flag burning, profanity, and sexually themed (but not obscene) speech, all examples of speech that some argue is of “low value” (result B). In fact, a lower court might feel *bound* to reach result B because of precedent A’s acceptance of justification J. We might call this process a legal effect slippery slope, because B follows from A as an application of an existing legal rule (the obligation to follow precedent). A related legal effect slippery slope may happen when the justification underlying A is vague enough that it *could* justify B, even if this effect isn’t certain.

But this legal effect slippery slope doesn’t by itself provide much of an argument against result A, because advocates of A could simply urge courts to implement A based on a narrower justification that avoids the excessive breadth or the added authority that would lead to B. For instance, A’s advocates

could argue that bans on racial, sexual, and religious slurs are constitutional because

- only racially, sexually, and religiously bigoted epithets are “low-value speech” and can thus be prohibited (J1);
- epithets are “low-value speech” and thus may be restricted if a sufficient level of harm is shown—and this level of harm is present for racially, sexually, or religiously bigoted epithets but not for other epithets (J2);
- epithets are “low-value speech,” but the Court has the authority to draw such a conclusion only about epithets, not about more reasoned discourse (J3).

Under each of these justifications, A’s defenders would argue, bad result B would not necessarily follow as a direct legal effect. Arguing that judicial decision A will lead to B thus requires more than just an assertion that “A will set a precedent for B.” Defenders of A can always craft some legal justification for A that distinguishes it from the unwanted result B.

*(b) Extension of Precedent as a Judicial-Judicial Equality/ Administration Cost Slippery Slope.*—But that a distinction between A and B *can* be drawn doesn’t mean that enough future judges will be persuaded by this distinction. Even judges who aren’t legally obligated to follow precedent A, because its justification is not literally applicable to current case B, might still feel impelled to extend A beyond its original boundaries.

Consider, for example, justification J1, which would authorize A (racial epithets are punishable but others are protected) but not B (epithets, bigoted or not, are unprotected). Supporters of J1 believe that racial epithets and other epithets are distinguishable, but some Justices might not be persuaded by the distinction. They may particularly oppose restrictions that they see as viewpoint-based. They may oppose giving flag burning, which they see as an anti-American epithet, more protection than other epithets get. Or they might simply conclude that bigoted epithets are not materially different from other epithets, and believe that their duty to treat like cases alike obligates them to treat all epithets the same way. Those Justices might therefore view A as the *least* satisfactory position, less appealing than either 0 or B.

Say, then, that the Justices form the following blocs (bloc I and bloc II can have any number of Justices between 1 and 4, so long as they add up to 5):

Bloc	Policy Preferences			Supports Proposed Move?			Attitude	# of Justices
	Most Prefers	Next preference	Most dislikes	0→A	A→B	0→B		
I	0	B	A		✓		"More speech protection is best, but distinguishing bigoted epithets from others is the worst"	4/3/2/1
II	A	0	B	✓			"Punishing only bigoted epithets is best, but if we can't have that, then protect all epithets"	1/2/3/4
III	B	A	0	✓	✓	✓	"Restrict epithets as much as possible"	4

On a Court where the Justices fall into these blocs, a proposal to move directly from “epithets protected” (0) to “all epithets unprotected” (B) would lose 5–4; only bloc III would prefer B over 0. But a proposal to move from 0 to “bigoted epithets unprotected” (A) would win, with the support of blocs II and III. A proposal to move from A to B would then also win, with the support of blocs I and III. And any proposal to then move from B back to 0 would lose, so long as even one Justice is willing to adhere to precedent even though he substantively prefers 0 to B.

So in our scenario, the bloc II Justices believe that bigoted epithets should be treated differently from other epithets, and their arguments may be logically defensible. But in practice, the arguments were not fully persuasive to blocs I and III, and so the bloc II Justices got what they saw as the worst result—their desire to create an exception for bigoted epithets led to the denial of protection to all epithets. Thus, even with no changes to the Court’s personnel, a decision A that doesn’t legally

command B (and that some Justices see as consistent with the rejection of B) might still bring about B through the equality slippery slope.

Equality slippery slopes may be particularly likely in judicial decision making. Judges are expected to explicitly justify their decisions, and to have principled reasons for the distinctions they draw. They may therefore be more reluctant than legislators or voters to adopt what they see as logically unsound compromises, which is how the judges in bloc I would view result A.

In fact, this sort of slippery slope may have occurred during the evolution of free speech law in the mid-1900s, as the rule that political advocacy is protected unless it creates a “clear and present danger” of some serious harm (A) was extended in the 1948 *Winters v. New York* case to protect entertainment as well as serious political discourse (B), and was then again extended to sexually themed speech, at least so long as the speech falls outside the narrow obscenity and child pornography exceptions (C). These extensions rested at least in part on the difficulty of administering any dividing line between political advocacy and entertainment, and the felt need to treat ideas—whether about sex or about politics—equally.

Thus, a judge deciding whether to adopt proposed principle A may rightly worry that future judges, who have different understandings of equality or administrability than the original judge does, might deliberately broaden A to B. And there is little that the original judge can do when adopting A to reliably prevent this broadening; for instance, saying “But this decision should not lead to B” in the opinion justifying A may have only a limited effect on future decisions, since judges who prefer B to A on equality or administrability grounds may not be swayed much by such a statement.

#### E. Multi-Peaked Preferences and Unconstitutional Intermediate Positions

Opponents of legalizing marijuana sales (A) have sometimes argued that legalizing sales might help lead to legalizing marijuana advertising (B), and to the spending of vast sums to persuade more people to smoke marijuana. But why

would this be so? After all, A and B are clearly logically distinguishable.

The answer lies in the Supreme Court's commercial speech doctrine. Under current First Amendment law, the government may ban commercial advertising of illegal products. But if selling a product becomes legal, prohibiting advertising of the product becomes much harder (though perhaps not impossible). So if selling marijuana is legalized, courts may find that marijuana sellers have a constitutional right to advertise.

As with constitutional equality rules (see section II.D.3 above), this phenomenon arises out of the overlay of legislative preferences, which may be single-peaked, and multi-peaked judicial preferences. The legislature may prefer position A (legalize marijuana sales but keep advertising illegal) over positions 0 (keep marijuana illegal) and B (legalize both sales and advertising). But a majority of the Justices have expressed a different preference—they see 0 and B as constitutional and thus within the legislature's prerogative, but they believe that position A is at least presumptively constitutionally invalid.

Combining the two preferences, and recognizing that the Justices' constitutional decisions trump the legislature's choices, we see that if the legislature moves from 0 to A, the Court's commercial speech jurisprudence—which is a result of the Justices' multi-peaked preferences—may then move the law from A to B. Again, voters or legislators who are considering whether to support a move from 0 to A should consider the possibility that A will be unstable, because some important group (here judges rather than other voters or legislators) may find A to be inferior to both extreme alternatives.

#### F. The Hidden Slippery Slope Risk and the *Ad Hominem* Heuristic

Slippery slope risks might also be hidden—especially from average voters—by information asymmetry. Voters might not know exactly which step B would be proposed after step A is adopted. They might not know whether the results of step A would prove to be politically stable, or whether there are enough voters or legislators whose multi-peaked preferences would cause slippage to some broader result. But voters might suspect that the politically savvy interest groups that are

proposing A do know more about likely future proposals and likely voter preferences, and that those groups won't be satisfied with A but will push for something more.

What then should voters do, given their desire to make decisions without spending a lot of time and effort investigating the true magnitude of the slippery slope risk? One possible voter reaction is what might be called the *ad hominem heuristic*: if proposal A is being championed by a group that you know wants to go beyond A to a B that you dislike, you should oppose proposal A even if you mildly like it or have no strong opinion about it.

This heuristic seems similar to the *ad hominem* fallacy, in which a speaker asks listeners to reject certain arguments because the arguments are promoted by a group that the listeners dislike. We are properly cautioned to be wary of *ad hominem* arguments and to focus on the merits of the debate rather than the identities of the debaters.

But voters often lack the time and the knowledge base needed to evaluate proposals on their merits. Rationally ignorant voters need a simple rebuttable presumption that they can use when evaluating uncertain empirical matters, such as the risk that some behind-the-scenes mechanisms will cause proposal A to lead to result B. It is therefore rational for pro-choice voters, for instance, to reason that "If a pro-life advocacy group is for proposal A, then this increases my concern that A will lead to B, a broader abortion restriction, and persuades me to oppose A."

Even if the *ad hominem* heuristic is rational from each voter's perspective, it might be socially harmful; it might, for example, worsen the tone of political debate by fostering a culture in which more time is spent demonizing a proposal's supporters than debating a proposal's merits. Nonetheless, voters may reasonably conclude that time and information constraints make the *ad hominem* heuristic a valuable tool, which they can't afford to abandon even if it lowers the tone of political debate.

### III. ATTITUDE-ALTERING SLIPPERY SLOPES

[I]t is proper to take alarm at the first experiment on our liberties. The freemen of America did not wait till

usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle.

— James Madison,  
*Remonstrance Against Religious Assessments.*

“[T]he assault weapons ban is a symbolic—purely symbolic—move in [the] direction [of disarming the citizenry],” wrote columnist Charles Krauthammer, a *proponent* of a total gun ban. “Its only real justification is not to reduce crime but to desensitize the public to the regulation of weapons in preparation for their ultimate confiscation . . . . De-escalation begins with a change in mentality . . . . The real steps, like the banning of handguns, will never occur unless this one is taken first . . . .”<sup>7</sup>

This is a claim about slippery slopes, though made by someone who would welcome the slippage. Decision A (an assault weapon ban) will eventually lead to B (total confiscation of weapons) because A and similar decisions will slowly change the public’s mind about gun ownership—“desensitize” people in preparation for a future step. (Note how this mechanism differs from the multi-peaked preferences slippery slope [Part II], which does not rely on people’s underlying attitudes’ being shifted.)

But how does this metaphorical “desensitization” actually work? Why don’t people simply accept decisions A, B, C, and so on until they reach the level they’ve wanted all along, and then say “Stop”? Why would voters let government decisions “change [their] mentality” this way?

#### A. Legislative-Legislative and Judicial-Legislative Attitude-Altering Slippery Slopes: The Is-Ought Heuristic and the Normative Power of the Actual

In the wake of the September 11 attacks, Congress was considering the USA Patriot Act, which, among other things, may let the government track—without a warrant or probable cause—which e-mail addresses someone corresponded with, which Web hosts he visited, and which particular pages he visited on those hosts. Let’s call this “Internet tracking,” and let’s assume for now that this power is undesirable. This is our

result B. Twenty-two years earlier, in *Smith v. Maryland*, the Supreme Court approved similar tracking of the telephone numbers that a person had dialed (the so-called “pen register”). This was decision A.

Curiously, most arguments on both sides of the Internet tracking debate assumed A was correct, even though a precedent holding that similar legislation was *not unconstitutional* might have at first seemed of little relevance in a debate about whether the new legislation was *proper*. The new proposals, one side argued, are just cyberspace analogs of pen registers and are therefore good. No, the other side said, some aspects of the proposals (for instance, the tracking of the particular Web pages that a person visited) are unlike pen registers—they are analogous not just to tracking whom the person was talking to, but to tracking what subjects they were discussing. Few people argued that *Smith* was itself wrong and that the bad precedent shouldn’t be extended. The “normative power of the actual”<sup>8</sup> was operating here—people accepted that pen registers were proper because they were legal.

Why did people take the propriety of pen registers for granted? Why didn’t people ask themselves what they, not courts, thought of such devices, both for phone calls and for Internet access? Why didn’t they consider the propriety of B directly, rather than being swayed by decision A, the legal system’s possibly incorrect acceptance of pen registers?

Perhaps these people fell into what David Hume called the “is-ought” fallacy; they erroneously assumed that just because the law allows some government action (pen registers), actions of that sort must be proper. If this error is common, then one might generally worry that the government’s implementing decision A will indeed lead people to fallaciously assume that A is right, which will then make it easier to implement B.

This worry doesn’t by itself justify disapproving of A, since people’s acceptance of the propriety of A will trouble you only if you already think A is wrong. But it might substantially intensify your opposition to A; even if you think A is only slightly wrong on its own, you might worry that its acceptance by the public could foster many worse B’s.

But there may be more involved here than just people’s tendency to succumb to fallacies. Sometimes, people may

reasonably consider a law's existence (is) to be evidence that the law's underlying assumptions are right (ought).

Consider another example: you ask someone whether peyote is dangerous. It would be rational for the person's answer to turn partly on his knowledge that peyote is illegal. "I'm not an expert on drugs," the person might reason, "and it's rational for me not to develop this expertise; I have too many other things occupying my time. But Congress probably consulted many experts and concluded that peyote should be banned, presumably because it thought peyote was dangerous."

"I don't trust Congress to always be right, but I think it's right most of the time. Thus, I can assume that it was probably right here, and that peyote is indeed dangerous." Given the person's rational ignorance, it makes sense for him to let the state of the law influence his factual judgment about the world. And the same approach may also apply to less empirical judgments, such as the proper scope of police searches. Instead of thinking deeply through the matter themselves, many people may choose to defer to the Court's expert judgment, if they think that the Justices are usually (even if not always) right on such questions.

We might think of this as the is-ought heuristic, the non-fallacious counterpart of the is-ought fallacy. Because people lack the time and ability to figure out what's right or wrong entirely on their own, they use legal rules as one input into their judgments. As the literature about the expressive effect of law suggests, "law affects behavior . . . by what it says rather than by what it does."<sup>9</sup> One form of behavior that law A can affect is voters' willingness to support law B.

The is-ought heuristic might also be strengthened by the desire of most (though not all) people to assume that the legal system is fundamentally fair, even if sometimes flawed. Those people may thus want to trust that legislative and judicial decisions are basically sound, and should be relied on when deciding which future decisions should be supported.

The is-ought heuristic may in turn reinforce the persistence heuristic mentioned in the discussion of enforcement need slippery slopes (section II.C). Once society adopts some prohibition A—for example, on unauthorized immigration, drugs, or guns—and the prohibition ends up being often flouted, the persistence heuristic leads people to support further

steps (B) that would more strongly enforce this prohibition. The is-ought heuristic leads people to support B still further, because the very enactment of A makes its underlying moral or pragmatic principle (that unauthorized immigration, drugs, or guns ought to be banned) more persuasive.

When we think about attitude-altering slippery slopes this way, some conjectures (unproven, but I think plausible) come to mind. All of them rest on the premise that the is-ought heuristic flows from people thinking that they lack enough information about what's right, and therefore using the current state of the law to fill this information gap:

1. We should expect attitude-altering slippery slopes to be more likely when *many people—or at least a swing group—don't already feel strongly* about the topic.
2. We should expect attitude-altering slippery slopes to be more likely when *many voters are pragmatists rather than ideologues*. The Burkean, who believes that each person's "own private stock of reason . . . is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages," is more likely to be influenced by the judgments of authoritative social institutions—judgments that help compose "the general bank and capital" of people's knowledge—than someone who has a more deductive ideology.
3. We should expect attitude-altering slippery slopes to be more likely in those areas *where the legal system is generally trusted by much of the public*. For instance, the more the public views certain kinds of legislation as special-interest deals, the less attitude-altering effect the legislation will have.
4. We should expect attitude-altering slippery slopes to be more likely *in areas that are viewed as complex, or as calling for expert factual or moral judgment*. The more complicated a question seems, the more likely it is that voters will assume that they can't figure it out themselves and should therefore defer to the expert judgment of authoritative institutions, such as legislatures or courts. Thus, replacing a simple political principle or legal rule with a more complex one can facilitate future attitude-altering slippery slopes.

## B. Legislative-Judicial Attitude-Altering Slippery Slopes: “Legislative Establishment of Policy”

Judges, like voters, might also be influenced by legislative decisions. Judges might sometimes be less likely to perceive that they are less knowledgeable than legislators (the standard rational ignorance scenario), but they may still perceive that a legislative judgment is *more democratically legitimate* than the judges’ own (at least where the decision isn’t determined by binding precedent or by statutory or constitutional text).

Consider, for instance, Justice Harlan’s opinion for the Court in *Moragne v. States Marine Lines, Inc.*, which dealt with whether wrongful death recoveries should be allowed in admiralty law. The Court has the power to make common law in admiralty cases, and in *Moragne* there was no binding federal statute mandating the result. Nonetheless, the Court looked to state and federal statutes to inform its judgment:

In the United States, every State today has enacted a wrongful-death statute. The Congress has created actions for wrongful deaths [in various contexts]

. . . .

These numerous and broadly applicable statutes, taken as a whole, . . . evidence a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow [recovery for wrongful death]. *This legislative establishment of policy carries significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law . . . .*

. . . .

. . . In many [though not all] cases the scope of a statute may reflect nothing more than the dimensions of the particular problem that came to the attention of the legislature, inviting the conclusion that the legislative policy is equally applicable to other situations in which the mischief is identical. This conclusion is reinforced where there exists not one enactment but a course of legislation dealing with a series of situations, and where the generality of the underlying principle is

attested by the legislation of other jurisdictions . . . .  
[T]he work of the legislatures has made the allowance of recovery for wrongful death the general rule of American law, and its denial the exception. Where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery . . . .

The statutes to which the Court referred thus had a legal effect beyond their literal terms. Legislative decision A (enacting wrongful death liability in certain areas) altered judicial attitudes about question B (wrongful death liability in another area). This phenomenon is common in many common-law-making areas, and even some constitutional inquiries: some degree of deference to the aggregate judgment of state legislatures is part of the tests for what constitutes cruel and unusual punishment, denial of substantive due process, and other constitutional violations.

Moreover, just as a legislative decision may strengthen the attitude-altering force of a principle that's consistent with A, so it can weaken the attitude-altering force of a principle that seems inconsistent with A. Consider, for instance, the Vermont Supreme Court's decision in *Baker v. State*, which held that the Vermont Constitution's Common Benefits Clause requires the state to give same-sex couples "all or most of the same rights and obligations provided by the law to married partners." A major part of the court's stated reason was the legislature's previous decisions to enact laws allowing gay adoption, providing for child support and visitation when gay couples break up, repealing bans on homosexual conduct, prohibiting private discrimination based on sexual orientation, and enhancing penalties for crimes motivated by hostility to homosexuals. (The court might have struck down the law even without this justification, but the Justices' making the argument shows that they thought some readers would find the argument persuasive.)

This wasn't merely an equality slippery slope such as that described in section II.D.3; the theory was *not* "The legislature allowed heterosexual marriages (A), so because sexual orientation classifications are presumptively impermissible, the legislature must now allow homosexual marriages (B)." Rather,

the court held that the Common Benefits Clause test required that all classifications—whether or not they turn on sexual orientation—have a “reasonable and just relation to the governmental purpose,” something similar to the vigorous rational basis scrutiny that some have urged. And under this test, the court concluded, the legislature’s granting homosexuals certain rights in the past (A) contributes to the requirement that homosexuals be given certain other rights now (B).

Why would past legislative decisions affect a constitutional decision this way? The court relied on the legislature’s past pro-gay-equality decisions in two contexts:

[1.] The State asserts that [the goal of promoting child rearing in a setting that provides both male and female role models] . . . could support a legislative decision to exclude same-sex partners from the statutory benefits and protections of marriage. . . . It is conceivable that the Legislature could conclude that opposite-sex partners offer advantages in this area, although we note that . . . the answer is decidedly uncertain.

The argument, however, contains a more fundamental flaw, and that is the *Legislature’s endorsement of a policy diametrically at odds with the State’s claim*. In 1996, the [Legislature removed] all prior legal barriers to the adoption of children by same-sex couples. At the same time, the Legislature provided additional legal protections in the form of court-ordered child support and parent-child contact in the event that same-sex parents dissolved their “domestic relationship.”

*In light of these express policy choices*, the State’s arguments that Vermont public policy favors opposite-sex over same-sex parents or disfavors the use of artificial reproductive technologies are patently without substance.

. . . [2. W]hatever claim [based on history and tradition] may be made in light of the undeniable fact that federal and state statutes—including those in Vermont—have historically disfavored same-sex relationships, *more recent legislation plainly undermines the contention*. [In 1977, Vermont repealed a statute that had criminalized fellatio.] In 1992, Vermont was one of the first states to enact statewide legislation

prohibiting discrimination in employment, housing, and other services based on sexual orientation. Sexual orientation is among the categories specifically protected against hate-motivated crimes in Vermont. Furthermore, as noted earlier, recent enactments of the General Assembly have removed barriers to adoption by same-sex couples, and have extended legal rights and protections to such couples who dissolve their “domestic relationship.”

Thus, viewed in the light of *history*, logic, and *experience*, we conclude that none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license . . . .

The court thus reasoned that courts should generally pay some deference (though not complete deference) to *consistently asserted* government interests. As the court wrote earlier in the opinion, what keeps the inquiry into whether a law “bears a reasonable and just relation to the governmental purpose . . . grounded and objective, and not based upon the private sensitivities or values of individual judges, is that in assessing the relative weights of competing interests courts must look to the history and traditions from which [the State] developed.” *Baker* thus turns the is-ought heuristic into a constitutional mandate, at least where the current system of legal rules is internally consistent.

