JOURNAL OF LAW, ECONOMICS & POLICY

VOLUME 2 FALL 2006 NUMBER 2

CONTENTS

SELF-DEFENSE?

*Nicholas J. Johnson**

INTRODUCTION

> "We find no precedent establishing a constitutional right of self-defense in the criminal law." *Rowe v. DeBruyn*[1]

> "It is difficult to the point of impossibility to imagine a right in any state to abolish self-defense altogether, thereby leaving one a Hobson's choice of almost certain death through violent attack now or statutorily mandated death through trial and conviction of murder later." *Griffin v. Martin*[2]

Is there a constitutional right to self-defense? The skeptic who insists on a citation to the seminal case unequivocally establishing the right may claim that the Supreme Court has not elaborated the right of self-defense the way it has developed the highly litigated provisions of the bill of rights. But as a practical matter, we find the right of self-defense an essentially universal value that the Court and commentators have used as a foundational principle to ground and illuminate other constitutional rights.

And that is the paradox. It is plausible to contest a constitutional right to self-defense because the Court has not framed it in the fashion of, say, the freedom of speech.[3] But it is equally implausible to deny its existence, or, as the *Griffin* court put it, "difficult to the point of impossibility to imagine that a state could abolish the right of self-defense altogether."[4]

So which view controls? This article will show that self-defense is a basic raw material of our social and political structure, a right from which other constitutional guarantees have been derived and therefore (even if unenumerated)[5] in the first echelon of fundamental constitutional rights. Section I will summarize the case that self-defense is protected by the Second Amendment. Section II will explain why a basic right to self-defense might be imperfectly enumerated and suggest how the Ninth Amendment

---

* Nicholas J. Johnson earned his B.S./B.A from West Virginia University in 1981, and earned his juris doctorate from Harvard University in 1984. Johnson currently is a professor at Fordham University School of Law, where his principal subjects are Contracts, Environmental Law, Gun Control and Gun Rights.

1 17 F.3d 1047, 1052 (7th Cir. 1994).

2 785 F.2d 1172, 1187 n.37 (4th Cir. 1986).

3 Query what a jurisprudence of the Second Amendment would look like if the Court had taken as many right-to-arms cases as it has right-to-speech cases.

4 785 F.2d at 1187 n.37.

5 The numerous individual rights critiques of the Second Amendment put this point in dispute.

might support it. Section III shows how self-defense has been used as a building block of the constitutional right to abortion. Section IV shows how elaborations of the Fourth and Eighth Amendment are derived from self defense. Section V presents a series of nineteenth century Supreme Court cases that treat self-defense like the sun rising in the east. Section VI shifts the burden of proof, and shows that the independent case against the right of self-defense depends on ideas rooted in the most vile social institution ever to afflict our society.

I conclude from all of this that while the stickler might quibble about the fashion in which it has been recognized, the ancient right of self-defense is in the first echelon of fundamental constitutional rights essential to "liberty," first among the rights protected by the Ninth Amendment and at the core of a proper understanding of the Second Amendment.

I. THE SECOND AMENDMENT

The imbedded self-defense question has been central to the Second Amendment debate of the last few decades. Most legal scholars who have considered the question conclude that the amendment secures an individual right to arms that includes a personal right to self-defense. The evidence they cite seems quite overwhelming. The supportive statements of the framers and the writers who influenced them are so numerous that a counting is not practical.

Don Kates' pivotal 1983 article in the Michigan Law Review presents these views in detail sufficient to convince the willing that the Second Amendment recognizes a pre-existing right of the people to keep and bear arms. Kates argues that the amendment achieves three things: "(1) crime prevention, or what we would today describe as individual self-defense; (2) national defense; and (3) preservation of individual liberty and popular institutions against domestic despotism."[6]

Nelson Lund's 1987 treatment makes the case that "in liberal theory, the right to self-defense is the most fundamental of all rights—far more basic than the guarantees of free speech, freedom of religion, jury trial and due process of law" and that the framers did not really distinguish between the personal and political reasons for a right to arms.[7]

In 1989 Sanford Levinson's *Embarrassing Second Amendment* challenged the academic elite with the conclusion that the individual rights view of the Second Amendment might be a stronger interpretation of the text and history than the dismissive states/collective rights view and that the general

---

[6] Don B. Kates, *Handgun Control and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 203 (1983).