But when the court sees the legislature’s judgments as inconsistent with each other, this need to partly defer to the legislature apparently disappears, and the court becomes more willing to apply its own judgment about whether the classification is “reasonable and just.” A few legislative pro-gay-rights steps A may thus alter a court’s willingness to defer to the legislative policy of favoring heterosexuality over homosexuality, and may lead a court to take a step B (allowing homosexual quasi-marriages) that’s much broader than what the legislature envisioned.

Many have dismissed this particular slippery slope concern before, for instance rejecting as “arrant nonsense” the claim that a hate crime law “would lead to acceptance of gay marriages.”<sup>10</sup> But *Baker* suggests that the concern was factually

well-grounded (though of course many might believe that the slippage was good).

This example also illustrates how active rational basis review may sometimes discourage compromise, and how deferential review may encourage it. If courts routinely inquire into whether a body of laws is internally consistent, legislators may come to worry that one legislative step may undermine the consistency of a formerly clear rule, leading to future judicial steps that undermine the rule still further. Those legislatures may thus become more hesitant about enacting compromises, such as legalizing gay adoption but retaining the discrimination embodied in the heterosexuals-only marriage policy; this is the “slippery slope inefficiency” that was discussed earlier, where a potentially valuable compromise is ruled out by some supporters’ fear that it will lead to something broader later (see Part II.A.6). The highly deferential version of the rational basis test, in contrast, decreases the risk of the legislative-judicial slippery slope, thus making one-step-at-a-time compromises safer from the legislators’ perspectives.

### C. Just What Will People Infer from Past Decisions?

[H]owever narrow the first opening, there will never be wanting hands to push it wide, and those will be the hands of the strong, the sagacious, and the interested. . . . [S]omething peculiar may be found in every case, and future judges will look to the [newly adopted] principle alone, and lay aside the guards and qualifications. *The people will not comprehend such subtleties.*  
— *Harrington v. Commissioners* (S.C. 1823).

1. *From Legislative Decisions.*—So far, I have argued that a legal rule may change some people’s attitudes: People may apply the is-ought heuristic and conclude that if the rule exists, its underlying justifications are probably sound. And this conclusion may in turn lead people to accept other proposals that rest on these justifications.

Attitudes, however, are altered by the law’s justifications as they are *perceived*. Say people conclude that A’s enactment means that A is probably good, and that another proposal B is probably also good if it is analogous to A. Whether B is seen as

analogous to A turns on which particular justification people ascribe to A, and see as being legitimized by A's enactment.

Consider, for instance, the tax for the support of Christian ministers that Madison condemned in his *Memorial and Remonstrance*:

Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

People should therefore be wary, Madison argued, of power “strengthen[ing] itself by exercise, and entangl[ing] the question in precedents”—they should recognize “the consequences in the principle,” and “avoid[] the consequences by denying the principle.”

But Madison's argument implicitly turned on the justification the public would infer from the law and accept as a “precedent” for the future. If the justification was, to borrow part of the statute's preamble, that the government may properly coerce people to do anything regarding religion, so long as such coercion supposedly has a “tendency to correct the morals of men, restrain their vices, and preserve the peace of society,” then Madison's fears would have been well-founded. But if the justification was, to borrow another part, that the government may properly require people to pay a modest tax that will be distributed without “distinctions of preeminence amongst the different societies or communities of Christians,” then his concerns would be less plausible.

Unfortunately, we often can't anticipate with certainty which principle a statutory scheme will eventually be seen as endorsing. Sometimes, the debate about a statute will focus on one justifying principle, and for some time after the statute is enacted, that will probably be seen as the principle that the statute embodies. But as time passes, the debates may be forgotten, and only the law itself

will endure; and then advocates for future laws B may cite law A as endorsing quite a different justification.

Consider the installation of cameras that photograph people who run red lights. If the policy's existence will lead people to conclude that the policy is good, and will thus lead them to view analogous programs more favorably, what justification for the policy—and thus what analogy—will people accept?

Some people will infer the justification to be that “the government may properly enforce traffic laws using cameras that only photograph those who are actually violating the law” (J1). Others, though, may draw the broader justification that “the government may properly record all conduct in public places” (J2). Decision A (cameras aimed at catching red light runners) might thus increase the chances that decision B (cameras throughout the city aimed at preventing street crime), which J2 would justify, will be implemented, especially if public opinion on B were already so closely divided that influencing even a small group of voters could change the result. And if you strongly oppose B, this consequence would be a reason for you to oppose A as well.

This possibility suggests that Madison might have been right to consider the worst-case scenario in assessing how the tax for support of the Christian ministers might change people's attitudes. People might have seen it as endorsing only a very narrow principle, to which even Madison might not have greatly objected, but they might also have seen it as endorsing a much broader principle. And if one thinks that one of the potential B's that can flow from A is very bad, this may be reason to oppose A even if the chances of A facilitating that particular B are relatively low.

2. *From Judicial Decisions.*—Judicial decisions, unlike many statutes, explicitly set forth their justifications, and might therefore have more predictable attitude-altering effects. But people might still interpret a decision as endorsing a certain justification even if that's not quite what the decision held, partly because many people don't read court decisions very closely or remember them precisely (again because of rational ignorance).

All of us have some experience with this phenomenon, where a decision is boiled down in some observers' minds to a brief and not fully accurate summary. Thus, for instance, in *Zacchini v. Scripps-Howard Broadcasting Co.*, the Supreme Court held that an unusually narrow state “right of publicity” claim didn't violate the First Amendment, but repeatedly stressed that “[p]etitioner

does not merely assert that some general use, such as advertising, was made of his name or likeness; he relies on the much narrower claim that respondent televised an entire act that he ordinarily gets paid to perform.” Nonetheless, *Zacchini* is regularly cited for the very proposition that the Court explicitly *refused* to decide: that the more common version of the “right of publicity”—the right to control many uses of one’s name or likeness—is constitutional.

This tendency may be exacerbated when decision A is justified by a combination of factors, because it’s easy for people’s simplified mental image of the decision to stress only a subset of the factors. Consider, for instance, the pen register decision (*Smith v. Maryland*), which let the government get—without probable cause or a warrant—a list of all the phone numbers that someone has dialed. The decision rested on three main justifications: the Court began by pointing out that the phone numbers didn’t reveal that much about a conversation (J1); it ended by arguing that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties” such as the phone company (J3); and in between, it included the following argument about people’s *actual* expectation of privacy (J2):

[W]e doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must “convey” phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills. In fact, pen registers and similar devices are routinely used by telephone companies “for the purposes of checking billing operations, detecting fraud, and preventing violations of law.” . . . Pen registers are regularly employed “to determine whether a home phone is being used to conduct a business, to check for a defective dial, or to check for overbilling.” . . . Most phone books tell subscribers . . . that the company “can frequently help in identifying to the authorities the origin of

unwelcome and troublesome calls.” Telephone users, in sum, typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes. . . . [I]t is too much to believe that telephone subscribers, under these circumstances, harbor any general expectation that the numbers they dial will remain secret.

When the Internet tracking question arose more than twenty years later, however, justification J2 was nowhere to be seen, though the analogy to *Smith* was a big part of the debate (see p. 90). Had J2 been absorbed into people’s attitudes, people might well have resisted the analogy, since J2 doesn’t apply to Internet communications. But apparently *Smith* led people to believe that the warrant requirement should be relaxed whenever J1 and J3 were applicable. J2 was largely forgotten—perhaps “[t]he people [did] not comprehend such subtleties.” And the *Smith* decision may have thus led many people to accept a justification broader than what the opinion itself relied on.

What can judges who see this possibility do? Making their justifications explicit, and perhaps giving some examples in which the justifications don’t apply, might help, but it might not be enough: consider, for instance, *Zacchini*, which explicitly refused to decide the constitutionality of the broad right of publicity, but which has nonetheless been read as deciding just that.

Another option is to ignore this risk. I have a duty to decide the case as best I can, a judge might conclude, without changing my reasoning based on a speculative (even if sensible) fear that some people in the future might oversimplify the reasoning.

A third option, though, is to consider the possibility of oversimplification in close cases. A judge who feels strongly about, for instance, a broad vision of free speech or the Fourth Amendment, might adopt a rebuttable presumption against change—when it’s a close question whether to create a new exception to speech protection or the warrant requirement, the judge might vote against the exception, because of the risk that

even a carefully limited exception might later be oversimplified into something broader.

3. *From Aggregates of Legislative or Judicial Decisions.*—So far, the discussion has focused on the principles that people may draw from one statute or case. But people who are applying the is-ought heuristic often look to a broader body of law, especially since a set of decisions would likely be seen as more authoritative—and deserving more deference—than a single decision.

In looking at this broader body of law, people are especially unlikely to precisely absorb all the details of each past case or statute; instead, they tend to try to fit the decisions into a general mold that stresses one or two basic principles at the expense of many of the details. And it is this mold, imprecise as it may be, that is remembered and that can influence people's attitudes.

(a) *Rules and Exceptions.*—One classic example of such a general mold is “This is the rule, though there are some exceptions”—for instance, the government may not impose content-based speech restrictions unless the speech falls into one of several narrow exceptions, or searches require warrants “subject only to a few specifically established and well-delineated exceptions.” The simple rule can have powerful attitude-shaping force, and the first decision A1 carving out an exception probably wouldn't materially undermine this force: people would still think “There is a rule, though there's also a rare exception.” The second exception, A2, might not undermine the rule's force either, especially if it seems necessary (for example, a free speech exception for death threats), and if it fits within some exceptional supercategory (for instance, cases that have been traditionally recognized as being outside the main principle, or cases where there's a clear, immediately pressing need for the exception).

But at some point, some people who are surveying the body of decisions may start concluding that the law is so internally inconsistent that they can't distill any core underlying principles from it, or even that the exceptions themselves have become the rule. The first exceptions might not lead to this, but each additional exception might make it more likely, even after the first few exceptions have been accepted. One needn't take the “in for a penny, in for a pound” view that since the

law has already compromised a bit on the principle, there's nothing to be lost by compromising further.

The attitude-altering slippery slope may thus counsel against the creation of each additional exception, especially an exception that doesn't fit into some compelling overarching justification, such as one based on the presence of an emergency. Again we see a plausible argument for a rebuttable presumption against even small changes: avoid creating new exceptions unless there's a strong reason to do so, since even seemingly small exceptions may help undermine the rule's attitude-shaping force.

*(b) Several Decisions Being Read as Standing for One Uniting Principle.*—Just as people often try to identify what is the rule and what is the exception, they sometimes take several decisions—especially ones that already have a common label—and pull from them one basic justification that these decisions all share, placing less weight on the countervailing principles that might appear only in one decision or another. And it is this inferred justification, shorn of any limits or reservations, that may end up being remembered and affecting people's attitudes.<sup>11</sup>

Consider, for instance, intellectual property rules. The legislators and courts that created these rules—especially copyright law, trademark law, and right of publicity law—have generally limited the rules in important ways, ways that have often been influenced by free speech concerns. The Supreme Court decisions that have upheld various intellectual property laws against First Amendment challenge rely on these limitations.

People who pay attention to the details of these laws might thus have their attitudes altered only modestly by the laws' existence. The is-ought heuristic may lead them to conclude from the Court's copyright and trademark cases that Congress may properly give people a monopoly over expression (but not ideas or facts), or may properly restrict the use of certain words and symbols in advertisements (but not in newspaper articles) to prevent consumer confusion and possibly trademark dilution.

But some courts, commentators, and legislators have drawn a much broader principle from the intellectual property laws' existence and constitutional validity: legislatures, they seem to conclude, should be free to create whatever intellectual property

rights they want, whether in expression, facts, or symbols, and whether covering only commercial advertising or a wide range of other speech. And the First Amendment is inapplicable in such cases, simply because “[t]he First Amendment is not a license to trammel on legally recognized rights in intellectual property.”<sup>12</sup>

These arguments generally don’t rely on detailed analogies to existing intellectual property rights, but rest instead on broader assertions that intellectual property rules are per se proper. The rules A1 (copyright), A2 (trademark), A3 (right of publicity), and a few others seemingly lead these observers to accept not a set of detailed, specific justifications, but rather one overarching justification: the government may constitutionally give an entity the power to restrict others’ communication of material just by giving the entity an intellectual property right in that material.

Why do some people internalize just this broad principle, rather than the narrower principles that actually correspond more closely to the boundaries of each law? One possible reason is that the principle seems to undergird each intellectual property law, while the countervailing principles limiting each rule (copyright can’t protect facts or ideas, the right of publicity doesn’t apply to news or fiction) are more rule-specific. Thus, each new intellectual property rule that a person sees reinforces the common principle, but doesn’t much reinforce the limiting principles, which vary from rule to rule.

And since people’s bounded rationality tends to make them seek simple summaries, the principle on which they focus, and the one that most affects their attitudes, is the one overarching common thread, and not the many important but detailed reservations. The existing intellectual property rules can therefore influence some people (though not all people) to accept the broad justification, and thus pave the way for new restrictions that are also justified by this justification but that lack the limiting principles present under the old rules—for instance, a right to own information about oneself (B1), a property right in databases of facts (B2), or a broadened right of publicity (B3).

Some of the original A’s may be sound, despite the risk that they may lead to the B’s. But the more the public accepts intellectual property-based speech restrictions, the more people

will shift from thinking “It’s proper to let people own copyrights, subject to traditional copyright limits, trademarks, subjected to traditional trademark limits, and so on” to thinking “It’s proper to let people have intellectual property rights over any concepts, be they expressions, ideas, facts, words, symbols, or anything else.”

#### D. Judicial-Judicial Attitude-Altering Slippery Slopes and the Extension of Precedent

As section III.B argued, judges to some extent tend to be reluctant to rely on their own moral or practical judgments. This tendency shouldn’t be overstated, but neither should it be ignored. Thus, judges may defer to policy judgments underlying past judicial decisions, even if the decisions aren’t strictly binding precedent.

And this tendency may turn from merely a legal rule that judges presumptively follow into an attitude-altering influence—judges may well conclude that they should assume that the precedents are morally or empirically sound, at least unless there’s some strong reason to doubt their soundness. This is especially so because precedents are supposed to be carefully reasoned, persuasively written, and authored by people with high status. Thus, if the Supreme Court upholds a ban on bigoted epithets using justification J (“epithets are ‘low-value speech’ and can thus be punished”), future Justices may be persuaded by this principle, rather than just reluctantly deferring to it. And, as a result, they may eventually apply it more broadly to bans on other epithets or other assertedly low-value speech.

But what if the Court tries to prevent this broadening by explicitly adopting a limited justification J1, which is that “Only racially, sexually, and religiously bigoted epithets are ‘low-value speech’ and can thus be punished” (p. 84)? This might reduce the risk of broadening: if a future Court accepts this entire principle as a guide, then it will be accepting the new exception’s boundaries (“only racially, sexually, and religiously bigoted epithets are ‘low-value speech’”) as well as the exception itself (“[such] epithets . . . can thus be punished”).

These two components, however, might have different degrees of attitude-altering force. A future Justice might find the “epithets may be punished” sub-principle to be more

morally or pragmatically appealing than the “racially, sexually, and religiously bigoted epithets are special” sub-principle. The precedent would thus have persuaded future Courts that epithets should indeed be punishable—but not persuaded them to limit this to only a narrow class of epithets.

This danger might help explain why various Justices have refused to adopt new principles that lack well-defined, coherent limits. Thus, *Cohen v. California* reasoned that the proposed principle that profanity is unprotected but other offensive words remain protected “seems inherently boundless,” and *Texas v. Johnson* and *Hustler v. Falwell* used similar reasoning in rejecting new exceptions for flag burning and speech that intentionally inflicts emotional distress on public figures.

The Justices *could* have drawn boundaries and said “Profanities, flag burning, and parodies alleging grotesque sexual relationships are punishable because they are offensive, but other speech is protected even if it is offensive.” But the apparent arbitrariness of these boundaries would likely have made them less influential in altering judges’ attitudes. Even Justices who might want to draw such a line in one particular case might recognize that future Justices might find this line morally or pragmatically unappealing, and might thus accept the seemingly less arbitrary underlying principle (offensive speech may be punished because of its offensiveness), but reject the limitation to profanity, flag burning, and gross insult.

#### E. The Attitude-Altering Slippery Slope and Extremeness Aversion Behavioral Effects

Implementing decision A may also lead people to see B as less extreme and thus more acceptable. When we’re at position 0 (no handgun ban), the leading policy options may be 0, A (a ban on small, cheap handguns), and B (a total handgun ban), and B may seem like a large step. But after A is adopted, the leading options may become A (the narrow handgun ban), B (the total handgun ban), and C (a ban on all firearms, whether handguns, rifles, or shotguns), and B may thus seem more moderate; position 0 might no longer be considered, because it’s been tried and rejected.

In principle, such framing effects—whether B is seen as the extreme option among 0, A, and B or as the middle option

among A, B, and C—should be irrelevant. When the choice is between A and B, people shouldn't be influenced by the presence of options O or C.

But social psychologists have shown that people do tend to view proposals more favorably if they are presented as compromises between two more extreme positions. In one experiment, for instance, one group of subjects was asked to decide which of two cameras, a low-end model and a mid-level model, was the better deal; 50% chose the mid-level as the better deal. Another group was asked to choose among the same two cameras plus a high-end model; in this group, the mid-level was favored over the low-end by over two-and-a-half to one.

The result may seem irrational; the addition of the new option might reasonably *decrease* the fraction of people choosing either of the other two options, but it shouldn't *increase* the relative fraction preferring the mid-level option. At the very least it reflects bounded rationality. But in any event, that's the result, which has been replicated for legal decisions by mock juries. And it fits our experience: people are often (though not always) more sympathetic to options framed as "moderate" than to those framed as "extreme." To the extent this phenomenon occurs among voters, it can produce slippery slope effects, as the enactment of even modest steps makes a formerly extreme proposal seem more moderate.

#### *F. The Erroneous Evaluation Slippery Slope*

Experience with a policy can change people's empirical judgments about policies of that sort, and this can of course be good. Sometimes, though, people learn the wrong lesson, because they err in evaluating an experiment's results. For instance, suppose that after A is enacted, good things happen: stringent enforcement of a drug ban is followed by reduced drug use; an educational reform is followed by higher test scores; a new gun law is followed by lower crime rates.

People might infer that A caused the improvement, even if the true cause was different. Crime or drug use might have fallen because of demographic shifts. Test scores might have risen because of the delayed effects of past policy changes. The furor that led to enacting this policy might also have produced

other policies (such as more efficient policing), which might have caused the improvement. But because A's enactment was *correlated* with the improvement, people might incorrectly assume that A *caused* the improvement, and thus support a still more aggressive drug enforcement strategy, educational reform, or gun control law (B).

Those who are skeptical about A can argue that correlation doesn't necessarily mean causation, and that *post hoc ergo propter hoc* ("after, therefore because of") is a fallacy. But, as with the "is-ought" fallacy, the fact that philosophers have had to keep condemning this fallacy for over 2000 years shows that it's not an easy attitude to root out.

Moreover, as with the is-ought fallacy, *post hoc ergo propter hoc* may correspond to an often non-fallacious heuristic. People might be rational to generally assume that when a legal change is followed by a good result, the result probably flowed from the change, but be mistaken to believe this in a particular case. If we have reason to anticipate that voters or legislators who follow this heuristic will indeed draw a mistaken inference from the outcome of decision A, that may be reason for us to oppose A.

This concern about erroneous evaluation of decision A might be exacerbated, or mitigated, by two kinds of circumstances. First, we might foresee that people will evaluate certain changes using some incomplete metric that ignores the changes' costs and focuses too much on their benefits. The benefits might be more quickly seen, more easily quantifiable, or otherwise more visible than the costs. The benefits might be felt by a more politically powerful group than the costs might be. The benefits might be deeply felt by easily identifiable people, while the costs might be more diffuse, or might be borne by people who aren't even aware of them. (Of course, if the harms flowing from decision A are more visible than the possible benefits, then A's net benefits may be underestimated. If that's so, then we needn't worry as much that an improper evaluation of A's effects will lead to greater enthusiasm for implementing B.)

Second, we might doubt the impartiality of those who will play leading roles in evaluating A's effects. Most new laws have some influential backers (whether media, government agencies, or interest groups), or else they wouldn't have been enacted.

These influential authorities will want their favorable predictions to be confirmed, so we might suspect that they will consciously or subconsciously err on the side of evaluating A favorably. B might then be adopted based on an unsound evaluation of A's benefits. Again, though, the opposite may also be true: if we know that, say, the media is generally against proposal A, then we shouldn't worry much about an improper evaluation of A leading to further step B—if A is seen as a success even by a generally anti-A media, then it probably is indeed a success, and perhaps the further extension to B is therefore justified.