[7] Nelson Lund, *The Second Amendment, Political Liberty and the Right to Self Preservation*, 39 ALA. L. REV. 103, 117 (1987).

failure to approach the question in a more serious way should be a source of embarrassment to the academy.[8] In his 1992 article *The Second Amendment and the Ideology of Self Protection,*[9] Don Kates showed in rich detail how central self-defense was to the social and political thinking of the people who framed and ratified the right of the people to keep and bear arms. With salient passages from Blackstone, Locke, Sidney, Machiavelli, Thomas Paine, George Mason, James Madison, and Thomas Jefferson, Kates shows how the framers and the writers who influenced them considered self-defense as basic as the right to breath.

In 1994 William Van Alstyne, after distilling the text and history of the Second and Fourteenth Amendments, found that the individual rights view of the Second Amendment, while starved for jurisprudential attention from the Court, is as well anchored in the Constitution as the early twentieth century claims that lead to the modern, robust First Amendment.[10]

By 1995 Glenn Reynolds, recounting the "explosion" of scholarly treatments, confidently dubbed the individual rights view the "standard model" of Second Amendment scholarship, noting that "this view dominates the academic literature on Second Amendment almost completely." [11]

Reflecting that evolution is Laurence Tribe's treatment of the question in his influential constitutional law treatise. Chris Chrisman summarizes the story:

> One commentator [Glenn Reynolds] has noted, "For whatever reason, the past five years or so have undoubtedly seen more academic research concerning the Second Amendment than did the previous two hundred."
>
> A mere six years before, yet another academic [Sanford Levinson] opined that the Second Amendment is largely dismissed by many of the most prominent legal scholars. He notes that the esteemed Laurence Tribe gives the Amendment only nominal consideration, a literal "footnote" in his lengthy and comprehensive treatise on constitutional law. One cannot blame Professor Tribe for failing to devote attention to the right to keep and bear arms. After all, only one twentieth-century United States Supreme Court case has addressed the issue, and its meaning is less than clear. Lower courts have heretofore interpreted the Second Amendment uniformly, holding that the right to bear arms is conferred upon the state governments, and not the people themselves. Despite this doctrinal trend, Professor Tribe's upcoming fourth edition of American Constitutional Law represents an interesting academic revision. Tribe explains his reexamination of the Second Amendment and is even prepared to depart from federal case law in favor of a new perspective of the right to bear arms.

---

[8] Sanford Levinson, *The Embarassing Second Amendment*, 99 YALE L.J. 637, 658 (1989) ("For too long, most members of the legal academy have treated the Second Amendment as the equivalent of an embarrassing relative, whose mention brings a quick change of subject to other, more respectable, family members. That will no longer do.").

[9] Don Kates, *The Second Amendment and the Ideology of Self Protection*, 9 Const. Comment 87 (1992).

[10] William Van Alstyne , *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994).

[11] Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 475 (1995).

> Tribe's actions are indicative of how academic focus, and even some attitudes, have changed concerning the Second Amendment.[12]

As to the current status of the debate, Randy Barnett comments that the purely states rights view of the Second Amendment, a longstanding staple of opposition to the standard model, is no longer seriously made by academics, having been replaced by various militia-centric theories that still aim to constrain individual rights claims.[13]

Another strand of Second Amendment analysis that equally, if not more strongly, supports the idea of a constitutional right to self-defense is the work on the intent of the framers of the Fourteenth Amendment. Akhil Amar, Robert Cottrol, Steven Halbrook, David Kopel, and others chronicle the evidence showing that the framers of the Fourteenth Amendment considered the right to bear arms one of the privileges and immunities extended to freedmen.[14] In this context the right to arms is discussed almost exclusively as an individual right essential to the personal self-defense of a class of new citizens whose physical security was in constant peril.

The Supreme Court actually informs this argument by recounting the concerns that prompted the Reconstruction civil rights statutes and the Fourteenth Amendment. In *United States v. Price,*[15] the Court describes in rich detail the post-war environment and the security concerns of freemen that prompted a statutory and constitutional response.

> The purpose and scope of the [civil rights statutes] must be viewed against the events and passions of the time. The Civil War had ended in April 1865. Relations between Negroes and whites were increasingly turbulent. Congress had taken control of the entire governmental process in former Confederate States. It had declared the governments in 10 "unreconstructed" States to be illegal and had set up federal military administrations in their place. Congress refused to seat representatives from these States until they had adopted constitutions guaranteeing Negro suffrage, and had ratified the Fourteenth Amendment. Constitutional conventions were called in 1868. Six of the 10 States fulfilled Congress' requirements in 1868, the other four by 1870.
>
> For a few years "radical" Republicans dominated the governments of the Southern States and Negroes played a substantial political role. But countermeasures were swift and violent. The Ku Klux Klan was organized by southern whites in 1866 and a similar organization appeared with the romantic title of the Knights of the White Camellia. In 1868 a wave of murders and

---

[12] Christopher Chrisman, *Constitutional Structure and the Second Amendment: A Defense of the Individual Right to Keep and Bear Arms*, 43 ARIZ. L. REV. 439 (2001).

[13] Randy Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237 (2002) (reviewing H. RICHARD UVILLER & AND WILLIAM G. MERKEL, THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT).

[14] Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale. L.J. 1131 (1990); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309 (1991); STEPHEN P. HALBROOK, THE FOURTEENTH AMENDMENT AND THE RIGHT TO BEAR ARMS, 1866-1876 (1998); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U.L. REV. 1359 (1998).

[15] United States v. Price, 383 U.S. 787 (1966).

> assaults was launched including assassinations designed to keep Negroes from the polls. The States themselves were helpless, despite the resort by some of them to extreme measures such as making it legal to hunt down and shoot any disguised man. Within the Congress pressures mounted in the period between the end of the war and 1870 for drastic measures. A few months after the ratification of the Thirteenth Amendment on December 6, 1865, Congress, on April 9, 1866, enacted the Civil Rights Act of 1866, which, as we have described, included § 242 in its originally narrow form. On June 13, 1866, the Fourteenth Amendment was proposed, and it was ratified in July 1868. In February 1869 the Fifteenth Amendment was proposed, and it was ratified in February 1870. On May 31, 1870, the Enforcement Act of 1870 was enacted.[16]

David Kopel sharpens the point:

> The Congressmen of this period were hardly interested in strengthening the state militias (which had just been defeated in the War of Rebellion, as they called it), or in reinforcing states' rights. The Congressional concern about the constitutional right to keep and bear arms was plainly a concern about the self-defense rights of individual citizens, especially freedmen. It would be ludicrous to attempt to explain the record of the Reconstruction Congresses as anything but strong support for a personal right to arms for self-defense. Thus, the anti-individual authors simply avoid any mention of the subject. Jonathan Bingham and Jacob Howard, like St. George Tucker, are carefully ignored.[17]

There are a multitude of treatments that offer in total a quite robust support for a constitutional right of self-defense imbedded purely in the Second Amendment and as elaborated by the Fourteenth Amendment.[18]

Although there are contrary views, they generally reject the trend of construing the Bill of Rights broadly, and for this special case only, they offer various theories of why this seemingly dramatic articulation of rights really means nothing of any modern significance. This scholarship often reveals an unwillingness to embrace even the basic message of the Second Amendment: that *somebody, somehow* is vested with the constitutional right to use violence to resist either large- or small-scale threats to liberty.[19]

---

16 *Id.* at 803-05.

17 David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U.L. REV. 1359 (1998).

18 The cynic might finesse this away on a technicality. The Court's evisceration of the Fourteenth Amendment through the *Slaughter House Cases*, 83 U.S. 36 (1872), and revival of it through the mechanism of limited incorporation of fundamental rights, has so far left out the Second Amendment. *But see* Planned Parenthood v. Casey, 505 U.S. 833, 847-48 (1994). So as a technical matter, one might resist the self-defense pedigree of the Fourteenth-Amendment-influenced "right to bear arms."