This danger suggests that we might want to ask the following when a policy A is proposed:

1. Is there some other trend or program that might yield benefits that could be erroneously attributed to A?
2. Is there reason to think that measurements of A's effectiveness will be inaccurate because they underestimate some costs or overestimate some benefits?
3. Do we distrust the objectivity and competence of those who will play leading roles in evaluating A's effects?
4. Have the effects of similar proposals been evaluated incorrectly in the past?
5. Are there ways to reduce the risk of erroneous evaluation? For instance, opponents of B might want to negotiate for including a sound evaluation system in the proposal. There will doubtless be debate about which evaluation system is best, but the opponents of B may have more power to insist on a system that's acceptable to them while A is still being debated.

If any of the answers to the first four questions is "yes," that might give those who oppose B reason to also oppose A, at least unless they can find—per question 5—some way to decrease the risk of the erroneous evaluation slippery slope.

#### IV. SMALL CHANGE TOLERANCE SLIPPERY SLOPES

[J]ealously maintain[] . . . the spirit of obedience to law, more especially in small matters; for transgression creeps in unperceived and at last ruins the state, just as the constant recurrence of small expenses in time eats up a fortune. The expense does not take place at once, and

therefore is not observed; the mind is deceived, as in the fallacy which says that “if each part is little, then the whole is little.” . . .

In the first place, then, men should guard against the beginning of change . . . .

— Aristotle  
*Politics*.

Libertarians often tell the parable of the frog. If a frog is dropped into hot water, it supposedly jumps out. But if a frog is put into cold water that is then heated, the frog doesn’t notice the gradual temperature change, and eventually dies.<sup>13</sup> Likewise, the theory goes, with liberty: people resist attempts to take rights away outright, but not if the rights are eroded slowly.

The frog doesn’t notice the increase because of a sensory failure; it senses not absolute temperature but changes in temperature. Perhaps our decisionmaking skills suffer from an analogous cognitive feature. Maybe we underestimate the importance of gradual changes because our experience teaches us that we needn’t worry much about small changes—but unfortunately this trait sometimes leads us to unwisely ignore a sequence of small changes that aggregate to a large one.

This theory suggests that we just don’t pay much attention to the small change from 0 to A, the small change from A to B, and so on, even though we would have paid attention to the change from 0 all the way to E. (Of course, people might also pay *more* attention—and express more opposition—to all the small changes in the aggregate than to one sharp shock. I claim only that, at least in *some* situations, the aggregate opposition to a series of small changes might be less than the opposition to one large one.) This is not an attitude-altering slippery slope, or a multi-peaked preferences slippery slope: the small shifts don’t necessarily persuade people to support the next shift, and don’t move the law to a politically unstable position. Rather, people simply don’t think much about each shift.

Consider, for instance, the following exchange on an *ABC News* special:

[Peter] Jennings: And the effect of the assault rifle ban in Stockton? The price went up, gun stores sold out and police say that fewer than 20 were

turned in. Still, some people in Stockton argue you cannot measure the effect that way. They believe there's value in making a statement that the implements of violence are unacceptable in our culture.

[Stockton, California] Mayor [Barbara] Fass [(a supporter of the ban)]: I think you have to do it a step at a time and I think that is what the NRA is most concerned about, is that it will happen one very small step at a time, so that by the time people have “woken up”—quote—to what's happened, it's gone farther than what they feel the consensus of American citizens would be. But it does have to go one step at a time and the beginning of the banning of semi-assault military weapons, that are military weapons, not “household” weapons, is the first step.

Did Mayor Fass have reason to believe that Americans might indeed take time to wake up to changes that “happen one very small step at a time,” or was she mistaken?

#### A. Small Change Apathy, Small Change Deference, and Rational Apathy

It is seldom that liberty of any kind is lost all at once. Slavery has so frightful an aspect to men accustomed to freedom that it must steal in upon them by degrees and must disguise itself in a thousand shapes in order to be received.

— David Hume  
*Of the Liberty of the Press.*

Let's say a legislator is proposing a ban on .50-caliber rifles. Some kinds of guns are already entirely or mostly banned, while other kinds are allowed. You know that .50-caliber rifles are fairly rare; neither you nor anyone you know owns one. And no one is claiming that the .50-caliber rifle ban will by itself significantly impair gun rights or significantly decrease gun crime. What is your reaction to this proposal?

Most people would probably say “I don't much care” (at least unless they have slippery slope concerns in mind). People have limited time to spend on policy questions; they'd rather

invest this time in researching and discussing a few big, radical policy changes than many small, incremental ones. Even if their gut reaction is against the law, they won't feel strongly about it. We might call this *small change apathy*. And this apathy may be exacerbated by the media's relative lack of interest in small changes, at least when those changes are outside some hot issue, such as abortion.

Media outlets also operate with what one might call *subsequent step apathy*: they prefer to cover novel changes rather than the latest change in a long progression, partly because it seems more exciting to the journalists, and partly because viewers prefer the novel. Reporters tend to be less likely to cover a story about the sixth or seventh step in the sequence; try pitching such a story to them and see how far you'll get.

If voters are generally apathetic about small changes, they may support the law just because they know that some influential opinion leaders—politicians, the media, or reputable interest groups—support it. Voters might not defer to expert judgment on big debates (for instance, should dozens of varieties of guns, owned by 20% of the population, be banned all at once?), but for small changes, they might prefer to follow the experts rather than investing the effort into arriving at an independent conclusion.

We might call this decision making process the *small change deference heuristic*: if a change seems small enough, defer to elite institutions, so long as you think the institutions are right on most issues most of the time. Like most heuristics, this one stems from rational ignorance, or rational apathy. When there seems to be little at stake in a decision, and the cost of making the decision thus exceeds the benefit of independent investigation (both the practical benefit that flows from an informed vote, and the good feeling that one gets from knowing how to vote), deferring to others makes sense, even if their views don't always perfectly match your own.

Voters' small change deference heuristic may also carry over to legislators: when voters care little about a proposal, legislators will tend to care little about it as well (though other factors, such as interest group pressures, party discipline, and political friendships and enmities, may counteract or reinforce this tendency). But beyond this, legislators and their staffs may themselves be rationally ignorant or apathetic about certain

proposals, and may often defer to elite opinion or the views of fellow legislators and the party leadership.

This small change deference heuristic doesn't itself favor all small changes; rationally ignorant voters may defer to others' opposition to the changes as well as to others' support of them. But the heuristic does favor small changes that are supported by elite institutions. Thus, for instance, gun rights supporters in a state where the media favors gun control more than the public does might worry that their gun rights may be eroded in small steps unless mildly pro-gun-rights voters are made aware of the slippery slope risk.

Small change apathy likewise favors small changes that are backed by intense supporters. A strongly committed minority may often prevail if the majority on the other side is less concerned about the issue. Thus, in a state where pro-life voters are better organized and on average more committed than pro-choice voters, abortion rights supporters might worry that abortion rights may be gradually eroded by a sequence of small pro-life victories, unless the mildly pro-choice voters block each small change.

#### B. Small Change Tolerance and the Desire To Avoid Seeming Extremist or Petty

Say you care little about the .50-caliber rifle ban, but your neighbor strongly supports or opposes it. His vote in the election, he says, will be influenced by the candidates' views on the ban, and he has donated time and money to pro- or anti-ban groups. If you don't think the law will tend to lead to broader laws, you might think this fellow is a bit extremist.

Voters and legislators who like to see themselves and to be seen by others as "moderate" might therefore adopt a small change tolerance heuristic; and when a law's opponents don't want to seem extremist but the law's supporters don't mind appearing this way—either because they're extremist by temperament or because the status quo looks so bad to them that they feel a strong "don't just stand there, do something" effect—a small change tolerance slippery slope might take place. Supporters will push for small changes, and opponents won't push back much.

Small change tolerance slippery slopes can also interact with other slippery slopes, for instance when step A ends up being easily evaded and then a small extension B is promoted as a “loophole-closing measure.” The combination of some people’s opposition to situations where a law is being evaded (an enforcement need slippery slope), A’s enactment changing others’ minds about B’s merits (an attitude-altering slippery slope), and the tendency of still others not to care much about small loophole-closing proposals (a small change tolerance slippery slope) can facilitate decision B once A is enacted, even if B would have been rejected at the outset had it been initially proposed instead of A.

Finally, small change tolerance can also be reinforced by the need to compromise. Legislators and appellate judges often have to give up something on one issue to get what they want on another—few judges will explicitly offer to change their *votes* on one case in exchange for a colleague’s vote on another, but judges routinely compromise on an opinion’s *wording* to earn another judge’s support or goodwill—and such compromise is naturally more common on small matters than on big ones. Decisionmakers might thus be more willing to compromise on a small step A, then small extension B, and then small extension C than they would have been had the larger extension C been proposed up front.

### C. Judicial-Judicial Small Change Tolerance Slippery Slopes and the Extension of Precedent

It may be that [this] is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.

— *Boyd v. United States* (1886).

Just as precedents can be extended beyond their original terms through equality slippery slopes and attitude-altering slippery slopes (see sections II.D.4.b & III.D), they can also be extended through small change tolerance slippery slopes.

Legal rules are often unavoidably vague at the margins. Even when a rule usually yields a clear result, there will often

be some uncertainty on the border between the covered and the uncovered. If, for instance, a new free speech exception allows the punishment of “racial, sexual, and religious epithets,” some speech (for example, “nigger” or “kike”) would pretty clearly be covered. Other speech (for example, “blacks are inferior” or “Jews are conspiring to rule the world”) would clearly not be covered. For other speech (for example, “Jesus freak” or “Bible-thumper” or “son-of-a-bitch”), the result might be uncertain.

In such situations, the judge deciding each case has considerable flexibility. The test’s terms and the existing precedents leave a zone of possible decisions that will seem reasonable to most observers. If the judge draws the line at any place in that zone, most observers won’t much complain. This is a *small change deference heuristic*: if the distance between this case and the precedents is small enough, defer to the judge.

There can be various causes for this deference. Judges on a multi-member panel may defer to an authoring judge’s draft opinion because they know that they can’t debate every detail of the many cases that need to be decided; this isn’t rational ignorance as such, but more broadly rational management of the court’s time. Judges may also not want to alienate colleagues, with whom they must regularly work, by fighting seemingly minor battles. Thus, while each judge may in theory review the authoring judge’s draft *de novo*, in practice there’s some deference.

Future judges who aren’t bound by the precedent (either because they’re on another court or because they’re considering a case that is a step beyond the precedent) may also be more easily influenced by a past decision that makes only a small change. If a judge sees that the precedents imposed liability in four fairly similar situations A, B, C, and D, the judge may quickly conclude that the dominant rule is liability in all situations falling between A and D. If the judge sees that the precedents imposed liability in three similar situations A, B, C, and in a very different situation Z, the judge may be more likely to look closely and skeptically at the big change Z. This deference to closely clumped decisions is probably a rational ignorance effect—because judges, law clerks, and staff attorneys lack time to closely examine the merits of every potentially persuasive precedent, they spend more of their skepticism

budget on outlier cases than on the ones that seem more consistent.

Decisions that make small changes may also be less criticized by academics or journalists. An article saying that some decision is a small change and a slight mistake is less interesting to write, and less likely to be read and admired, than one saying that another decision is a big change and a big mistake. And this effect may be strengthened to the extent that laypeople, lawyers, and other judges view judges as professionals exercising technical judgment within a system of rules: Deferring in some measure to people who are exercising professional judgment is usually seen as good sense and good manners, so long as the judgment doesn't diverge much from those reached by the professionals' peers.

And this effect is not limited to changes that are part of a judge's deliberate campaign to alter some legal test. Some small changes can happen simply because judges are faithfully trying to apply a vague rule, and conclude that the rule should extend a bit beyond its previous applications (especially if extending the rule is viscerally appealing, perhaps because one side in the typical case seems so sympathetic). Moreover, judges' ingrained habit of defending their decisions as being fully within the precedents may lead them to downplay—even to themselves—the broadening of the rule, and to describe the rule as having been this broad all along.

Thus, because of small change tolerance, a legal rule may evolve from A to B to C to D via a judicial-judicial slippery slope, even if legal decisionmakers would not have gone from A to D directly. And just as with legislative-legislative slippery slopes, those who strongly oppose D might therefore want to try to stop the process up front by arguing against A in the first place.

## V. POLITICAL POWER SLIPPERY SLOPES

### A. Examples

Assume again that the Supreme Court holds that Congress may legalize marijuana but ban marijuana ads, notwithstanding the commercial speech doctrine. Now Congress can enact a law that allows marijuana sales but not advertising (decision A)

without fear that the Court will hold that marijuana advertising must also be legal (result B).

But can Congress prevent *itself* from legalizing marijuana advertising? Once marijuana sales are decriminalized, a multi-billion dollar marijuana industry will come out into the open, and probably grow. If industry members find that advertising is in their interest, they will probably lobby Congress to repeal the advertising ban. They may spend money on public advocacy campaigns, on contributions aimed at electing pro-advertising candidates, and on organizing marijuana users into a powerful voice. They will have employees who will tend to support the companies' positions. And the companies will likely have the ear of legislators from marijuana-growing states.

Decision A may thus change the balance of political power by empowering an interest group that might use this power to promote B; getting to A first and then to B would thus be easier than getting to B directly. And this would happen without multi-peaked preferences, small change tolerance, or attitudes altered by public deference to legal institutions.

Another classic political power slippery slope arises when a legislature creates a new benefits program or a new bureaucracy (decision A). The legislature might not want the program or bureaucracy to get bigger (result B), but decision A creates interest groups—the funding beneficiaries and the agency employees—that have a stake in the program's growth. Getting to B directly from the initial position 0 might have been politically impossible, because of the legislature's initial reservations about creating the program. But getting to A and then going to B would be easier.

Political power slippery slopes can happen even without financial incentives for one or another political actor; all that matters is that a law changes the size of a political group. Consider a hypothetical example: say the public is currently 52.5%–47.5% against a total handgun ban (decision B), but this split breaks down into two groups—50% of the voters are gun owners, who are 80%–20% against the ban, and 50% are nonowners, who are 75%–25% in favor of the ban.

The legislature then enacts a law (decision A) making it harder for new buyers to buy handguns, for instance by requiring time-consuming and costly safety training classes. We're not banning handguns, the legislators say—we're only

imposing reasonable safety regulations. Many existing handgun owners may support the law because it seems reasonable, and because it doesn't affect them. They might respond similarly if the legislature imposes a substantial but not prohibitive tax on new gun purchases.

Over time, though, the extra difficulty of getting a gun may lead fewer people to become gun owners, which may in fact be part of A's purpose. (Many gun control advocates say that part of their reason for supporting even nonconfiscatory gun controls is to "reduce the number of guns" generally, and not just the number of illegally owned guns.) Some gun owners die or move away, and are replaced by new residents who are less likely to own guns because of the new law. The population now shifts from 50%–50% to 40% gun owners and 60% nonowners.

Thus, without any changes in attitudes among gun owners or nonowners, the overall public attitude towards a total handgun ban has shifted from 52.5%–47.5% opposed to 53%–47% in favor ( $40\% \times 80\% + 60\% \times 25\% = 47\%$ ). B would lose if proposed at the outset, but it can win if A is enacted first and then B is enacted after A has helped shift the balance of political power.

This is a stylized example, with a wide gulf between the views of the two groups—the non-gun-owners, whose number increases as a result of decision A, and the gun owners, whose number decreases—and with a considerable change in the groups' populations. But these effects may be reinforced by others. Gun owners may, for instance, be likelier than nonowners to contribute to pro-gun-rights groups, and nonowners may be likelier than owners to contribute to pro-gun-control groups; and beyond that, the political power slippery slope may work together with some of the other types of slippery slopes that this article has identified.

## B. Types of Political Power Slippery Slopes

Decision A may change the political balance in several different ways.

1. Decisions to *change the voting rules* (such as rules related to voter eligibility, ease of registration, apportionment, or supermajority requirements) may lead to more changes in the

future. For instance, if noncitizen immigrants tend to support broader immigration, and oppose laws excluding noncitizens from benefits, then letting such noncitizens vote (A) may lead to more benefits for noncitizens, and more immigration (B).

2. Decisions that *change the immigration or emigration rate* could also lead to political power slippery slopes. This is true for both international migration and interstate and inter-city migration, and for both actual migration rules and any decision that makes migration more or less appealing. Allowing more residential development in a rural area (A), for instance, may lead to more policy changes (B), as migration from urban areas changes the political makeup of the rural area.

3. Political power slippery slopes can also be created by decisions that *change the levels of participation in political campaigns*, for instance the enactment of limits on what certain groups can say about candidates or proposals, or on how much money they can spend or contribute. The Massachusetts ban on corporate speech regarding various ballot measures (A), which was struck down in *First National Bank of Boston v. Bellotti*, was probably an attempt to ease the path to imposing new burdens on corporations, such as a corporate income tax (B). Likewise, some oppose “paycheck protection” measures that limit union spending on elections (A) because they are concerned that these measures would weaken unions politically and thus make broader anti-union laws easier to implement (B). Similar effects may also flow from changes in who in fact participates in campaigns and not just from changes in election rules, as the marijuana advertising example shows.

4. Political power slippery slopes may also be driven by changes in the *number of people who feel personally affected by a particular policy*, as in the school choice example—people who start using a valuable government service become a constituency for political decisions that preserve and expand this service. This is also why some oppose means-testing for certain benefits programs, such as Social Security or Medicare. If a general benefit program shifts to being open only to a smaller and poorer group (A), the political constituency that deeply supports the program declines in size and power, and further reductions (B) become easier to enact.

5. Finally, political power slippery slopes may be driven by government actions that *make it easier or harder for supporters or opponents of a certain policy to organize* or that *affect the supporters’ or*

*opponents' credibility with the public.* For instance, even mildly enforced criminalization of some activity (for instance, marijuana use) may diminish the political power of those who engage in this activity, because they may become reluctant to speak out for fear of being arrested or at least discredited.

## VI. POLITICAL MOMENTUM SLIPPERY SLOPES

Following the passage of the Brady Bill by the House of Representatives in 1991, the pro-gun-control movement was jubilant, not only savoring its victory but anticipating more to come. “The stranglehold of the NRA on Congress is now broken,” said then-Representative Charles Schumer. “[T]hey had this aura of invincibility . . . and they were beaten.” One newspaper editorialized that “with the post-Brady Bill momentum against guns, we hope fees (including on gun makers) can be increased, and the monitoring of dealers tightened,” thus “reduc[ing] the total number of weapons in circulation.” Decision A (the Brady Bill) was thus seen as potentially leading to a decision B (further gun controls) that may not have been politically feasible before decision A had been made.

Why would people take this view? Say that the gun control groups' next proposal (B) was a handgun registration requirement, and that right before the Brady Bill (A) was enacted, B would have gotten only a minority of the vote in Congress—perhaps because some members were afraid of the NRA's political power. Wouldn't B have still gotten only a minority of the vote even after the Brady Bill was enacted? The conventional explanation for the importance of the NRA's victory or defeat is “political momentum,” but that's just a metaphor. What is the mechanism through which this effect might operate?

### A. Political Momentum and Effects on Legislators, Contributors, Activists, and Voters

The answer has to do with imperfect information. Most legislators don't know the true political costs or benefits of supporting proposal B; they may spend some time and effort estimating these costs and benefits, but their conclusions will

still be guesses. (Polls are of only limited use here; they generally don't accurately reveal the depth of voters' feelings and don't reveal what the voters would think about the proposal once the NRA and its opponents started running their ads.) And in this environment of limited knowledge, decision A itself provides useful data: the NRA's losing the Brady Bill battle is some evidence that the gun-rights movement may not be that powerful, which may lead some legislators to revise downward their estimates of the movement's political effectiveness. So behind the metaphor of "momentum" lies a heuristic that legislators use to guess a movement's power: a movement that is winning tends to continue to win.

This phenomenon is different from the political power slippery slope, because it focuses on the movement's *perceived* power, not on its actual power. And it's different from the attitude-altering slippery slope, though both operate as a result of bounded rationality: In an attitude-altering slope, A's enactment leads decisionmakers to infer that *A is probably a good policy*, and thus that B would be good, too. In a political momentum slippery slope, A's enactment leads decisionmakers to infer that *the pro-A movement is probably quite strong*, and thus that the movement will likely win on B, too. And since legislators tend to avoid opposing politically powerful movements, they may decide to vote with the movement on B. Some legislators, of course, will vote their own views, and others may oppose B despite the movement's perceived strength, because they know that their own constituents disagree with the movement. But a movement's apparent strength may affect at least some lawmakers, and in close cases this may be enough to get B enacted.

Citizens may also change their estimates of a movement's power based on its recent record. Potential activists and contributors tend to prefer to spend their time and money on contested issues rather than on lost causes or sure victories. Likewise, voters may be more likely to choose among candidates based on a single issue when that issue seems up for grabs, rather than when success on that issue seems either certain or impossible.