19 The difficulty with these views is that in one way or another the Second Amendment undoubtedly anticipates somebody using tools of violence for purposes the framers perceived as salutary. The opposition commentary seems to wish away that possibility entirely. Gary Wills' argument that the amendment was simply a ruse that today means nothing at all permits him to avoid the conclusion that even if not individual citizens, certainly someone is vested with the continuing right to have tools of violence to fight both internal as well as external evils. Gary Wills, *To Keep and Bear Arms*, The New York Review of Books, Sept. 21, 1995. David Williams argues that the Amendment might have meant something, but because the modern militia is not now universal (it never was), the Second Amendment today means nothing. David Williams, *The Terrifying Second Amendment*, 101 YALE L.J. 551 (1992).

I and others have tried to test the substance of the anti-self-defense views of the Second Amendment.[20] This exercise quickly yields the conclusion that the violence policy implications of the state or collective rights views are equally or more problematic than the individual rights view. But more telling is that the advocates of these positions have done so little to elaborate those implications and show so little interest in pursuing their theories past the point of dismissing the individual rights claim.[21]

Perhaps this should not be surprising. The lower federal courts have essentially done the same thing. Generally speaking, they employ a glib dismissal of the Second Amendment as some sort of state or collective right, the details of which seem not to matter much as the result of dismissing individual rights claims.[22]

Then there is the Supreme Court's central explanation of the Second Amendment, *U.S. v. Miller*.[23] Many of us have sought to illuminate *Miller's* support for private firearms and self-defense.[24] We get sporadic hints that particular justices see some type of individual right in the Second Amendment and would construe *Miller* that way.[25] But overall, *Miller* remains an enigma that fuels controversy.

I have only summarized here the view that a right of self-defense can be derived from the Second Amendment because that argument has occupied so much of the commentary over the last several decades. Also, I treat these arguments sparingly because there are other obstacles, like incorporation, to taking the Second Amendment as our exclusive answer to the question of a constitutional right of self-defense.[26]

---

[20] Nicholas J. Johnson, *Testing the States Rights Second Amendment for Content*, 38 IND. L. REV. 689 (2005); Don B. Kates & Glenn H. Reynolds, *The Second Amendment and States Rights: A Thorough Experiment*, 36 WM. & MARY L. REV. 1737 (1995). People who recoil at the costs of private gun ownership and pine for a European-style approach forget that we are a federalist system, and even their preferred view of the amendment anticipates political violence between states and the federal government. The tacit view seems to be that such intra-federation conflict is so remote that the states rights view is a safe way of casting the constitutional protection of tools of violence harmlessly onto the ash heap.

[21] It seems plausible that the types of arms guaranteed to states under a states rights view—e.g., tanks, artillery, attack aircraft—would be much more destructive than the private arms guaranteed to citizens under the individual rights view. While standard model scholars aiming to test the implications of the various state or collective rights views have raised this issue, it has been ignored by states rights theorists. *Id.*

[22] Silveira v. Lockyer, 312 F.3d 1052, 1075 (9th Cir. 2002); *see also* Nicholas J. Johnson, *Testing the States Rights Second Amendment*, 38 IND. L. REV. 689 (2005).

[23] 307 U.S. 174 (1939).

[24] *See e.g.* Kates, *supra* note 9.

[25] Antonin Scalia, *Vigilante Justices: The Dying Constitution*, National Review, Feb. 10, 1997 at 32-33. *See also* United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

[26] *See generally*, Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993) (arguing that the Fourteenth Amendment applies the first eight amendments to the states).

But more than this, there is the possibility that a basic right of self-defense might be derived from other aspects of the Constitution either with or without reference to any particular technology. So with the rich discussion of the implications of the Second Amendment stipulated, I will move to other aspects of this question that, in combination with the existing Second Amendment literature, make it difficult to deny that our Constitution protects the ancient right of self-defense.

II. SELF-DEFENSE IN CONTEXT: A GOVERNMENT OF LIMITED POWERS AND THE NINTH AMENDMENT

On one view it is quite natural that the Court has not talked so much about self-defense as a constitutional right. The reason is tied up in the nature of our Constitution and the nature of self-defense. The Constitution mainly sets out the relationship between the federal government, the states, and the people. If we take the text seriously, it grants limited powers to the federal government.

On a pre-bill-of-rights model of constitutional construction, asking whether there is a constitutional right to self-defense might generate just a quizzical look. Self-defense between individuals might be seen as simply in another constellation from the question of what powers the federal government could exercise against the people or the states.[27] This is one way of illustrating an answer that the Court might render when confronted with the question.[28] That is, the Constitution simply does not speak to the kinds of private altercations in which self-defense become relevant.

There is a quick response to this that actually sharpens the point. When we talk about self-defense, we are really asking whether the federal government and perhaps state governments (assuming the right is also deemed fundamental and incorporated as a limitation on state prosecution of homicides where self-defense is claimed) must respect particular substantive and/or procedural claims when meting out the consequences of defensive violence. The answer might be subsumed in issues of due process, jury trial, or other questions of criminal law or procedure, or even in a protection as slim as the possibility of jury nullification. But in this context I wish to make the more basic point that from the view that the Constitution primarily delineates the limited powers of government and sets out some rights that might easily be impaired by the exercise of that power, it is not surprising that self-defense is not a perfectly enumerated right.

---

[27] Set aside for a moment the question of whether there is a constitutional right of self-defense against the federal government. That question may allow us to speculate about the meaning of the Second Amendment as a political right, the function of the militia of the whole, the danger of federal tyranny, and so forth, but all of those things present different questions from the one posed.

[28] *See generally* Presser v. Illinois, 116 U.S. 252 (1885).

In its immediate and most essential form, self-defense is not something government really can stop. If a psychopath kicks down my door, nothing anyone in Washington can say or do will keep me from going at him with something heavy or sharp. Sometime later the state might punish me for defending myself or deny me excuses that would lessen or avoid punishment. States can even make it more expensive and legally risky for me to obtain or use particular defensive technologies. But states cannot actually stop me from protecting myself or others with contraband technology I have on hand. Plus I can defend myself with many different technologies, or with just my hands and feet. In the emergency where it counts most, the state cannot affect my right of self-defense.

Compare now our more explicitly enumerated rights. Government can stop my public parade. It can shut down my newspaper.[29] Government can break down my door, search my home, seize my papers, take my guns, incarcerate and even execute me. For all of these impairments, government sets the schedule. In every case the connection between government power and impairment of individual rights or interests is direct and immediate.

But episodes of self-defense arise on a schedule that pushes government deep into the background. At the instant the threat arises, government generally is just an abstraction with nothing to say about the physical matters at hand, powerless either to impair self-defense or for that matter to protect the victim. In this way, self-defense is like breathing . . . or whistling. It is like the multitude of rights that those who debated the Ninth Amendment argued were part of the innumerable rights retained by the people.

They might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper; but I would ask the gentleman whether he thought it necessary to enter these trifles in a declaration of rights, in a Government where none of them were intended to be infringed.[30]

One historical consequence of the fact that it seems quite impossible to enumerate fully the rights of American citizens is the Ninth Amendment's declaration that "The Enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[31] So far no one in Washington has proposed to mandate what one should eat or wear.

But that is something the Ninth Amendment seems most basically to prohibit. And if I am right that self-defense by its character appears in the

---

[29] The Internet does complicate this comparison.

[30] Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J.L. & POL. 63, 72 (1987) (quoting 1 Annals of Congress 759, 759-60 (J. Gales and W. Seaton ed. 1834) (1st ed. J. Gales 1789)).

[31] U.S. CONST. amend. IX.

same basket, but by its consequences is one of the most important things in the basket, then it ought to be one of the first things protected under the Ninth Amendment.