Thus, when a movement's success in battle A makes the movement seem more powerful and its enemies more vulnerable, and therefore makes the outcome of battle B seem

less certain than before, potential activists may be energized. For instance, one history of Prohibition suggests that the 1923 repeal of a New York state prohibition law “gave antiprohibitionists a tremendous psychological lift. The hitherto invincible forces of absolute and strict prohibition had been politically defeated for the first time. Could not other, and perhaps greater, victories be achieved with more determination and effort?”<sup>14</sup>

So it’s sometimes rational for voters and legislators to support or oppose decision A based partly on the possibility that A will facilitate B by increasing the perceived strength of the movement that supports both A and B. For example, those who want to see expansion from a modest gun control to broader controls may take the view that, in the words of a 1993 *New York Times* editorial: “In these early days of the struggle for bullet-free streets, the details of the legislation are less important than the momentum. Voters and legislators need to see that the National Rifle Association and the gun companies are no longer in charge of this critical area of domestic policy.”<sup>15</sup> And those who oppose the broader downstream controls might likewise try to prevent this momentum by blocking the modest first steps.

This is especially so because movements rarely just disband after a victory. Successful movements often have paid staff who are enthusiastic about pushing for further action, and unenthusiastic about losing their jobs. The staff have experience at swaying swing voters, an organizational structure, media contacts, volunteers, and contributors. It seems likely that they will choose some new proposal to back.

This possible slippage seems more likely still if the pro-A movement’s leadership is already on the record as supporting the broader proposal B. For instance, many leaders in the gun control movement have publicly supported total handgun bans, even though their groups are today focusing on more modest controls, and some gun control advocates have specifically said that their strategy is to win by incremental steps. Likewise, if a group’s proposal is so modest that it seems unlikely to accomplish the group’s own stated goals, then we might suspect that a victory on this step will necessarily be followed by broader proposals, which the momentum created by the first step might facilitate.

In such cases, foes of B may well be wise to try to block A, rather than wait until the pro-B movement has been strengthened by a success on A. Naturally there may be a cost to this strategy: sometimes, blocking decision A may make B *more* likely, for instance if it enrages a public that thinks that something needs to be done. This is a common argument for compromise: let's agree on the modest concession A (say, a modest gun control) because otherwise voters might demand B (a total ban). But the discussion of political momentum slippery slopes identifies one possible cost (from the anti-B movement's perspective) of such compromises.

Finally, a movement's victory or defeat in battle A may also affect the movement's internal power structure: if the movement loses, its leaders may be discredited; if the movement wins, those who most strongly supported the winning strategy may gain more power. The result in A might thus affect the movement's willingness to back proposal B and not just its ability to do so—though such effects may be hard to predict, especially for outsiders who know little about the movement's internal politics.

#### B. Reacting to the Possibility of Slippage—The Slippery Slope Inefficiency and the *Ad Hominem* Heuristic

As with other slippery slopes, the danger of a political momentum slippery slope creates a social inefficiency: the socially optimal outcome might be A, but it might be unattainable because some people who support A in principle might oppose it for fear that it will lead, through political momentum, to B.

This slippery slope inefficiency might sometimes be avoided by coupling a proposal supported by one side with a proposal supported by the other, for instance a new gun control with a relaxation of some existing control. This isn't just a compromise that moves from the initial position 0 to a modest gun control (A) but not all the way to a strict gun control (B)—such compromises are still moves in one direction and may lead legislators to upgrade their estimate of the gun-control movement's power. Rather, it's a proposal under which both sides win something and lose something, which should have no predictable effect on legislators' estimates of either side's strength.

Another reasonable reaction by B's opponents, though, may be to adopt the *ad hominem* heuristic, the presumption that one should usually oppose even modest proposals A that are being advocated by those who hope to implement more radical proposals B later (see section II.F). Acting this way might seem too partisan or even ill-mannered. Still, it seems to me that voters or legislators who strongly oppose B may rightly choose to oppose anything that could help bring B about, even to the point of trying to block passage of an intermediate matter A in order to diminish the movement's political momentum.

## VII. IMPLICATIONS AND AVENUES FOR FUTURE RESEARCH

This article has tried to describe how slippery slopes can actually operate. How can these descriptions be practically helpful?

### A. Considering Slippery Slope Mechanisms in Decision making and Argument Design

Identifying the various slippery slope mechanisms can help us estimate the risk of slippage in a particular case. Will legalizing marijuana sales, for instance, be likely to lead to the legalized advertising of marijuana? Just asking "Is the slippery slope likely here?" might lead us to guess "no," because we might at first think only of attitude-altering slippery slopes or small change tolerance slippery slopes, which might not seem particularly likely in this situation. But if we systematically consider all the possibilities, we may find that the first step might indeed lead to other steps through, say, the political power slippery slope or the legal-cost-lowering slippery slope.

Conversely, sometimes a slippery slope may seem plausible, but looking closer at the potential mechanisms might persuade us that in this situation none of them is likely to cause slippage. (For instance, we might recognize that the slippery slope we had in mind was a multi-peaked preferences slippery slope, and either a survey or our general political knowledge might suggest that not enough voters have multi-peaked preferences on this issue to make slippage likely.) In either case, considering the

concrete mechanisms will give us a more reliable result than we'd get just by focusing on the metaphor.

If we think through the various slippery slope mechanisms, we can also come up with some general heuristics or presumptions governing our actions in particular areas. I've identified two—the rebuttable presumption against even small changes (see sections III.C.2 and III.C.3.a) and the *ad hominem* heuristic (see sections II.F and VI.B)—but doubtless there are others. Finding such heuristics, and figuring out where they can sensibly apply, can be an important research project, especially in light of the pervasive need for heuristics under conditions of bounded rationality. Understanding the slippery slope mechanisms might help in this research.

Studying these mechanisms might also help us persuade others, in our capacities as lawyers, scholars, commentators, judges, and legislators. Arguments such as “Oppose this law, because it starts us down the slippery slope,” have earned a deservedly bad reputation because they are just too abstract to be persuasive. One can always shout “Slippery slope!,” but without more details, listeners will wonder “Why will a slippery slope happen here when it hasn't happened elsewhere?”

If, however, one identifies the concrete mechanism through which slippage might happen, and tells listeners a plausible story about the steps that might take place, the argument will usually become more effective. And when that happens, understanding the mechanisms of the slippery slope can likewise help the other side craft effective counterarguments.

## B. Thinking About the Role of Ideological Advocacy Groups

Being aware of the slippery slope mechanisms can help counter them: such awareness may help prevent the initial decision A that might set the slippage in motion, and may possibly stop B even if A is indeed enacted. This awareness, of course, is part of why ideological advocacy groups, such as the ACLU and the NRA, try to persuade people to pay attention to slippery slope risks.

Slippery slope risks thus help explain and, to some extent, justify these groups' behavior. Such groups are often faulted as being extremist or unwilling to endorse reasonable compromises, and these criticisms may often lead voters to

distrust these groups. But the phenomena discussed in this article might suggest that these groups' tactics could, on balance, be sound:

1. Most obviously, the ACLU's or the NRA's opposition to a facially modest compromise A may seem more reasonable and less fanatical given the risk that A may indeed make a broader restriction B more likely.

2. Of course, one can't know for sure just how likely A is to lead to B, and some might reason that in the absence of this knowledge, the advocacy group should be willing to compromise. But the plausibility of many slippery slope mechanisms suggests that such modest compromises can indeed be dangerous. If an advocacy group strongly opposes B, it can reasonably adopt a rebuttable presumption against even small changes that might help bring B about (rebuttable by evidence that A is very good on its own, or that A is highly unlikely to lead to B).

3. Likewise, groups may reasonably fear that their opponents' victories could create political momentum for the opponents' broader proposals, by increasing the opponents' perceived political strength. The advocacy groups might therefore reasonably adopt an *ad hominem* heuristic, distasteful as it may be: "Though we might not strongly disagree with [the Religious Right/the Brady Campaign/etc.] on this issue, we will still oppose them here for fear that their victory today might increase their chances of winning broader restraints tomorrow" (see sections VI.B and section II.F).

4. Advocacy groups must do more than just adopt policy stances; they must also persuade the public to adopt those stances. But because of rational ignorance, many voters won't be willing to adopt nuanced policy positions—rather, they'll need simple heuristics that they can follow.

"Look closely at the purported evidence underlying gun control proposals" is thus not an effective message for the NRA to send. It's wise advice in the abstract, but most voters won't be willing to spend the time needed to follow it. "If guns are outlawed, only outlaws will have guns" may be less accurate in theory, but it's easier to apply in practice (though it may also risk alienating voters who oppose such simplistic-seeming heuristics).

5. Finally, this need to give voters some simple heuristics increases the importance of the *ad hominem* heuristic. Most voters have little information about the likelihood that enacting A will eventually lead to B. They don't know how the battle over A will change the power of various advocacy groups. They don't know whether other voters have multi-peaked preferences that could make A unstable. They don't know whether A's results are likely to be evaluated in a way that will make B seem appealing.

But they do know that A is being backed by a group with which they disagree most of the time, and which is also committed to ultimately enacting B. In an environment of severely bounded rationality, it makes sense for voters to adopt an *ad hominem* heuristic, and for advocacy groups to try to instill this heuristic in voters, though the groups should recognize that stressing this approach too much might cause a backlash among voters who find such arguments unfair, offensive, or divisive.

Of course, these considerations are only a small part of how advocacy groups plan their strategy. My point here is simply that (1) advocacy groups are an important means of fighting the slippery slope, that (2) in the process of fighting it, they may reasonably take positions that would have looked unreasonable had the slippery slope risk been absent, and that (3) perhaps these groups can make their positions more politically effective by explaining more explicitly why the slippery slope is a real risk.

### C. Fighting the Slippery Slope Inefficiency

Understanding slippery slope mechanisms can also help us think about how to avoid the slippery slope inefficiency, where a potentially valuable option A, which would pass if considered solely on its own merits, is defeated because of swing voters' reasonable fears that A will lead to B. Various tools can help prevent this slippery slope inefficiency by decreasing the chance that A could help bring about B, and thus increasing the chance that A will be enacted. This article has discussed three such tools: (1) strong constitutional protection of substantive rights; (2) weak rational basis review under equal protection rules; and (3) proposals in which both sides win something and lose

something, thus preventing either side from gaining political momentum. We may want to look for other such tools.

For instance, to what extent can interest groups use their permanent presence, and their continuing relationships with legislators and members of opposing advocacy groups, to work out deals that can prevent slippery slope inefficiencies—deals that unorganized voters could not themselves make? Can such deals be reliable commitments, even though they aren't constitutionally entrenched, or is there too much danger that future legislatures will overturn the deals?

It might also be interesting to do case studies of situations where a slippery slope seemed plausible, but no slippage occurred. Here, too, this article's taxonomy and analysis might be useful, because the slippage avoidance techniques would probably differ depending on the kind of slippery slope that's involved.

#### D. Slippery Slopes and Precedent

Slippery slopes in judicial decision making might at first seem quite different from slippery slopes in legislatures. Judicial decision making, the theory would go, involves a legal obligation to follow precedent, but legislative decision making doesn't—and without a system of binding precedent, slippery slopes are unlikely.

But this article suggests that judicial and legislative slippery slopes are more alike than we might suppose. Many judicial-judicial slippery slopes rely on more than just the binding force of precedent—they rest also on pressures for equal treatment, on the attitude-altering effects of legal rules, and on small change tolerance, forces that may operate in legislatures as well. Considering how slippery slopes work might thus provide a perspective on the way legal rules evolve within the judicial system; and considering how judge-made rules evolve may likewise illuminate similar mechanisms in the evolution of statutes.

#### E. Empirical Research: Econometric, Historical, and Psychological

The analysis in this article cries out for empirical research, though unfortunately such research is hard to do. Econometric models, for instance, might possibly help us empirically evaluate the likelihood of certain kinds of slippage, and perhaps even generate testable predictions. Likewise, it would be good for people to do historical case studies, exploring which changes in the law (such as the growth of police surveillance, of income tax rates, of antidiscrimination law, of public smoking bans, of free speech protections, or of hostile environment harassment law) came about as a result of slippery slopes and which ones didn't. This article's identification of the different kinds of slippery slopes might make this sort of research more productive, since the factors influencing the slippery slope risk likely vary with the mechanism involved.

This article has also linked slippery slopes to other phenomena that scholars have recently discussed: multi-peaked preferences, rational ignorance, the expressive effect of law, path dependence, and possible departures from rationality, such as context-dependence. Understanding these connections—especially from the perspective of those who, unlike me, are experts in social psychology and related fields—might help us further explore slippery slopes, and understand when the risk of slippage is higher and when it is lower.

### VIII. CONCLUSION

Sandra Starr, vice chairwoman of the Princeton Regional Health Commission . . . , said there is no “slippery slope” toward a total ban on smoking in public places. “The commission’s overriding concern,” she said, “is access to the machines by minors.”

— *New York Times*, Sept. 5, 1993.

Last month, the Princeton Regional Health Commission took a bold step to protect its citizens by enacting a ban on smoking in all public places of accommodation, including restaurants and taverns. . . . In doing so, Princeton has paved the way for other municipalities to institute similar bans . . . .

— *The Record (Bergen County)*, July 12, 2000.

Let me return to the question with which this article began: When should you oppose one decision A, which you don't much mind on its own, because of a concern that it might later lead others to enact another decision B, which you strongly oppose?

One possible answer is "never." You should focus, the argument would go, on one decision at a time. If you like it on its own terms, vote for it; if you don't, oppose it; but don't worry about the slippery slope. And in the standard first-order approximation of human behavior, where people are perfectly informed, have firm, well-developed opinions, and have single-peaked preferences, slippery slopes are indeed unlikely. People decide whether they prefer 0, A, or B, and the majority's preferences become law without much risk that one decision will somehow trigger another.

Likewise, in such a world, law has no expressive effect on people's attitudes, people's decisions are context-independent, no one is ignorant, rationally or not, and people act based on thorough analysis, not on heuristics. Policy decisions in that world are easier to make and to analyze.

But as behavioral economists, norms theorists, and others have pointed out, that is not the world we live in, even if it is sometimes a useful first-order approximation. The real world is more complex, and this complexity makes possible slippery slopes and their close relative, path dependence. We can't just dismiss slippery slope arguments as illogical or paranoid, though we can't uncritically accept them, either.

The slippery slope is in some ways a helpful metaphor, but as with many metaphors, it starts by enriching our vision and ends by clouding it. We need to go beyond the metaphor and examine the specific mechanisms that cause the phenomenon that the metaphor describes—mechanisms that connect to the nature of our political institutions, our judicial process, and possibly even human reasoning. These mechanisms and their effects deserve further study, even if paying attention to them will make policy analysis more complex. So long as our support of one political or legal decision today can lead to other results tomorrow, wise judges, legislators, opinion leaders, interest group organizers, and citizens have to take these mechanisms into account.

## ENDNOTES

\*Professor of Law, UCLA School of Law (volokh@law.ucla.edu). This is a condensed version of an article that appears at 116 *Harv. L. Rev.* 1026 (2003); please consult that article, or a draft version of the piece that's *available at* <<http://www1.law.ucla.edu/~volokh/slippery.htm>>, for more details. In particular, this version omits most citations—if you're curious about the source of a particular point, or about specific examples of a general claim made in the text, please check the full article, which probably has more sources and illustrations than it needs.

1. Attributed by Roy Schotland (in personal conversation) to Sir Frederick Maitland.
2. *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 137 (1961) (Black, J., dissenting).
3. The leading law review article on this subject is Frederick Schauer's excellent "Slippery Slopes," 99 *Harv. L. Rev.* 361 (1985), but it focuses chiefly on slippery slopes in judicial reasoning, a fairly small though important subset of the problem discussed here. Philosophers' recent work on the subject, *see generally* Eric Lode, "Slippery Slope Arguments and Legal Reasoning," 87 *Cal. L. Rev.* 1469, 1479 (1999), and sources cited therein, has typically focused on theoretical questions (such as whether these arguments are logically valid) rather than on the concrete mechanisms of how slippery slopes operate.
4. Wilbren van der Burg, "The Slippery Slope Argument," 102 *Ethics* 42, 65 (1991).
5. *See* Robert Cottrol & Raymond Diamond, "Second Amendment Cannot Be Ignored," *Legal Times*, May 27, 1991, at 24 (making this argument).
6. For more detail on slippery slopes in assisted suicide liberalization and in speech restrictions, *see* Eugene Volokh, "Mechanisms of the Slippery Slope," 116 *Harv. L. Rev.* 1026, 1057-60 (2003).
7. Charles Krauthammer, "Disarm the Citizenry: But Not Yet," *Wash. Post*, Apr. 5, 1996, at A19;.
8. Morris R. Cohen, "The Basis of Contract," 46 *Harv. L. Rev.* 553, 582 (1933) (attributing the phrase to Georg Jellinek).
9. Richard H. McAdams, "An Attitudinal Theory of Expressive Law," 79 *Or. L. Rev.* 339, 339 (2000).
10. *E.g.*, Editorial, "A Vote Against Hate," *Louisville Courier-J.*, Feb. 3, 1994, at 6A.
11. A whole genre of legal writing, of which Warren & Brandeis's *The Right to Privacy* is the classic example, tries to take advantage of this

tendency by drawing from a line of cases a single unifying justification that goes considerably beyond the particular holdings of each case.

12. *E.g.*, *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188–89 (5th Cir. 1979) (rejecting a First Amendment defense to a trademark claim).

13. I have not checked this myself, nor do I intend to. Some sources suggest that real frogs don't behave this way; but consider the discussion as referring to the metaphorical frog — a creature much like the metaphorical ostrich, which (unlike a real ostrich) does bury its head in the sand when danger looms, and which is thus far more useful to us than a real ostrich could ever be.

14. David E. Kyvig, "Repealing National Prohibition" 54, 57 (2000).

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# Blacks, Gun Cultures, and Gun Control: T.R.M. Howard, Armed Self-Defense, and the Struggle for Civil Rights in Mississippi

David T. Beito and Linda Royster Beito

*T.R.M. Howard was a leading civil rights activists and businessman in Mississippi in the mid-twentieth century. Having grown up in the gun culture, he armed himself for self-defense against racist, helping to set a pattern of affirmative self-defense which was followed by other civil rights leaders.*

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Few blacks in Mississippi were more assertive in confronting Jim Crow and disfranchisement in the 1950s than Dr. Theodore Roosevelt Mason Howard. When he spoke out, it was hard to ignore him. Howard was not only one of the wealthiest blacks in the state but headed the largest civil organization in the Delta. In honor of his efforts, *The California Eagle* called him the “Most Hated, and Best Loved, Man in Mississippi.” From the beginning, armed self-defense was an important component of Howard’s civil rights strategy. In this respect, he followed in a long tradition that later found expression under the leadership of

Robert Williams in Monroe, North Carolina, and various civil rights activists in the Deep South in the 1960s who relied on the often interrelated strategies of “God, Gandhi, and Guns.”<sup>1</sup>

## YOUTH

Howard was born in the small town of Murray in Calloway County, Kentucky, in March 1908. Unlike many other civil rights leaders of his generation, he grew up in rural poverty. His childhood was steeped in Kentucky’s gun culture, where firearms and hunting were ubiquitous. Murray was in the center of the black patch in the western part of the state, so named because of its high quality of tobacco. At the time of Howard’s birth, a secret society, the Night Riders, was launching violent attacks as part of an effort by planters to force up tobacco prices.<sup>2</sup>

About a quarter of Murray’s population of 2,139 was black in 1910, a proportion much higher than the county average. Though the town and county had cast their lot with the Confederacy during the Civil War, race relations at the turn of the century were relatively good by western Kentucky standards. Not one lynching had occurred there. But, to the extent that a condition of racial peace and good will existed, it was only superficial.<sup>3</sup>

Events in the months during and after Howard’s birth threatened to destroy this outward harmony. In March, the *Paducah Evening Sun* reported that the first “real night riders have appeared in Calloway county” and were intimidating independent growers and burning barns. A few tried to scare blacks into leaving Murray. The dangers of violence heightened in April when a county judge warned that Night Riders were about to “swoop down on Murray and burn property and beat her citizens.”<sup>4</sup>

The planned sack of Murray fell apart after the governor sent a detachment of troops. Although the announced targets of the Night Riders were prominent merchants and bankers, the record of recent attacks in nearby Marshall and Trigg counties indicated the likelihood of atrocities on a much broader scale. Murray’s blacks could have anticipated an orgy of racial killings and ethnic cleansing.<sup>5</sup>

Despite the subsequent demise of the Night Riders, the threat of lynching always lurked in the background. The rope

and faggot claimed the lives of fifty-four blacks in Kentucky between 1900 and 1919. In January 1917, lynching fever reached Murray when a mob threatened to storm the jail holding Lube Martin, a black man who was under arrest for killing a prominent white in a probable act of self-defense. Governor Augustus O. Stanley, an avid opponent of lynching, had other ideas. Taking the first train to Murray, he successfully shamed the crowd into dispersing.<sup>6</sup>

It is almost certain that Howard, then eight years old, was aware of the Lube Martin affair. Murray was, after all, a small town and its black community was smaller still. Moreover, his house was only a few blocks from the shooting and only a little farther away from the courthouse where Governor Stanley had faced down the mob. Lube Martin's brother, Chester Martin, who had witnessed the killing and remained in Murray for the rest of his life, was certainly aware of Howard. More than two decades later, he visited him in Mississippi and later commented with pride on the local boy who made good.<sup>7</sup>

The events of 1908 and 1917 left a lasting imprint on Murray's black community and probably Howard. One lesson taken by many in the younger generation was the need to be prepared to shoot back. During the 1890s, Ida Wells-Barnett had framed the idea in terms that many blacks in Murray would have understood. Noting that blacks in nearby Paducah had warded off attacks, she recommended that "a Winchester rifle should have a place of honor in every black home, and it should be used for that protection which the law refuses to give . . . The more the Afro American yields and cringes and begs, the more he has to do so, the more he is insulted, outraged and lynched."<sup>8</sup>

At about the time that Lube Martin was nearly lynched, Howard was perfecting his hunting skills with the family shotgun. He was expected to contribute to the meager family budget. He later recalled that his mother gave him twenty cents each Sunday to buy four shells. Her instructions were to return with either two rabbits or two squirrels, or one of each for the dinner table. She warned not to waste shells on quail because "there wasn't any meat on 'em." While his weapons of choice and necessity changed over time, guns always remained an important part of Howard's life.<sup>9</sup>

When he was only twelve, Howard caught the eye of Dr. Will Mason, the white head of the local community hospital.

Mason, a Seventh Day Adventist, encouraged the young boy's ambitions to be a doctor. Later, he helped to pay for Howard's college education at three Adventist colleges. During the late 1920s, Howard showed his gratitude to his white mentor by changing his name to Theodore Roosevelt *Mason* Howard. Howard received his M.D. in 1935 from the College of Medical Evangelists (now Loma Linda University) in California.<sup>10</sup>

#### DOCTOR, BUSINESSMAN, AND COMMUNITY LEADER

In 1942, Howard became chief surgeon at the Taborian Hospital of the Knights and Daughters of Tabor, a fraternal organization, in the all-black town of Mound Bayou, Mississippi. Within five years, he had founded various business and community enterprises, including an insurance company, hospital, home construction firm, and a large farm where he raised cattle, quail, hunting dogs, and cotton. He also built a small zoo and a park, as well as the first swimming pool for blacks in Mississippi. In 1947, he broke with the Knights and Daughters of Tabor, and founded his own fraternal organization, the United Order of Friendship of America. It established a rival hospital just across the street from the Taborian Hospital.<sup>11</sup>

From the onset, Howard had to contend with Mississippi's discriminatory gun control laws. Sheriffs routinely denied concealed carry permits blacks, including prominent leaders such as Howard. But Howard later boasted that he found a way to evade the law. He said that had a secret compartment in his car where he could stow his gun if the police pulled him over. Several years later, the *Pittsburgh Courier* reported that as Howard "rode the highways, he would take the gun from its secret hiding place and put it in his lap . . . always cocked!"

An arrest record from 1947, when Howard's car was stopped for speeding in Leland, is consistent with the newspaper description. As the officer approached, he noticed that five of the occupants were hurriedly pulling guns from their belts and throwing them on the floor. Howard was the only one who did not have a gun, perhaps because he stowed it away just in time. The other men were not so lucky. Each had to pay a fine of 100 dollars on the charge of carrying a concealed weapon without a permit.<sup>12</sup>

Because the permit system did not apply to unconcealed weapons, Howard took advantage of his legal right to have weapons in open view in his car. Like many Mississippians, black and white, he had a long gun prominently displayed in the rack on the window of the back seat.<sup>13</sup>

Howard entered the civil rights limelight after 1951 by founding the Regional Council of Negro Leadership. The youngest official of the Council was Medgar Evers, whom Howard had hired to be an agent for his insurance company. The Council mounted a successful boycott of service stations that denied restrooms to blacks. It distributed 20,000 bumper stickers bearing the slogan, "Don't Buy Gas Where You Can't Use the Restroom." The Council organized yearly rallies (sometimes drawing audiences of 10,000 or more) for civil rights and voter registration. Each of these events featured nationally-known speakers, such as Rep. William Dawson of Chicago, Alderman Archibald Carey of Chicago, Rep. Charles Diggs of Michigan, and NAACP attorney Thurgood Marshall.<sup>14</sup>

#### MISSISSIPPI GUN CONTROL

As black assertiveness increased, whites showed heightened interest in tougher gun control. Proponents of legislation did not hide the fact that race was central to their concerns. Of course, this was not new. During the late nineteenth and early twentieth centuries, several southern states had enacted gun control laws that restricted access of cheap handguns to blacks. The term "Saturday Night Special" originated during this period as a racial slur.<sup>15</sup>

In January 1954, an editorial in the *Clarion Ledger* of Jackson (which had the highest circulation in the state) stressed the dangers posed by .22 caliber pistols and rifles. Focusing on the example of an "allegedly 'crazed' Negro" who killed three white men," it lamented that these "weapons are easily obtained and ammunition for them can be bought almost anywhere." If this problem continued, the editorial recommended "legislative action dealing with control of the sale of weapons and ammunition or the keeping of records of all such sales."<sup>16</sup>

In October 1954, a more ambitious proposal "to require registration of all firearms and records on all sales of ammunition" came close to becoming law. The sponsor, Rep.

Edwin White, noted with alarm that many blacks were buying guns and concluded that the bill would protect “us from those likely to cause us trouble.” The Mississippi House approved the bill but it failed to get out of committee in the Senate. In the end, Mississippi’s vibrant gun culture was too strong an obstacle repressive legislation. Still, it was a near thing.<sup>17</sup>

#### RACIST DANGERS

Howard had run afoul the White Citizens Councils which had launched a credit squeeze against blacks who took part in the civil rights movement. He was instrumental in organizing a national campaign to encourage black businesses, churches, and voluntary associations to transfer their accounts to the black-owned Tri-State Bank of Memphis. The funds swelled to nearly 300,000 dollars and were made available for loans to victims of the squeeze.<sup>18</sup>

As if this were not enough, Howard’s speeches, which were widely reported in the white press, were often highly inflammatory. In 1955, he told a crowd of several thousand in Mound Bayou that the late Senator Theodore G. Bilbo, an extremely virulent racist even by the standards of the time, was now living in hell and had recently “sent a direct message to the capital at Jackson asking to stop treating the Negroes so badly in Mississippi and to give them a break, because they have a Negro fireman down there that keeps the fire mighty hot.” Because the story apparently went over so well, it became a staple in later speeches. While characterizing economic pressure as “a flop,” he counseled against complacency because “the next round will be a well-organized wave of violence.”<sup>19</sup>

Despite Howard’s highly visible militancy, he was apparently never attacked. It helped, of course, that he lived in Mound Bayou, where any white person stuck out like a sore thumb. But this does not provide a complete answer because Howard often traveled to other communities. It is likely that he also gained some indirect protection because of his remaining business and personal ties to members of the white elite in the Delta, who still gave him some grudging respect and owed him favors.<sup>20</sup>

One of the most important deterrents to any attack, however, was that whites knew that Howard and his followers could respond with deadly fire. Also, it was difficult for any

shooter to get in close enough to make a successful kill, much less escape. The Regional Council of Negro Leadership's reliance on armed self-defense was still fairly informal, however. Although members carried guns when they were in public, the Council never aspired to the same degree of training and paramilitary organization that would characterize groups such as the Monroe, North Carolina branch of the NAACP in the late 1950s, the Tuscaloosa Citizens for Action in 1964, or the Deacons for Defense and Justice of Bogalusa in 1965.<sup>21</sup>

The threat of violence rose to a much higher level of intensity after the murder of Emmett Till in August 1955. The subsequent events represented the culmination, and the beginning of the end, of Howard's career in Mississippi. Howard was instrumental in finding witnesses and uncovering evidence in the hope of securing a conviction against the two men arrested for the crime.<sup>22</sup>

Even before the trial, the Howard home in Mound Bayou was taking on the character of a "black command center" and safe haven for journalists, witnesses, and prominent visitors. Mamie Bradley, Emmett Till's mother, stayed there, as did Rep. Charles Diggs of Michigan, who was an observer. The tight security left a deep impression on guests. It was so formidable that journalists and politicians from a later era might have used the word "compound" rather than "home" to describe it. According to Simeon Booker, a correspondent from *Jet*, Howard's "security program was a model of dispatch and efficiency." Strangers had to pass through a checkpoint and guards were on duty around the clock. Bradley particularly remembered "an old man with a long shotgun and I understand he really knew how to use it."

Firearms were ubiquitous, including a pistol strapped to Howard's waist. When Cloyte Murdock of *Ebony* had difficulty getting her luggage through the front door, she looked around the corner and saw a cache of weapons on the other side. Another visitor spied a magnum pistol and a .45 at the head of Howard's bed, a Thompson submachine gun at the foot, and "a long gun, a shotgun or rifle, in every corner of every room." Each day, Howard escorted Bradley and Diggs from Mound Bayou to Sumner, where the trial took place, in an armed car caravan. Bradley asked to ride in Howard's air-conditioned

Cadillac, but he refused saying that the target was too tempting for snipers.<sup>23</sup>

#### THE MOVE NORTH

Despite the efforts of Howard, Medgar Evers, and many other black civil rights activists and journalists, an all-white jury acquitted the accused killers of Till in September 1955. Three months later, Howard sold most of his real estate and announced that his family had moved out of the state for their own protection. He soon followed them and set up a thriving medical practice in Chicago.

Although the cycle of violence was an important factor in his flight, he probably had other reasons as well. Howard was an intensely ambitious man. Especially as economic pressure bore down, he might have seen the possibilities for future business successes as limited and dwindling. As blacks migrated to the North in increasing numbers, the potential customer and membership base for his organizations and enterprises promised only to shrink. He could continue on as before, perhaps, but he was not a man to be content in a world of limits. In the short term, white pressure had only accelerated the process.<sup>24</sup>

White segregationists expressed glee at Howard's departure. In "Good Riddance," the *Jackson Daily News* editorialized that by deciding to leave Howard had "rendered the greatest service he has yet performed for the state. Dr. Howard is not a desirable citizen. He is a radical agitator who devotes much of his time to stirring up ill feeling between the races . . . .Howard's room is much preferred to his company. All possible speed should accompany his going."<sup>25</sup>

Although he no longer had to live in constant fear of attack after he moved to Chicago, Howard did not put away his guns. In the public mind, he became increasingly identified with his favorite past-time of big game hunting, and he made several trips to Africa for this purpose.

It was far more than a hobby. To display his trophies, he established a "safari room" in his South Side mansion that was often made available for public tours. Howard was equally comfortable using guns for recreation as well as personal protection. As historians such as Charles Payne, John Dittmer, Simon Wendt, and Akinyele O. Umoja have shown, armed self-

defense was a key component of civil rights activism in Mississippi during the 1960s. In taking a stand, the civil rights activists were following a path blazed by men such as Dr. T.R.M. Howard.<sup>26</sup>

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# Ohio's Concealed Carry Law: Practical Applications and Possible Revisions

Ian Redmond

*Ohio is one of the most recent states to enact a Shall Issue law for concealed handgun licensing. This article outlines the new law, and examines some of its complexities and uncertainties. A 2002 graduate of Notre Dame law school, Ian Redmond is an Ohio attorney, and author of "The Second Amendment: Bearing Arms Today," which was published in the Journal of Legislation in 2002.*

In 2004, Ohio joined forty-five other states which permit their residents to carry concealed weapons.<sup>1</sup> Ohio's General Assembly made the right available to Ohioans through the enactment of Am. Sub. H.B. No. 12, which became effective April 8, 2004.<sup>2</sup> The Concealed Carry Law allows approved Ohio residents to obtain a permit to carry a concealed handgun. The intent of the Law is to recognize the "inalienable and fundamental right of an individual to defend the individual's person and the members of the individual's family."<sup>3</sup> The General Assembly explained that the enactment of the Concealed Carry Law in no way:

declare[s] or otherwise give[s] the impression that, prior to the effective date [of the Act], an individual did not have an inalienable and fundamental right, or a right under the Ohio Constitution or the United States Constitution, to carry a concealed handgun or other firearm for the defense of the individual's person or a member of the individual's family while engaged in lawful activity.<sup>4</sup>

Ohio's Concealed Carry Law affirms an individual's right to bear arms, as enunciated in the Ohio State Constitution: "The people have a right to bear arms for their defense and security..."<sup>5</sup>

Unfortunately, provisions throughout the Concealed Carry Law whittle away at the express purpose of the Law, while other sections simply fail to comport to the legislative intent. This article will analyze the Concealed Carry Law and suggest revisions to fulfill more properly the intentions of the General Assembly.<sup>6</sup> First, the article addresses the basic standards that persons who apply for a license must meet before they may obtain a concealed carry permit. Second, the article details the strict guidelines the license holder must observe in order to carry a concealed weapon in a car. Third, the article lists the various locations throughout the State of Ohio that license holders may not carry weapons. Fourth, the article addresses the controversy surrounding the Law's provision that although names of license holders are not public information, the license holders' names are available to the public through the media.

#### I. LICENSING REQUIREMENTS

Before a person can obtain a concealed handgun license, she must meet certain prerequisites.<sup>7</sup> She must be a resident of Ohio for at least 45 days, a resident of the county for a minimum of thirty days, and be twenty-one years or older.<sup>8</sup> The applicant cannot be a fugitive or have a criminal record containing specific convictions, indictments or guilty pleas.<sup>9</sup> The applicant must be mentally competent<sup>10</sup> and not subject to a protection order.<sup>11</sup>

In addition, the applicant must complete minimum educational requirements.<sup>12</sup> The educational component consists of ten hours of instruction on gun safety and storage, plus two hours of training on a firing range, followed by a written exam.<sup>13</sup> The applicant must also pay a nonrefundable fee and provide the Sheriff a recent color photograph of herself.<sup>14</sup> Upon proof of certified training and the standards cited above, the sheriff of the applicant's county "shall issue" the applicant a permit to carry a concealed weapon.<sup>15</sup>

The Concealed Carry Law requires an applicant for a concealed carry license to attest that she "desires a legal means to carry a concealed handgun for defense of the applicant or a member of the applicant's family while engaged in lawful activity."<sup>16</sup> The applicant's affirmation underscores the General Assembly's and the Governor's intention to enable the citizens of Ohio to protect themselves.

The Ohio Concealed Carry Law offers licenses only to Ohio residents.<sup>17</sup> Fortunately, Ohio grants reciprocity to concealed weapon permit holders from other states with similar licensing requirements.<sup>18</sup> Ohio's reciprocity allows individuals with concealed carry licenses from another state to carry concealed handguns in Ohio if the other state has licensing requirements similar to those of Ohio, and if the other state affords licensed Ohioans the same right.<sup>19</sup> The reciprocity provision affords the same rights to residents of any reciprocal state who follow the precepts of the Law and are capable of appreciating them.

The educational requirements mandate ten hours of instruction on gun safety, handling and storage. The Concealed Carry Law requires the applicant to "name and explain the rules of safe handling of a handgun and proper storage practices for handguns and ammunition."<sup>20</sup> At the end of the course, the instructor administers a written examination.<sup>21</sup> The Law establishes no criteria for passing the exam and only minimum requirements for the contents of the test. While the basic knowledge of gun safety will assist every applicant, the Law does not ensure that every applicant has a sufficient understanding of gun safety. Without a standard for passing the exam, there is no guarantee that every course will train adequately every successful applicant.

The Concealed Carry Law demands two hours of range instruction and training. The statute requires: "A physical demonstration of competence in the use of a handgun and in the safe handling and storage of a handgun and a physical demonstration of the attitude necessary to shoot a handgun in a safe manner."<sup>22</sup> The section emphasizes safety, but fails to define competence. An individual may safely aim the handgun down range, away from unintended targets, may cautiously hold the gun and use the necessary eye and ear protection, but the individual may miss the target entirely. While the State does not need to ensure that every license holder is a marksman, consistently hitting the target at a distance of twelve feet would provide some assurance to the public. Thus, the Law fails to articulate the commensurate proficiency needed to fire a real handgun.

Further, the Concealed Carry Law's definition of a qualified instructor is vague. The Law places great faith in the National Rifle Association and the executive director of the Ohio Peace

Officer Training Commission, who must certify the instructor.<sup>23</sup> Sheriff Departments must grant licenses to applicants based upon the successful completion of the training course. But the ambiguous language of the Law leaves sheriffs questioning whether the training course is adequate. Indeed, general counsel for the Summit County Sheriff's Office stated: "the office isn't going to recommend any instructors. 'We don't know yet what qualified training is.'"<sup>24</sup>

Significantly, the Law omits any requirement that the applicant must qualify with the firearm she intends to carry. An applicant could be trained and "qualify" with a .22 caliber, single-shot pistol. After obtaining a license based on that qualification, she could carry a much heavier, more complex and more powerful .50 caliber handgun. The Law fails to recognize simple differences between sizes of guns as well as the types of handguns (revolvers and semi-automatics). As a result, as written, an applicant, who "qualifies" with one gun, may carry another without necessarily possessing the skill to handle the other firearm.

License holders may also carry an unlimited number of handguns with only one permit. The applicant discussed above who "qualified" with the .22 caliber, single shot pistol could carry that gun as well as a .50 caliber handgun, and numerous other semi-automatics and revolvers, despite proving competence with only one of the multitude she carries.

Besides outlining what constitutes "qualified training," the Law ought to require an applicant to prove her ability with both the type and caliber of gun she intends to carry. If an applicant can qualify with multiple firearms, she should be licensed to carry those handguns, although not all at once. A limit on the number of guns a licensee may carry should be based on a reasonable standard. For example, there are few if any circumstances in which an average citizen would have need to carry more than three handguns at once. However, under the current law, licensees may carry as many as their physical strength will allow.

The Concealed Carry Law placed an increased burden on local Sheriff Departments to distribute and accept applications, as well as to conduct background checks of each applicant's criminal records and records indicating adjudications of mental incompetence. Sheriff departments across the state initially

experienced challenges with the Concealed Carry Law. Some counties experienced a flood of applications, taxing the sheriff's resources. The volume of applications resulted in delays issuing the licenses. Counties near Toledo noted that the "process [was] painfully slow, eating up both time and staff."<sup>25</sup> A Cincinnati television station reported the "response to Ohio's new concealed carry law has been overwhelming."<sup>26</sup> The Cuyahoga County Sheriff's Office refused to accept any applications the first day the Law was in force. A spokesman said: "[T]he office has not received the necessary computer equipment from the state to process applications for the concealed-carry license."<sup>27</sup> Most of the administrative problems experienced by sheriffs, however, subsided once the initial applications were processed.

## II. MOTOR VEHICLES

Ohio's General Assembly chose to limit the individual's right to bear concealed firearms by balancing a concern for law enforcement safety against the individual's right to defend herself when traveling in a car with a loaded firearm. The General Assembly, however, defined how a license holder may transport a loaded handgun without jeopardizing the safety of police officers.

While Ohio law generally prohibits the possession of a loaded firearm in the passenger compartment of a vehicle,<sup>28</sup> the Concealed Carry Law now permits a concealed carry license holder to transport a loaded handgun in a vehicle under specific circumstances.<sup>29</sup> Under the statute, the gun must be carried in a holster, on the person and in "plain sight," or in a locked glove compartment, or in a locked gun case in "plain sight."<sup>30</sup>

While the General Assembly correctly recognized a need to transport a handgun, provisions of the statute are subject to interpretation. For example, if a licensee is subject to a traffic stop and is lawfully carrying a concealed handgun, the licensee must "promptly" notify the officer that she has a license to carry a concealed handgun and is currently carrying one (in that order to avoid scaring the officer with a declaration that the driver "has a gun").<sup>31</sup> The licensee must then keep her hands in "plain sight" and not touch or attempt to touch the firearm.<sup>32</sup> The licensee must strictly comply with the above rules in order to

avoid severe criminal penalties and the risk of a police officer mistakenly taking defensive action against the licensee.

The main problem with the transportation requirements is that “plain sight” is not defined. The term “plain view” is a legal term of art used in search and seizure cases, governed by the Fourth Amendment.<sup>33</sup> According to the Fourth Amendment, individuals are protected from unreasonable searches and seizures. A valid search warrant presumes that a subsequent search is reasonable, and thus, legal. However, searches without a warrant can be deemed reasonable in certain instances, such as under “the plain-view doctrine.”<sup>34</sup>

The “plain view” exception allows police officers to confiscate contraband without a warrant. Under the plain view doctrine, an officer may seize an item without a warrant if “(1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent.”<sup>35</sup> Accordingly, an officer standing outside an individual’s car has a legal right to be there. If the officer determines that the presence of the licensee’s gun is “immediately apparent,” then the individual is complying with the Law. However, an officer may not always be able to observe an unconcealed handgun.

The practical application for licensees is challenging. A licensee may not carry a loaded gun in an ankle holster if her pants cover the firearm. The next logical place to holster a gun is on the licensee’s hip. As long as a coat or shirt does not conceal the gun, the licensee may believe the weapon is in “plain sight.” However, a police officer could reasonably disagree. A left-handed licensee would naturally holster the gun on her left hip. While sitting in the driver’s seat of the car, the firearm would be nestled between the door and the driver. The firearm would not be concealed by clothing but is still not visible from outside the car. Is the firearm in “plain sight?” Likewise, a right-handed licensee would wear the holster and the loaded gun on the right hip. The gun would be visible from the passenger side window, but not from the driver’s side because the driver’s body would block the officer’s view. Moreover, a person sitting in the passenger seat would obscure the officer’s view of the gun from the passenger side window. The law-abiding licensee is faced

with a dilemma of how to lawfully holster a firearm that is visible to a police officer while the licensee is seated in the car.

Even instructors offer differing advice regarding how a licensee should respond during a traffic stop:

[One instructor stated] tell the officer at your window that you have a permit and are carrying a concealed gun. From then on the officer is anxious and so are you. [Another Instructor] suggested that the driver offer to step out of the car, let the officer handcuff him or her and then take the gun. [A third] instructor, who has law-enforcement experience, made a practical suggestion: Let the officer tell you what to do. Follow his or her commands.<sup>36</sup>

The Concealed Carry Law also permits an officer to demand that the licensee relinquish possession of the handgun during the traffic stop.<sup>37</sup> A licensee's failure to comply with the officer's request/demand to surrender the handgun could intimidate the officer or be deemed a crime, for failure to "comply with any lawful order of any law enforcement officer given while the vehicle is stopped."<sup>38</sup> However, after a traffic stop, where the licensee is not cited for a violation of the Concealed Carry Law or *arrested* for some other offense, the officer must return the confiscated firearm to the licensee.<sup>39</sup>

### III. RESTRICTED LOCATIONS

#### A. Locations Restricted by Statute

The right to carry a concealed handgun in Ohio is not unregulated. The Ohio General Assembly has prohibited concealed carry licensees from carrying their concealed firearms into government buildings and offices, police stations, courthouses, libraries, schools, day-care centers, places of worship, airports, and places that furnish alcohol.<sup>40</sup> The enumeration forbidden locations affords a licensee some warning and knowledge before venturing out.<sup>41</sup> Before a licensee leaves her home for one of these destinations, she knows (or should know) that her firearm is prohibited inside these

locations. She must leave the firearm at home or in the car while she is inside the specific building.<sup>42</sup>

Some people in Cleveland are concerned that the Law only forbids concealed firearms from state buildings. State buildings are defined to include buildings belonging to subdivisions of the state—such as cities and counties. Cleveland’s public transportation service wishes to expand the Law to prevent licensees from carrying concealed firearms on buses: “The Greater Cleveland Regional Transit Authority can prohibit guns in its buildings and terminals, but not on buses... . ‘[I]f someone had a permit to carry a concealed weapon and they were stopped on the bus, there is no legal recourse.’”<sup>43</sup> Buses and other vehicles are not mentioned within the locations restricted by statute, and accordingly it would not seem that government transportation services could forbid licensed guns on buses.<sup>44</sup>

Municipalities are also concerned that licensees may enter public areas with concealed handguns. The Concealed Carry Law allows licensees to carry concealed firearms in parks, in recreational areas and on bike paths. A spokesman for the Ohio Attorney General said: “If you are a licensed concealed-carry holder, you should be allowed to carry in a park.”<sup>45</sup> Toledo’s law director disagrees, relying on the city’s home-rule authority.<sup>46</sup>

Under the Ohio Constitution: “Municipalities shall have authority to exercise all powers of local self government and to adopt and enforce within their limits such police, sanitary and other regulations, as are not in conflict with general laws.”<sup>47</sup> Certain instances will mandate that local ordinances give way to state law: “A municipal ordinance is preempted by state law when (1) the challenged ordinance involves the exercise of police power rather than local self government; (2) the statute is a general law; and (3) a conflict exists between the ordinance and state law.”<sup>48</sup> Under this test, a city that prohibits licensees from carrying concealed handguns in the public parks would be exerting its police power in contravention of a general state statute.

Toledo is not the only city to balk at the prospect of concealed guns in parks. The City of Chardon, Ohio, passed a city Ordinance prohibiting concealed weapons on all municipal property, including parks.<sup>49</sup> The ordinance was repealed less than a month later.<sup>50</sup> The Chardon Law Director explained the need to repeal the city Ordinance at a city council meeting: “[T]he

Ohio Revised Code states that Municipalities cannot prohibit the carrying of concealed weapons in areas which are permitted by the State.”<sup>51</sup> Even so, a question remains whether a city could prohibit concealed weapons from the buildings within the park, such as restrooms. A concealed carry license holder is again left wondering how to follow the Law.

#### B. Locations Restricted by Private Owners

The Law permits a private business to prohibit concealed handguns from its premises:

Nothing in this section shall negate or restrict a rule, policy, or practice of a private employer that is not a private college, university, or other institution of higher education concerning or prohibiting the presence of firearms on the private employer’s premises or property, including motor vehicles owned by the private employer.<sup>52</sup>

Any private business may “post a sign in a conspicuous location” prohibiting licensees from entering the property with a concealed firearm.<sup>53</sup> Indeed, a licensee who carries a concealed weapon onto the property is subject to criminal sanctions.<sup>54</sup>

Some private businesses do not want their employees or their patrons to carry concealed handguns on their property and have posted “do not carry” signs.<sup>55</sup> Ironically, the “do not carry” signs do not prevent a gun from being carried onto the property. A concealed handgun can be *physically* carried into a building with or without a license; all the signs prevent is gun-carrying by law-abiding persons.

Some private businesses prefer to have qualified licensees on their premises. One convenience store owner posted signs welcoming customers with legally carried firearms, and added: “If I get robbed, I hope that maybe two or three of my customers will have concealed-carry.”<sup>56</sup>

While a business is permitted to post a sign, it ought to be aware of the risks associated with adopting a no-weapons policy. Businesses may incur liability through enforcement of a no-weapons policy:

A criminal who is intent on robbing a business at gunpoint, shooting an employee, or committing some other gun-related crime is unlikely to be deterred by a cardboard sign posted at the door stating 'No guns allowed.' Therefore, the effectiveness of the no-weapons policy is not going to depend on whether a sign saying 'No guns allowed' is posted; rather, it will depend on the business's or employer's willingness to enforce the policy against those who violate the policy.<sup>57</sup>

A business is immune from some civil liability related to allowing or forbidding concealed firearms within the business's building.<sup>58</sup> However, a private business needs to be concerned when it does not allow concealed carry licensees to frequent the business. Businesses that forbid concealed firearms from their premises may incur greater duties and liabilities through their enforcement of their decision to forbid concealed weapons. When a business places a sign prohibiting licensees from entering with their handguns, the business may be required to ensure that employees and patrons comply with the policy. Otherwise, the policy is no more than a toothless proclamation. Further, customers could argue that they entered the store with a greater expectation of safety, believing that no firearms were present. Firearm restricted companies are challenged by needing to aggressively enforce their rules. Attempts to enforce the No-Weapons policy may force private businesses that choose to post Do-not-carry signs to incur greater costs by installing metal detectors or hiring security guards to uphold the heightened duty of care to their employees and customers. For this reason, certain private businesses choose not to adopt a no-weapons policy: "The weapon is concealed anyway. How are you going to know? What are you going to do, have metal detectors? Enforcing it [would] be a greater challenge."<sup>59</sup>

Businesses may attempt to prevent their employees from entering the workplace with a firearm (concealed or otherwise) by giving proper notice that anything the employee brings to work may be searched. The Fourth Amendment only protects against unreasonable searches conducted by government agents.<sup>60</sup>

The problem of enforcing a do-not-carry policy against employees lies instead with civil liability for possible invasion of privacy. Ohio's Tenth District Court of Appeals addressed this possibility in *Branan v. Mac Tools*.<sup>61</sup> There, an employer who was investigating an employee for information leaks and the loss of confidential business information to competitors sued his employer for invasion of privacy (among other claims). The employer had "enter[ed] the employee's locked office, unlock[ed] desk drawers, and search[ed] a storage locker, and discard[ed] some personal belongings..."<sup>62</sup> The Appellate Court denied the employee's invasion of privacy claim and found that the employee had no expectation of privacy in his office, because the employer had a master key and the employee often left his office unlocked.<sup>63</sup>

The employee also alleged invasion of privacy for the employer's search of the employee's unlocked briefcase. The Appellate Court reversed the trial court's decision and remanded the issue back to the trial court for a determination at trial whether the employee had an expectation of privacy in his personal briefcase.<sup>64</sup> Accordingly, employers may be liable for a search through an employee's private belongings, thus complicating a business's efforts to enforce a do-not-carry policy.

The Law allows businesses to infringe upon the "inalienable and fundamental right of an individual to defend the individual's person and the members of the individual's family" by simply posting a prohibitory sign on the front window. Thus, a licensee may lawfully load her gun at home, carry it to her car and lawfully drive to work, where her employer allows concealed weapons. However, the licensee's parking garage may post a sign prohibiting the licensee from entering the garage. The licensee is forced to either leave the gun at home or park elsewhere in order to avoid violating the Law. Or a licensee may arrive at her destination only to find a prohibitive sign on the door. The licensee is required to return home or to lock the firearm in her car, risking possible theft.

A licensee who finds a "do not carry" sign at a store and decides to lock her firearm in the car may be liable for injuries resulting from a criminal breaking into the car, stealing the gun, and using the gun to commit a crime. The Fifth District Court of Appeals has decided that similar factual circumstances are

foreseeable and may impute liability. In *Pavrides v. Niles Gun Show, Inc.*,<sup>65</sup> the Appellant promoted a gun show, where he prohibited unsupervised minors from attending. Appellant was responsible for admittance but rented space to independent vendors for the display and sale of firearms.

Four minors entered the gun show on two separate occasions without adult supervision. The minors stole several guns from the unsecured tables at the show. The minors bought ammunition for the guns and left the show. The minors then broke into several cars in the parking lot before stealing a Camaro. One minor purposely swerved the car into trashcans on the side of the road before he lost control of the car and slid to a stop. Two men witnessed the reckless driving and followed the Camaro. After the Camaro stopped, the two witnesses approached the car. One of the minors shot both men with one of the stolen guns. While criminal acts are generally considered an intervening action that breaks the chain of causation,<sup>66</sup> the *Pavrides* Court rejected conventional understandings of intervening cause and foreseeability. The Court concluded:

The facts of this case present the issue of whether reasonable minds could conclude that defendants should have foreseen or anticipated the two types of criminal activity by the minor children herein. In construing the evidence in a light most favorable to appellants, we believe reasonable minds could conclude that defendants, based upon their prior knowledge of thefts and risks associated with permitting unsupervised minor children into a gun show, should have foreseen that children could be lured into stealing an unsecured firearm which the child could not otherwise legally purchase. The secondary and more troublesome criminal activity involves the subsequent use of the stolen firearm by one of the children to intentionally shoot appellants. Should the defendants have foreseen that children who successfully steal a firearm and purchase suitable ammunition at its gun show would use the loaded firearm in the pursuit of criminal activity? We believe reasonable minds could answer this query affirmatively.<sup>67</sup>

As in *Pavrides I*, reasonable minds could conclude that youths are likely to break into vehicles parked at a mall or movie theater. A licensee who is prohibited from carrying her concealed handgun into the mall could be found civilly liable for a murder, if a court reasons that the licensee was negligent to lock the gun in the car. A court, like the one in *Pavrides I*, could rule that a youth breaking into the car, stealing the gun and shooting a victim is a foreseeable consequence of leaving the handgun in the car. Notably, the business could foresee the same consequences but is immune from civil liability.

Whether businesses in Ohio permit concealed handguns on their property does not appear to have much immediate financial impact: “Now, nearly five months after concealed carry went into effect in Ohio, the law’s impact on business is more akin to an inconsequential ripple than a cresting wave of uncertainty. Whether or not businesses put prohibitive policies in place, it appears, has meant little in dollars and cents.”<sup>68</sup>

#### IV. PUBLIC DISCLOSURE OF CONFIDENTIAL INFORMATION

Individuals who obtain a concealed carry license are afforded a further statutory protection: their application, training certificate, and other records relating to their license are confidential. The Law excludes these records from the public domain.<sup>69</sup> By providing confidentiality, the Ohio General Assembly prevents individuals or organizations from discriminating against or harassing persons who exercise their right to defend themselves. Unfortunately, another subsection significantly weakens that protection.

Under the statute a journalist may request and obtain from the sheriff the name, birth date and county of residence of anyone to whom the sheriff has issued a concealed carry license.<sup>70</sup> At least one Ohio newspaper has published a list of all the concealed carry license holders in a nine county region.<sup>71</sup> The Cleveland *Plain Dealer* acknowledges that: “The general public is not allowed to see [the list of licensees].”<sup>72</sup> Therefore, the newspaper chose to be “the one and only way the average citizen can learn the identity of a concealed-weapon permit holder... .”<sup>73</sup> “Our readers deserve to know the identities of those who obtain permits to carry their guns in public.”<sup>74</sup>

The Concealed Carry Law declares that the information is not in the public domain and imposes criminal sanctions on those who “release” the licensees’ information to the public.<sup>75</sup> Newspapers and other journalists are exempt. A journalist may obtain the information “for the purpose of gathering, processing, transmitting, compiling, editing, or *disseminating information for the general public.*”<sup>76</sup> The “confidential” records relating to applications and licenses to carry concealed handguns are public information if and only if “released” through a journalist.

The General Assembly should not mince words. It is disingenuous of the General Assembly to lead licensees into believing that their information is confidential when it may be published in the next edition of the local paper. Instead, the licensing records are available to everyone through the media. Any individual could learn whether his neighbors or co-workers were potentially carrying a concealed handgun by appealing to a journalist for the information. If the records are not confidential, the General Assembly should clarify the fact. On the other hand, the intent of the Concealed Carry Law would be better served if the public were not aware of which individuals were licensed to carry a handgun. The uncertainty would also increase a criminal’s fear that his victim may protect herself with a concealed handgun.

#### V. JUDICIAL ISSUES

Ohio Courts are just beginning to see lawsuits related to the Concealed Carry Law. Only one suit, *State ex rel. Lee v. Karnes*<sup>77</sup> has reached the Ohio Supreme Court and produced an opinion analyzing the new statutes. In *Karnes*, the petitioner obtained applications for both a temporary emergency license and an ordinary license to carry a concealed handgun. Petitioner decided to only submit the application for the temporary license, which required that she attach “evidence of imminent danger.”<sup>78</sup> Petitioner produced an affidavit averring: “[S]he has reasonable cause to fear a criminal attack upon herself or a member of her family, such as would justify a prudent person in going armed.”<sup>79</sup> The sheriff failed to complete the application process and denied her application claiming that she failed to meet the statutory requirements, even though her affidavit recited the statutory

language required for a temporary emergency license. Rather than follow the administrative appeal process delineated within the Concealed Carry Law,<sup>80</sup> petitioner filed for a writ or mandamus to compel Sheriff Karnes to complete the application process and issue the petitioner either a temporary emergency license or a concealed carry license.

The Ohio Supreme Court found that the petitioner did not apply for a concealed carry license and denied that request for mandamus. “The sheriff’s duties under [the Concealed Carry Law] arise only after the applicant submits a completed application form and supporting materials to the sheriff’s office.”<sup>81</sup> The sheriff’s duties never attached because the evidence proved that the petitioner never submitted her application and other materials.

Petitioner did submit an application for a temporary emergency license. Sheriff Karnes argued that the petitioner’s affidavit failed to describe the underlying facts to substantiate her fear of imminent danger. The Ohio Supreme Court rejected this construction: “[The Ohio Concealed Carry Law] does not require underlying facts to support the sworn statement.”<sup>82</sup> The Court declined to add language to the statute, thus finding that Sheriff Karnes “erred in rejecting [petitioner’s temporary emergency license] application and failing to process it further.”<sup>83</sup> The sheriff ought to have processed the application: conduct a criminal background check and a mental incompetence review.<sup>84</sup> Ultimately, however, the Court denied the petitioner’s writ for mandamus because the petitioner failed to exhaust the appellate remedy available to persons whose temporary emergency licenses are denied.<sup>85</sup>

The only other case regarding the Concealed Carry Law to reach the Ohio Supreme Court was also a mandamus action.<sup>86</sup> Petitioner filed for a writ of mandamus to prevent the local sheriff departments from issuing concealed carry licenses. The petitioner

listed as the Respondents the Sheriffs of three prominent representative counties within the State of Ohio, as well as the chiefs of police for the major metropolitan cities located within each of those counties. The Verified Complaint set for numerous and substantial ways in which the new Carry

Concealed Weapons (“CCW”) law was unconstitutional and further threatened serious and irreparable harm not only to the Realtors and their member, who are residents of these various counties or likely to travel through them, but to the citizens of Ohio generally.<sup>87</sup>

The Ohio Supreme Court disagreed. Without comment, it granted the Respondents’ motions to dismiss.<sup>88</sup>

## VI. Conclusion

While the Concealed Carry Law is a large step in furtherance of Ohio’s “right to bear arms” under its Constitution, the Law is inconsistent in this endeavor. The licensing requirements ensure that licensees show a minimal level of competence, a basic ability to respect the law and appreciate the responsibility related to carrying a firearm. The Concealed Carry Law should also assure that individuals who obtain licenses to carry a concealed firearm are also knowledgeable and proficient. This right should not be limited by age, but rather ability and responsibility. To this end, the Law should be available to all adults over eighteen years old. Moreover, applicants should prove by some objective standard that they qualify to safely and accurately fire the handgun the applicant seeks to carry.

The General Assembly should reconsider the means by which a licensee can transport a loaded firearm in a vehicle. Individuals who are licensed to carry a concealed handgun should not only be able to access their firearm while in the car, but should also be secure that the way they are carrying the handgun will not provoke fear and aggression from law enforcement officers. As such, the Legislature or the Courts will have to define what “plain sight” means for licensees who carry their loaded guns in their cars.

Many private businesses will continue to fumble through the implications of their decision to prohibit concealed carry on their premises. The Concealed Carry Law should firmly uphold an individual’s right to bear arms and protect oneself without abdicating that decision to business owners. The current Law will threaten many well meaning business owners with civil

liability, while simultaneously infringing on patrons and employees right to bear arms under the Ohio Constitution.

The records relating to the concealed carry holders ought to be confidential, even to the media. The inconsistency in the Law would be clarified. Journalists could not expose the identities of those who obtain concealed carry licenses. Criminals would be weary lest their prospective victims be prepared to legally defend themselves.

Some clarification and amendment to the current Concealed Carry Law is necessary to properly reflect the declared intention of the Ohio General Assembly. Those modifications ought to support the Ohio State Constitution and place all Ohioans on notice of how to lawfully exercise their right to “bear arms” in protection of the “individual’s person and the members of the individual’s family.”<sup>89</sup>

#### ENDNOTES

1. *Editorial: Very Well Concealed*, THE PLAIN DEALER (Cleveland), Jan. 8, 2004. Other commentators count only states with an unambiguous right to obtain a concealed carry permit, for which the total is thirty-eight states. See *Right to Carry 2004*, at <[www.nraila.org/Issues/FactSheets/Read.aspx?ID=18](http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=18)>.
2. Governor Bob Taft signed H.B. 12, 125th Gen. Assemb. (Ohio 2004) into law on January 8, 2004. Hereinafter “Concealed Carry Law.” The law added and amended multiple sections of the Ohio Revised Code.
3. Concealed Carry Law, Section 6(A).
4. *Id.* at Section 7.
5. OHIO CONST. art. I, §4.
6. The instant article confines itself to the newly enacted Ohio Concealed Carry Law. For a more thorough analysis of the right to bear arms and its incorporation by the Fourteenth Amendment, See Ian Redmond, Note, *The Second Amendment: Bearing Arms Today*, 28 J. LEGIS 325 (2002).
7. This article discusses the general provisions regarding a concealed-handgun license. The Concealed Carry Law also provides for a temporary emergency license, which is similar to the concealed-handgun license in most respects. The primary difference is that an applicant for a temporary emergency license must attest to a reasonable

fear of criminal attack, constituting an imminent danger to the applicant or her family. Upon meeting the statutory requirements, the sheriff shall immediately conduct a criminal background check on the applicant and grant or deny the application. A temporary emergency license is valid for ninety days and may not be renewed. *See* Ohio Revised Code 2923.1213(B)(2).

8. O.R.C. 2923.125(D)(1)(a), (b).

9. O.R.C. 2923.125(D)(1)(c), (d-h).

10. O.R.C. 2923.125(D)(1)(i). The applicant must not have been “adjudicated as a mental defective, has not been committed to any mental institution, is not under adjudication of mental incompetence, has not been found by a court to be a mentally ill person subject to hospitalization by court order, and is not an involuntary patient other than one who is a patient only for purposes of observation.”

11. O.R.C. 2923.125(D)(1)(j).

12. O.R.C. 2923.125(G).

13. O.R.C. 2923.125(G)(1), (2).

14. O.R.C. 2923.125(B)(1), (2).

15. O.R.C. 2923.125(D)(1), which requires a sheriff to issue a license to any applicant who meets the statutory requirements for a concealed carry permit. The license expires four years after issuance. The licensee may then submit a renewal application, along with the documentation outlined in O.R.C. 2923.125(F). Some states issue concealed carry permits under a “may issue” system. “Under that system, a county sheriff or chief of police could, but was not required to, issue a concealed handgun permit to an applicant based on the sheriff’s or police chief’s subjective evaluation of the applicants qualifications and need for a permit.” Thomas E. J. “Tobie” Hazard, *In the Crosshairs: Colorado’s New Gun Laws*, 33-JAN COLO. LAW. 11 (2004).

16. O.R.C. 2923.125(D)(1)(k).

17. O.R.C. 2923.125(D)(1)(a).

18. O.R.C. 109.69(A)(1).

19. Representative Cliff Stearns (R-Fla.) has presented to the House of Representatives a bill that would grant reciprocity between all 50 states for concealed carry permits. H.R. 382, 107th Cong. (2001).

20. O.R.C. 2923.125(G)(2)(a).

21. *Id.*

22. O.R.C. 2923.125(G)(2)(b).

23. O.R.C. 2923.125(B)(3)(b)(ii).
24. Maggie Martin and Rachel Dissell, *Ohioans Fired Up About Gun Law, But Local Sheriffs Have Concerns*, THE PLAIN DEALER (Cleveland), Feb. 15, 2004; quoting Christine Croce, general counsel for the Summit County Sheriff Department.
25. Robin Erb, *Concealed Weapon Applicants Hurry, Wait; Paperwork Delaying Approval of Permits*, TOLEDO BLADE, May 14, 2004.
26. Stacy Puzo, *300 in Clermont County Want Concealed Carry Permits* (2004), at <<http://www.wcpo.com/news/2004/local/04/12/permits.html>>.
27. Brian Albrecht and Rachel Dissell, *Cuyahoga Turns Away Gun Owners*, THE PLAIN DEALER (Cleveland), Apr. 9, 2004.
28. O.R.C. 2923.16(B).
29. O.R.C. 2923.16(E).
30. *Id.* A gun locked in the glove compartment or a gun case will not generally endanger law enforcement and is not addressed in this article.
31. O.R.C. 2923.16(E)(3).
32. O.R.C. 2923.16(E)(4), (5).
33. U.S. CONST. amend. IV.
34. *State v. Akron Airport Post No. 8975, Veterans of Foreign Wars of the United States*, 19 Ohio St.3d 49, 51, 482 N.E.2d 606, 608 (1985).
35. *State v. Williams*, 55 Ohio St.2d 82, 85, 377 N.E.2d 1013, 1016 (1978).
36. Rachel Dissell, *Welcome to Pistol Packing 101, People Interested in Concealed-Carry Attend Required Class*, THE PLAIN DEALER (Cleveland), April 4, 2004.
37. O.R.C. 2923.16(J).
38. O.R.C. 2923.16(E)(4).
39. O.R.C. 2923.12(H).
40. O.R.C. 2923.126(B).
41. *See* SAINT THOMAS AQUINAS, SUMMA THEOLOGICA I-II, question 90, AA. 4. “Thus, from the four preceding articles, the definition of law may be gathered, and it is nothing else than a certain ordinance of reason for the common good, made by him who has care of the community, and promulgated.”
42. Even these prohibitions do not comfort some who are concerned that licensees may violate the statutory restrictions. “Will Ohioan’s

remember to check their newly concealed handguns at the door? ‘How the hell should we know?’ fumes Stephen Wood, head of the Cleveland Heights-University Heights Public Library. “They’re concealed!” Grant Segall, *Libraries, Other Public Buildings Post Reminders Against Guns*, THE PLAIN DEALER (Cleveland), Feb. 15, 2004.

43. T.C. Brown, *Ohioans Under the Gun, State’s Concealed-Carry Law that Takes Effect Thursday Has More Questions Than Answers*, THE PLAIN DEALER (Cleveland), Apr. 4, 2004, quoting Michael York, GCRTA’s deputy operations manager.

44. O.R.C. 2923.126(B)(9) specifically prohibits firearms from “buildings” owned by the state or political sub division. There is no mention of state vehicles or those of political subdivisions.

45. Ryan E. Smith, *Concealed Weapon Ban in Parks Not Enforceable*, TOLEDO BLADE, June 12, 2004, quoting Kim Norris of the Ohio Attorney General’s Office.

46. *Id.* “It is simply our right to control our own property through regulation,” said Toledo Law Director, Barb Herring.

47. OHIO CONST. art. XVIII, §3.

48. *See Fondessy Enterprises, Inc. v. Oregon*, 23 Ohio St.3d 213, 492 N.E.2d 797 (1986).

49. CHARDON, OHIO, ORDINANCE NO. 2200 (Mar. 11, 2004) (repealed Apr. 8, 2004); Brown, *supra* note 43.

50. CHARDON, OHIO, ORDINANCE NO. 2204 (Apr. 8, 2004).

51. Chardon City Council Minutes, April 8, 2004, *available at* <[www.chardon.cc/textdocuments/minutes/reg040804.htm](http://www.chardon.cc/textdocuments/minutes/reg040804.htm)>.

52. O.R.C. 2923.126(C)(1).

53. O.R.C. 2923.126(C)(3).

54. *Id.* Carrying a licensed and concealed handgun into a private business that posts a “Do not carry sign” constitutes a misdemeanor for criminal trespassing.

55. Paige Adams, *Concealed Carry Backers Promote Business Boycott* (May 11, 2004), *at* <[www.wcpo.com/news/2004/local/05/11/conceal.html](http://www.wcpo.com/news/2004/local/05/11/conceal.html)>. “We don’t want firearms in our stores,” quoting Karen Maier, vice president of marketing for Frisch’s Inc.

56. Christopher Montgomery, *Business as Usual, Even With Guns; Concealed-law Policies Cause Few Protests From Either Side*, THE PLAIN DEALER (Cleveland), Aug. 19, 2004, quoting George Rachid, co-owner of a JR Foods convenience store in Lorain, Ohio.

57. Hazard, *supra* note 15, at 17.
58. O.R.C. 2923.126(C)(2)(a). “A private employer is immune from liability in a civil action for any injury, death, or loss to person or property that allegedly was caused by or related to the private employer’s decision to permit a licensee to bring, or prohibit a licensee from bringing, a handgun onto the premises or property of the private employer.”
59. Tasha Flournoy, *Businesses Weighing Response to New Law*, THE PLAIN DEALER (Cleveland), Apr. 4, 2004, quoting Stephanie Zachowicz, spokeswoman for Tops Markets.
60. *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct 574, 576 (1921).
61. *Branan v. Mac Tools*, 2004 WL 2361568 (2004, Ohio App. 10 Dist.).
62. *Id.* at \*11.
63. *Id.*
64. *Id.*
65. *Pavrides v. Niles Gun Show, Inc.*, 93 Ohio App.3d 46, 637 N.E.2d 404 (1994), hereinafter “*Pavrides I.*” *Pavrides I* reversed the trial court’s ruling that granted summary judgment in favor of the defendant, finding that material issues of fact precluded summary judgment. After a jury verdict in favor of the plaintiff, the defendant appealed the trial court’s denial of a directed verdict. The Fifth District Court of Appeals relied on its previous ruling and affirmed the trial court’s jury verdict pursuant to the “law of the case” doctrine. *Pavrides v. Niles Gun Show, Inc.*, 112 Ohio App.3d 609, 679 N.E.2d 728 (1996), hereinafter “*Pavrides II.*”
66. *Kish v. Central Nat. Ins. Group of Omaha*, 67 Ohio St.2d 41, 424 N.E.2d 288 (1981).
67. *Pavrides I*, 93 Ohio App.3d, at 55, 637 N.E.2d at 410.
68. *Montgomery*, *supra* note 56.
69. O.R.C. 2923.129(B)(1).
70. O.R.C. 2923.129(B)(2).
71. *New Permits Issued to Carry Concealed Firearms in Northeast Ohio*, THE PLAIN DEALER (Cleveland), Jan. 25, 2005. An on-going tally of regional licensees is located on the newspaper’s website: <[www.cleveland.com/indepth/concealed](http://www.cleveland.com/indepth/concealed)>.

72. Doug Clifton, *Why We Printed the List, The Media Are the Public's Only Access to Concealed-carry Permit Records*, THE PLAIN DEALER (Cleveland), July 30, 2004.
73. *Id.*
74. *Editorial, supra* note 1.
75. O.R.C. 2923.129(E).
76. O.R.C. 2923.129(B)(2), (emphasis added).
77. State ex rel. Lee v. Karnes, 103 Ohio St.3d 559, 817 N.E.2d 76 (2004).
78. O.R.C. 2923.1213(B)(1)(a).
79. Karnes, at 559, quoting Petitioner's affidavit.
80. Karnes, 103 Ohio St.3d 559, discussing the procedure an applicant must follow after the denial of her application under O.R.C. 2923.125(D)(2)(b).
81. *Id.* at 561.
82. *Id.* at 563.
83. *Id.* at 564.
84. *Id.*
85. *Id.* applying OR.C. 2923.1213(B)(2), 2923.125(D)(2)(b) and 119.12.
86. State ex rel. Ohio Coalition Against Gun Violence v. Alexander, 102 Ohio St.3d 1527, 811 N.E.2d 1147 (2004).
87. Brief for Petitioner at \*1, State ex rel. Ohio Coalition Against Gun Violence v. Alexander, 102 Ohio St.3d 1527, 811 N.E.2d 1147 (2004).
88. *Alexander*, 102 Ohio St.3d. 1527. *See also Challenge to Ohio Carry Law Is Rejected*, July 16, 2004, at <<http://www.nrila.org/CurrentLegislation/Read.aspx?ID=1160>>.
89. Concealed Carry Law, *supra* note 3.

# The Religious Roots of the American Revolution and the Right to Keep and Bear Arms

David B. Kopel

*This article examines the religious background of the American Revolution. The article details how the particular religious beliefs of the American colonists developed so that the American people eventually came to believe that overthrowing King George and Parliament was a sacred obligation. The religious attitudes which impelled the Americans to armed revolution are an essential component of the American ideology of the right to keep and bear arms.*

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King George III reportedly denounced the American Revolution as “a Presbyterian rebellion.”<sup>1</sup> Horace Walpole, a distinguished man of letters, told his fellow members of Parliament, “There is no use crying about it. Cousin American has run off with a Presbyterian parson, and that is the end of it.”<sup>2</sup> Many other British sympathizers in America blamed the Presbyterians for the war.<sup>3</sup>

In 1775, the great statesman Edmund Burke tried to warn the British Parliament that the Americans could not be subjugated: “the people are Protestants, and of that kind which is the most adverse to all implicit submission of mind and opinion.” While the Catholic and Anglican Churches were supported by the government, and were inclined to support the state, the American sects were based on “dissenting interests.” They had “sprung up in direct opposition to the ordinary powers of the world, and could justify that opposition only on a strong claim of natural liberty. Their very existence depended on the powerful and unremitted assertion of that claim. All Protestantism, even the most cold and passive, is a sort of dissent. But the religion most prevalent in our northern colonies

is a refinement of the principle of resistance: it is the dissidence of dissent, and the protestantism of the Protestant religion.”<sup>4</sup>

Historian John Patrick Diggins writes that American historians have concentrated on political ideas while underplaying “the religious convictions that often undergird them, especially the Calvinist convictions that Locke himself held: resistance to tyranny....”<sup>5</sup>

The American Revolutionaries had many grievances which had little to do with religion—such as taxation without representation, searches and seizures without probable cause, the confiscation of firearms, and so on. Nevertheless, it was American religion, especially New England religion, which provided Americans with an intellectual frame for understanding their disputes with England. It was religion which told the colonists that the English government was not merely adopting unwise policy; rather, the King and Parliament were trampling the God-given rights of the Americans, and were in effect warring against God. It was religion which convinced the American that they had a sacred duty to start a revolution. The black-robed American clergymen were described as the “black regiment” for their crucial role in building popular support for war against England.

#### MINISTERS AND THE MILITIA

The first white settlers of New England were the Puritans who fled to North America to escape persecution in Britain.<sup>6</sup> The Puritans were quite confident that, no matter how severe their persecution, the kingdom of God was at hand. Although the initial migrants to New England had believed that they would return to England fairly soon, the defeat of Oliver Cromwell destroyed any hope of establishing a Puritan state in Britain. Accordingly, the New England Puritans set out to build their “shining city on a hill” in the wilderness of North America. Their stern belief in their holy mission made them unafraid of whatever fighting was necessary to accomplish their goals.<sup>7</sup>

Their laws about children and guns were strict: every family was required to own a gun, to carry it in public places (especially when going to church) and to train children in firearms proficiency.<sup>8</sup>

On the first Thanksgiving Day, in 1621, the colonists and the Indians joined together for target practice; the colonist Edward Winslow wrote back to England that “amongst other recreations we exercised our arms, many of the Indians coming amongst us.”<sup>9</sup>

In New England, Congregationalist ministers were usually the preachers of special sermons on Election Day (when a sermon was preached to the legislature and governor) and Artillery Day (when new militia artillery officers were elected). On these days, the preachers departed from narrowly religious themes, and often spoke of the duty of Christian men to fight for liberty against tyranny.<sup>10</sup>

Militia muster days were another occasion on which ministers exhorted men to fight in defense of their liberty, and to volunteer for expeditions beyond their state’s borders.<sup>11</sup> At all special military occasions, ministers presented prayers.<sup>12</sup> A minister who wanted to address an important public issue could also announce a special weekday sermon.

Important sermons had a much broader audience than just the people who were in attendance when the minister spoke. Sermons were often reprinted, and distributed to other states. By 1776, the New England Congregationalist ministers were preaching at a record pace of over two thousand sermons per week. The number of Congregationalist pamphlets from New England exceeded the number of secular pamphlets from all the other colonies combined by more than four to one.<sup>13</sup>

The meeting houses for church services were fortified buildings where the community could gather if attacked, and where arms and powder were often stored. (The community supplied militia arms to families which could not afford their own.) As historian Marie Ahearn writes, “Over the year the minister, the meeting house, and the militia forged an active and mutually supporting alliance.”<sup>14</sup>

Ezra Stiles, the Congregationalist President of Yale University, lauded “the wisdom of our ancestors in instituting a militia.”<sup>15</sup> Elisha Fish published the sermon *The Art of War Lawful and Necessary for a Christian People*, to encourage young men in their militia exercises. His introduction to the published version spoke of his intent to encourage other writers “to spread this martial Fire through our happy Land.”<sup>16</sup> Free men bearing

arms to defend their liberty were “the true strength and safety of every commonwealth.”<sup>17</sup>

Ministers taught that the militia bred good Christian character, whereas standing armies bred degradation and vice. When the Redcoats moved into Boston, the ministry contrasted the wicked, corrupt, degraded, and dependent character of the standing army with the Christian virtue of the free militiaman. The former fought for pay and for worldly gain; the latter fought for Christian liberty.<sup>18</sup> Ebenezer Chaplin’s 1774 militia sermon argued that just as David’s band of volunteers had defeated King Saul’s army, so an American militia would defeat a British standing army.<sup>19</sup>

Ministers cited the Roman historians Tacitus and Sallust to show that when Rome was defended by a militia, Rome was free. When the Roman character degenerated, and a standing army was substituted for the militia, Rome sank into despotism.<sup>20</sup>

What was true for the military arm of society was true for the entire society: the loss of freedom created a condition of moral degradation, of servile dependence, and of temptation to vice. Christian virtue was nearly impossible to maintain if political liberty were destroyed. The fight for political liberty was a sacred cause because civil liberty was the garden for the proper cultivation of the Christian soul, according to God’s natural law.<sup>21</sup>

Ministers quite often brought their own firearms to militia service, and fought in their town’s militia.<sup>22</sup> While all good citizens were obliged to become proficient in the use of arms, the obligation was especially great on wealthy citizens. After all, poor nations were rarely invaded, but wealth attracted foreign predators. So as for the wealthy:

It is therefore especially *their* duty, as well as interest, to do what they can to put the people into a capacity of defense. When *they* spend their time in idleness, effeminating pleasures, or even in accumulating riches, to the total neglect of the art of war, and every measure to promote it, they act unbecoming good members of society, and set an example highly prejudicial to the community.<sup>23</sup>

## SELF-DEFENSE AND THE GIFT OF LIFE

All of the natural rights philosophers—such as Blackstone, Montesquieu, Hobbes, and Locke—who provided the intellectual foundation of the American Revolution saw self-defense as “the primary law of nature,” from which many other legal principles could be deduced.

John Locke argued that a man’s life belonged to God. Accordingly, the life was inalienable property; a man could not destroy his life by suicide, or sell his life by voluntarily choosing to become a slave. To allow one’s life to be destroyed because one failed to engage in self-defense was a form of hubris. As a 1747 sermon in Philadelphia put it:

He that suffers his life to be taken from him by one that hath no authority for that purpose, when he might preserve it by defense, incurs the Guilt of self murder since God hath enjoined him to seek the continuance of his life, and Nature itself teaches every creature to defend itself.

Like the Catholic canonists, the New Englanders connected the natural law right of self-defense to the duty to protect one’s national liberties:

There is a Principle of Self-Defence and Preservation, implanted in our very Natures, which is necessary to us almost as our Beings, which no positive Law of God ever yet contradicted....When our Liberty is invaded and struck at, ‘tis sufficient Reason for our making War on the Defence or Recovery of it.<sup>24</sup>

Simeon Howard, preaching the Boston artillery company in 1773 likewise asserted the natural law right of self-defense:

Self-preservation is one of the strongest, and a universal principle of the human mind: And this principle allows of every thing necessary to self-defence, opposing force to force, and violence to

violence. This is so universally allowed that I need not attempt to prove it.<sup>25</sup>

According to Howard, failure to practice self-defense was a sin, one reason being that tame submission to tyranny created an environment conducive to sin: “Such submission tends to slavery; and complete slavery implies every evil that the malice of man and the devils can inflict.” Samuel Cooper likewise connected servility with moral degradation, for servility was “commonly accompanied with the meanest vices, such as adulation, deceit, falsehood, treachery, cruelty, and the basest methods of supporting and procuring the favour of the power upon which it depends.”<sup>26</sup>

The New Testament said that a man who neglects to provide for his family has implicitly denied the faith and is worse than an infidel. “But,” asked Howard, “in what way can a man be more justly chargeable with this neglect, than by suffering himself to be deprived of his life, liberty or property, when he might lawfully have preserved them?”<sup>27</sup>

Preaching the Boston election sermon of 1776, Samuel West pointed to another implication of “the law of nature” and its “principle of self-defence.” Self-defense included a duty to one’s community. It was violation of common sense and of natural law for people to think that they “did God service when they unmercifully butchered and destroyed the lives of the servants of God; while others, upon the contrary extreme, believe that they please God while they sit still and quietly behold their friends and brethren killed by their unmerciful enemies without endeavoring to defend or rescue them. The one is a sin of omission, and the other is a sin of commission...” Both sins were “great violations of the law of God.”<sup>28</sup>

#### GETTING READY FOR WAR

According to Harry S. Stout, a professor of religion at Yale University, “From the repeal of the Stamp Act on, New England’s Congregationalist ministers played a leading role in fomenting sentiments of resistance, and, after 1774, open rebellion.”<sup>29</sup>

The Boston Massacre, March 5, 1770, radicalized much of the Massachusetts clergy. The following Sunday, Rev. John

Lathrop, preaching at the Old North Church (from whose towers would shine on April 18, 1775, the “one if by land, two if by sea” lanterns for Paul Revere and Samuel Dawes), announced God’s condemnation of England. He proclaimed the legitimacy of forcible resistance to the British government, if reform were not speedy.<sup>30</sup>

Eli Forbes’ 1771 Artillery Day sermon, *The Dignity and Importance of the Military Character Illustrated*, emphasized the importance of being prepared to fight to defend liberty.<sup>31</sup> Christians were not required to wait until they were attacked by a tyrant. Preemption was more prudent, explained Simeon Howard in his 1773 sermon the Boston militia’s artillery company:

An innocent people threatened with war are not always obliged to receive the first attack. This may frequently prove fatal, or occasion an irreparable danger. When others have sufficient manifested an injurious or hostile intention, and persist in it, notwithstanding all the admonition and remonstrance we can make, we may, in order to avoid the blow they are meditating against us, begin the assault.<sup>32</sup>

Nathaniel Whitaker elaborated on preemption. He pointed out that God had ordered Joshua to strike first at Jabin, king of Hazor (*Joshua* 11):

[W]hile all the peace in his kingdom, for aught we find, God commands Israel to raise an army, and invade the tyrant’s dominions.

The moral reason for this is obvious. For usurpation or oppression, is offensive war, already levied. Any state which usurps power over another state, or rulers, who by a wanton use of their power, oppress their subjects, do thereby break the peace and commence an offensive war. In such a case opposition is mere self-defense, and is no more criminal, yea, as really our duty to defend ourselves against murderer, or highway robber. Self-preservation is an instinct God implanted in our

nature. Therefore we sin against God and nature, when we tamely resign our rights to tyrants, or quietly submit to public oppressors, if it be in our power to defend ourselves.<sup>33</sup>

After the British Army occupied Boston, the state legislature reassembled in Watertown. On May 31, 1775, a few weeks after the American victory at Lexington and Concord, Samuel Langdon preached a sermon to the legislature, telling the legislators not to worry about initiating military action: “he that arms himself to commit a robbery, and demands the traveller’s purse by the terror of instant death, is the first aggressor, though the other should take the advantage of discharging his weapon first, and killing the robber.”<sup>34</sup>

#### VICTORY INEVITABLE IN THE SACRED CAUSE OF LIBERTY

Liberty was the “daughter of God, and excepting his Son, the first born of heaven.”<sup>35</sup> Levi Hart declared that “the sacred cause of liberty” was why “the Son of God was manifest in the flesh, that he might destroy the tyranny of sin and satan, assert and maintain the equal government of his Father, redeem the guilty slaves from their more and Egyptian bondage, and cause the oppressed to go free.”<sup>36</sup>

To fight for liberty, therefore, was to fight for God. Biblical references to “liberty” was explained as referring primarily to spiritual liberty, yet also including civil liberty.<sup>37</sup> Indeed, the two were one, because tyranny would degrade religion. The favorite of all the liberty texts was “Stand fast therefore in the liberty wherewith Christ hath made us free, and be not entangled again with the yoke of bondage.” (*Galatians* 5:1).<sup>38</sup>

About a month before the battles of Lexington and Concord, Rev. William Emerson preached to the Concord militia that their victory against the larger British army was guaranteed, just as God had protected little Judah from a larger army. He challenged the British: “It will be your unspeakable Damage to meddle with us, for we have an unconquered Leader that carries his people to Victory and Triumph.” The coming war would bring many tribulations, he acknowledged, but

American victory had been ordained by God since the beginning of time.<sup>39</sup>

Five weeks later, on April 19, 1775, the Redcoats, having marched out of Boston, quickly routed the Lexington militia, and then marched on to Concord, where the Americans were rumored to possess a cannon. The militia had been roused by Paul Revere and Samuel Dawes, and the first man to muster at the North Bridge in Concord was Reverend William Emerson.

The Concord militia stood its ground. The Redcoats fled after a few minutes fighting, and were harried by Americans all the way back to Boston, suffering 293 casualties.<sup>40</sup> On July 4, 1837, the Concord Monument was dedicated, and the crowd sang the *Concord Hymn*, written by William Emerson's grandson Ralph Waldo Emerson:

*By the rude bridge that arched the flood,  
Their flag to April's breeze unfurled,  
Here once the embattled farmers stood,  
And fired the shot heard round the world.*

...

*Spirit, that made those heroes dare  
To die, and leave their children free,  
Bid Time and Nature gently spare  
The shaft we raise to them and thee.*

The Revolution would involve much, much more than the interests of the people then inhabiting the thirteen colonies. William Gordon urged Americans "not to fear to bleed freely in the cause," for their cause was "not of a particular people, but of mankind in general." And although "the country should be wasted by the sword," a war would preserve for future generations "the most essential part of the fair patrimony received from our brave and hardy progenitors—the right of possessing and disposing of, at our own option, the honest fruits of our industry."<sup>41</sup> In March 1775, Oliver Noble preached that "the Cause of AMERICA...is the cause of GOD, never did man struggle in a greater, or more glorious CAUSE."<sup>42</sup>

Because America was the last refuge of liberty, America was necessarily essential to God's plan of redeeming the whole world, and God could not let the cause of liberty fail in America.<sup>43</sup> In the fate of the American Revolution hung the fate

of freedom not only in America, but around the world, for millions of people yet unborn.<sup>44</sup> “Whatever is most dear and valuable in this world, to millions now living, and will be so to all the millions of posterity after them, till this world shall be no more, is at stake. The prize contended for is the LIBERTY OF AMERICA,” declared Enoch Huntington.<sup>45</sup>

During the tax crisis of 1767-68, the great Pennsylvania lawyer John Dickinson exhorted American resistance in a series of twelve public letters. The stakes were vastly greater than the immediate financial interests of the colonists: “you may surely, without presumption, believe that Almighty God Himself will look down upon your righteous contest with gracious approbation...You are assigned by Divine Providence in the appointed order of things, the protection of unborn ages, whose fate depends on your virtue.”<sup>46</sup>

Dickinson and the other Patriots were not just offering rhetoric for a tax dispute. Their language, which built on a century and a half of American history, was creating an American civil religion. It was an ecumenical religion, which ignored the issues on which a Baptist might disagree with a Congregationalist, or a Jew might disagree with a Presbyterian. The heart of religion was that liberty is a sacred gift from God; and that the United States of America has been chosen by God to guard the sacred lamp of liberty.

On the first anniversary of the Battle of Lexington, Jonas Clark preached, “From this day will be dated the liberty of the world.”<sup>47</sup>

#### REPENTANCE, THEN LIBERTY

The Americans knew that liberty was God’s cause. But in order to defeat the tyrant, they had to purify themselves morally. Only if the Americans were repentant, sincere Christians would they have the moral right to resist their evil governors. If the Americans remained sinful, then the Americans would have to accept their evil governors as God’s just punishment.<sup>48</sup>

By the time that fighting began at Lexington, the theme of repentance before victory had been well-established for a century. The first generations of settlers in New England had enjoyed mostly-peaceful relations with the Indians. But the swelling white population caused tensions with the Indians. In

1675, chief Metacom (a/k/a King Philip) led the Wampanoag, Nipmucs, and Narragansetts in a series of devastating attacks on towns from Connecticut to New Hampshire. The New Englanders and their Christian Indian allies were defeated again and again, until (according to the New England version of events), they sufficiently repented their sins, and from that point onward, God granted them favor, and they won King Philip's War, one of the most terrible wars ever fought on American soil.<sup>49</sup>

In a 1745 war, the New England militia captured the French fortress at Louisburg, Canada. In the French and Indian War of 1756-63, the Americans and the British won what they considered to be a holy war against papist tyranny. As in King Philip's War, the Americans who fought the French were informed by their ministers that only if they sincerely repented their sins would God grant them victory. And apparently, God did after they did.

So before the Americans warred for independence, they had to first fast, pray, and repent. The American clergy and the American governments announced what Perry Miller called the "double injunction of humiliation and exertion."<sup>50</sup> For example, the Connecticut assembly simultaneously declared a statewide day of fasting and humiliation, and passed a resolution to stockpile ammunition.<sup>51</sup>

Miller elaborated:

Circumstances and the nature of the dominant opinion in Europe made it necessary for the official statement [the Declaration of Independence] to be released in primarily "political" terms—the social compact, inalienable rights, the right of revolution. But those terms, in and by themselves, would never have supplied the drive for victory, however mightily they weighted with the literate minority. What carried the ranks of militia and citizens was the universal persuasion that they, by administering to themselves a spiritual purge, acquired the energies God has always, in the manner of the Old Testament, been ready to impart to His repentant children. Their first

responsibility was not to shoot redcoats but to cleanse themselves, only thereafter to take aim.<sup>52</sup>

Concludes Miller: “The basic fact is that the Revolution had been preached to the masses as a religious revival, and had the astonishing fortune to succeed.”<sup>53</sup> Summarizes Yale’s Harry Stout, “New England’s revolution would be nothing less than America’s sermon to the world.”<sup>54</sup>

#### CONCLUSION

The New England ministers incited their congregations to overthrow King George because they believed, as did the Virginian Thomas Jefferson, that rebellion to tyrants was obedience to God. In the religious roots of the American Revolution, we see the staunch belief that using arms to resist tyranny is an affirmative religious duty.

The belief about the sacred obligation to fight for freedom is not unique to the United States of America. Rather, the belief is at least as old as the Hebrew wars of independence (among Western religions) and the teachings of Confucius (among Eastern religions). However, it was in New England in the years leading to the American Revolution where the religious theory of the duty to defend the sacred gift of liberty was refined and elaborated in a more sophisticated form than ever before. The theory has never ceased to influence American attitudes about firearms and freedom, and is at the heart of American beliefs about the God-given right to keep and bear arms.

#### ENDNOTES

1. Douglas F. Kelly, *The Emergence of Liberty in the Modern World: The Influence of Calvin on Five Governments from the 16th Through 18th Centuries* (Philipsburg, N.J.: P&R Publishing, 1992), p. 131.
2. James G. Leyburn, *Scotch-Irish: A Social History* (Chapel Hill, N.C.: Univ. of North Carolina Pr., 1962), p. 305.
3. According to a Hessian captain in 1778, “Call this war by whatever name you may, only call it not an American rebellion. It is nothing more or less than a Scotch Irish Presbyterian rebellion.” A man representing Lord Dartmouth in New York wrote in 1776, “Presbyterianism is really at the Bottom of the whole conspiracy...”

Leyburn, p. 305. In 1774, Pennsylvania Loyalist Joseph Galloway told the British House of Commons that the opponents of British rule were “Congregationalists, Presbyterians, and smugglers.” Edward Frank Humphrey, *Nationalism and Religion in America: 1774-1789* (Boston: Chipman Law Pub. Co., 1924), p. 67.

4. Edmund Burke, “Speech on Moving Resolutions for Conciliation with the Colonies,” March 22, 1775, quoted in Paul A. Rahe, *Republics Ancient and Modern*; Vol. 3. *Inventions of Prudence: Constituting the American Regime* (Chapel Hill: Univ. of N.C. Pr., 1994), p. 8. Part of the quote is from Benjamin Hart, *Faith & Freedom: The Christian Roots of American Liberty* (Dallas, Texas: Lewis & Stanley, 1988), p. 272.

5. John Patrick Diggins, *The Lost Soul of American Politics: Virtue, Self-Interest, and the Foundations of Liberalism*, p. 7.

6. Kelly, p. 121.

7. *Ibid.*, p. 125.

8. E.g., Clayton Cramer, *Arming America* (unpublished manuscript), at <[www.claytoncramer.com/ArmingAmericaLong.pdf](http://www.claytoncramer.com/ArmingAmericaLong.pdf)>.

9. Marie L. Ahearn, *The Rhetoric of War: Training Day, the Militia, and the Military Sermon* (Westport, Conn.: Greenwood Pr., 1989), p. 1.

10. Dale S. Kuehne, *Massachusetts Congregationalist Political Thought 1760-1790* (Columbia: Univ. of Missouri Pr. 1996), p. 87; Kelly, p. 132. For example, Simeon Howard, “An Election Sermon” (1773)(Christian’s duty to wage war on tyrants).

11. E.g., Alice M. Baldwin, *The New England Clergy and the American Revolution* (N.Y.: Frederick Ungar, 1958)(1st pub. 1928), pp. 125-26.

12. Ahearn, p. 23. Back in England, ministers had also exhorted the militia. Ahearn, pp. 43-45.

13. Harry S. Stout, *The New England Soul: Preaching and Religious Culture in Colonial New England* (N.Y.: Oxford Univ. Pr, 1988), pp. 6-7, 303.

14. Ahearn, p. 23.

15. Ezra Stiles, “The United States elevated to Glory and Honor...May 8, 1783” (New Haven: Thomas & Samuel Green, 1783)(reprint of sermon), quoted in Nathan O. Hatch, *The Sacred Cause of Liberty: Republican Thought and the Millennium in Revolutionary New England* (New Haven: Yale Univ. Pr., 1977), p. 90. Reprinted in full in *The Pulpit of the American Revolution*, pp. 397-520.

16. Kuehne, p. 116.

17. Hatch, p. 65. Also, e.g., Simeon Howard, “A Sermon Preached to the Ancient and Honorable Artillery Company in Boston” (1773),

reprinted in *On Faith and Free Government*, ed., Daniel C. Palm (Lanham, Maryland: Rowman & Littlefield Pub., 1997), pp. 108-09 (“A people who would stand fast in their liberty, should furnish themselves with weapons proper for their defense and learn how to use them.” Militia service promotes civic virtue, while a standing army breeds aggression and servile allegiance to the king, rather than to the people as a whole.)

18. *Ibid.*, pp. 128-29. See also Samuel Cooke, “A Sermon Preached at Cambridge in the Audience of His Honor Thomas Hutchinson, Esq....May 30, 1770” (Boston: Edes & Gill, 1770), reprinted in *The Pulpit of the American Revolution or, the Political Sermons of the Period of 1776*, ed., John Wingate Thornton (N.Y. Burt Franklin, 1970)(1st pub. 1860), pp. 165-66 (election sermon denouncing standing armies as “dangerous to a free state” and “a very improper safeguard to a constitution which has liberty, British liberty, for its basis.”)

19. Stout, p. 288.

20. Ahearn., pp. 125-26.

21. Glen E. Thurow, “The Christian and Rebellion against Authority,” in *On Faith and Free Government*, pp. 54-55 (discussing Simeon Howard as an exemplar of this thinking).

22. Baldwin, pp. 168-71. One of the most notable military ministers was the Pennsylvania Lutheran minister John Peter Gabriel Muhlenberg. In 1776, Muhlenberg preached his farewell sermon to his congregation in Woodstock, Virginia. He explained that there was a time to pray and a time to fight. “It is now the time to fight” he said, and he took off his black robe, revealing the blue uniform of a Virginia Colonel. Humphrey, pp. 114-15. He entered the Continental Army as a Colonel, and rose to the rank of Brigadier General, commanding some of the American forces at Yorktown. He also served as Vice-President of Pennsylvania during the Revolution, under the Presidency of Benjamin Franklin.

23. Howard, p. 115.

24. James Cogswell, “God, The Pious Soldier’s Strength & Instruction; A Sermon...at Brooklyn in Pomfret, to the Military Company, Under the Command of Capt. Israel Putnam,...April, 1757” (Apr. 13, 1757), quoted in Baldwin, p. 87, n. 10 (ellipses in original title).

25. Howard, p. 103.

26. Samuel Cooper, “A Sermon on the Day of the Commencement of the Constitution,” (Oct. 25, 1780), at <[www.founding.com/library/lbody.cfm?id=486&parent=52](http://www.founding.com/library/lbody.cfm?id=486&parent=52)>.

27. Howard, p. 111.

28. *The Pulpit of the American Revolution*, pp. 312-13. West also declared: “We must beat our ploughshares into swords, and our pruning-hooks into spears, and learn the art of self-defence against our enemies.” West, in *The Pulpit of the American Revolution*, pp. 307-08.

See also Whitaker, pp. 165-66 (Moses as good example for intervening to kill the Egyptian who was beating the Hebrew slave). “But as freedom is an inheritance entailed on all men, so whosoever invades it, robs mankind of their rights, endeavors to spread misery among God’s creatures, and violates the law of nature, and all who refuse to oppose him, when in their power, are to be considered as confederates and abettors of his conduct, and partakers in his crimes.” *Ibid.*, p. 166.

29. Harry S. Stout, *The New England Soul: Preaching and Religious Culture in Colonial New England* (N.Y.: Oxford Univ. Pr, 1988), p. 283.

30. Kuehne, pp. 114-15; Stout, pp. 272-73, citing John Lathrop, *Innocent Blood Crying to God* (Boston: 1771). Compare Lathrop’s statement:

If the essential parts of any system of civil government are found to be inconsistent with the general good, the end of government requires that such bad systems should be demolished, and new one formed, by which the public weal shall be more effectually secured.

with the Declaration of Independence:

that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

31. *Ibid.*, p. 116.

32. Simeon Howard, “A Sermon Preached to the Ancient and Honorable Artillery Company in Boston,” p. 106.

33. Whitaker, p. 160.

34. Samuel Langdon, *Government Corrupted by Vice, and Recovered by Righteousness* (May 31, 1775), at <[www.frii.com/~gosplov/langdon.html](http://www.frii.com/~gosplov/langdon.html)>. Another part of Langdon’s sermon expressed the same principle that would appear in the Declaration of Independence: “By the law of nature, any body of people, destitute of order and government, may form themselves into a civil society, according to their best prudence, and so provide for their common safety and advantage.”

35. Hatch, p. 64.
36. Quoted in Hatch, p. xii.
37. Stout, pp. 298-99.
38. Ahearn, p. 112; Thurow, pp. 54-55 (Simeon Howard's 1773 sermon to the Boston artillery company); Stout, p. 299, quoting Judah Champion, *Christian and Civil Liberty and Freedom Considered and Recommended*, preached at Litchfield, Conn., May 1776 (Hartford, Conn.: 1776). Champion's sermon was reprinted by the Connecticut Assembly. Baldwin, p. 124, n. 10.

The text was a favorite of Dr. Joseph Warren, the eminent Boston patriot who chaired the Committee of Correspondence, authored the Suffolk Resolves, led the provisional government of Massachusetts, and died commanding the American forces at Bunker Hill. Stout, p. 299.

Another favorite was "While they promise them liberty, they themselves are servants of corruption" (2 Peter 2:19). Hatch, pp. 61-62.

39. Stout, pp. 289-90; William Emerson, *Sermon on 2 Chronicles 13:12*, preached Mar. 13, 1775.
40. Stout, p. 290; David B. Kopel, *The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies?* (Amherst, N.Y.: Prometheus Books, 1992), p. 313.
41. William Gordon, "A Discourse Preached December 15th, 1774, Being the Day Recommended by the Provincial Congress; And Afterwards at the Boston Lecture," (Corn-Hill: Thomas Leverett, 2d ed., 1775), reprinted in John Wingate Thornton, ed., *The Pulpit of the American Revolution* (N.Y.: Burt Franklin, 1st pub. 1860, reprinted 1970), p. 204.
42. Kuehne, p. 117.
43. Samuel West, "On the Right to Rebel against Governors" (1776), in *On Faith and Free Government*, pp. 121-49; Hatch, p. 88.
44. Hatch, pp. 88-89; Kuehne, pp. 116-17 (sermon of Dec. 15, 1774).
45. Stout, pp. 301-302, quoting Enoch Huntington, *The Happy Effects of Union* (Hartford: 1776)(preached at Middletown, Connecticut, April 8, 1776).
46. Hart, p. 251.
47. Baldwin, p. 133.

In 1781, Clark preached an Election Sermon for the first election under the new Massachusetts Constitution.

Among Clark's principles for good government was an armed citizenry:

Standing armies are abhorrent to the first principles of freedom, and dangerous to the liberties of a free Commonwealth. The sword, in the hands of the free citizens, is the protection of society, and the safety and defence of a people truly brave, truly free.—May I be permitted to ask, Whether the sword is in the hands of all the inhabitants of this Commonwealth?—Whether all the people have arms?—Or, Whether, having arms, they are taught the art—military, and the use of their arms, so as to be effectively prepared to oppose an invading enemy, upon the shortest notice?

Jonas Clark, *Election Sermon, Preached...1781* (Boston: 1781), quoted in Humphrey, p. 60.

A similar sentiment was expressed in a sermon Rev. Guming at the Congregational Church in Billerica, Mass., in 1783:

Though the land now rests from war and we daily expect to hear that the definite treaty of peace is completely ratified, yet it would be exceedingly unsafe for people to lay down their arms, and neglect all military matters. Our country affords so many objects to excite the ambition of other nations...that we can have no security of a lasting peace, or of enjoying long the blessings of freedom if we should totally withdraw our attention from the arts of war...Standing armies in a time of peace are indeed dangerous to liberty; but a well furnished and well disciplined militia is of great importance to state...The public welfare requires that our militia be kept on such a respectable footing, as shall render us secure at home, and formidable abroad.

Guming, *Election Sermon, Preached...May 28, 1783* (Boston: 1783), quoted in Humphrey, p. 61.

48. Perry Miller, *Nature's Nation* (Cambridge, Mass.: Harvard-Belknap, 1967), pp. 100-01; Howard, p. 99.

49. Stout, pp. 77-85. In New England, "From then on, Protestant Christian piety was no longer a merely private relation between the individual and God. It became inseparable from patriotism and military valor." The Rev. Samuel Nowell's famous wartime sermon "Abraham in Arms," proclaimed "that God requires men to train and to kill in defense of their lives and liberties. His was a fighting Christianity that was quick to repel evil and stood firm in defense of civil liberty." Thomas G. West, "The Transformation of Protestant Theology," in

Thomas S. Engeman & Michael P. Zuckert, eds., *Protestantism and the American Founding* (Notre Dame, Indiana: Univ. of Notre Dame Pr., 2004), p. 201.

50. Miller, p. 99.

51. Hart, p. 259.

52. Miller, p. 97. Parenthetical added. For example, see David Jones, *Defensive War in a Just Cause Sinless* (Philadelphia: 1775), at <[www.frii.com/~gosplov/jones.html](http://www.frii.com/~gosplov/jones.html)>.

53. Miller, p. 110.

54. Stout, p. 311.





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Title: The Second Amendment and Global Gun Control  
Subject:  
Author: J H Versnel  
Keywords:  
Comments:  
Creation Date: 7/5/2005 9:36:00 AM  
Change Number: 32  
Last Saved On: 7/15/2005 10:09:00 AM  
Last Saved By: J H Versnel  
Total Editing Time: 731 Minutes  
Last Printed On: 7/15/2005 10:10:00 AM  
As of Last Complete Printing  
Number of Pages: 198  
Number of Words: 48,270 (approx.)  
Number of Characters: 275,145 (approx.)