Now it is obvious that the Ninth Amendment has not fared very well in practice. In terms of popular sentiment, most people don't know it exists.[32] Judge Bork degraded it as an inkblot whose meaning cannot be deciphered.[33] One scholar has dubbed it the "Forgotten Amendment."[34] It seems like too much of a blank check for judges. Where are the instructions? What are the limits? Although this same problem in the other direction has been no impediment to broad legislation of the commerce clause, the Court has been quite shy in extrapolating anything whatsoever from the Ninth Amendment's guarantee of unenumerated rights.

More than a decade ago I argued that even ignoring the Second Amendment we could fairly derive a right to armed self-defense from the Ninth Amendment.[35] Because the Court has offered us so little to work with, that article keyed predominately on the theories various commentators had offered for implementing the Ninth Amendment.

I will not repeat here the various arguments in that article.[36] But one element crucial to any discussion of the Ninth Amendment is helpful to mention. The most salient treatment of the Ninth Amendment in a Supreme Court opinion is Justice Goldberg's concurring opinion in *Griswold v. Connecticut*.[37] He suggested judges might derive rights from the Ninth Amendment by looking to "the traditions and conscience of our people [to determine whether a principle is so rooted] as to be ranked as fundamental." Such rights "lie at the base of all our civil and political institutions."[38]

Much of my effort below is to show the right of self-defense as a building block, a right in the same class as breathing or sleeping, and assumed as a core principle on which other rights can be constructed. That discussion will highlight the Court's elaboration of the Fourth and Eighth Amendments, the right to abortion, and a series of self-defense claims considered at least nominally as a matter of federal common law. These ideas

---

32 This reflects my own unscientific survey of seventeen years worth of first-year law students and undergraduates. Generally less than 20% appreciated that anything like the ninth amendment appears in the bill of rights. Law students have been better on average than undergraduates, and government majors have been better than most.

33 *See* Editorial, *The Bork Disinformers*, WALL ST. J., Oct. 5, 1987, at 22.

34 *See* BENNETT B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955).

35 *See* Nicholas Johnson, *Beyond the Second Amendment, An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992).

36 *Id.* at 6-12. This article made the case for a Ninth Amendment right to armed self-defense. The question here is broader and easier. Self-defense, divorced from the particular technology, is core to the attitudes and ideals of the framers and most Americans. Even people who hate guns embrace self-defense by other means. Brown, *infra* note 82.

37 381 U.S. 479, 486 (1965).

38 *Id.* at 493.

have a dual role. They offer independent support for a constitutional right of self-defense. They also respond to Justice Goldberg's formulation by fixing self-defense at the base of our social and political structure.

III. SELF-DEFENSE AS A CONSTITUTIONAL BUILDING BLOCK: THE DERIVATIVE RIGHT TO ABORTION.

While the Court generally has ignored the Ninth Amendment, it has nonetheless protected unenumerated rights. Several years ago, I suggested that the methods used by the Court and scholars for drawing the unenumerated right to abortion out of the Constitution actually yield a right of self-defense earlier and easier, and that it would be perverse to conclude that the derivative abortion right is protected by the Constitution while the foundational self-defense right is not.[39]

Quite early on, commentators criticized the thin foundation on which the Court grounded *Roe v. Wade*[40] and began constructing alternative frameworks for the abortion right. Many of those early efforts rest on the stout building blocks of self-defense.

Donald Regan's 1979 Michigan Law Review article[41] places the abortion right on the spectrum of permissible self-defense scenarios. Regan begins with the core case of self-defense against a willful criminal attacker. After many contortions, he plots at the far end of the spectrum several scenarios he says are analogous to the self-defense claim of a woman who chooses abortion in order to avoid the physical trauma of child birth.

There are a number of objections to Regan's analysis and many will find his core claim unsatisfactory. The point for our purposes is his effort to build the contested right to abortion on something more solid. The building block he uses is self-defense. He does not present self-defense explicitly as a constitutional right. Yet he finds no reason to question that a constitutional right can be derived from it. It is a familiar treatment. Self-defense undergirds our basic thinking about fundamental rights and duties. It is a building block of our culture, part of the backstop of our civilization.

Regan's article is one of two prominent essays that Cass Sunstein contends provide the strongest justifications for the abortion right.[42] The other is Judith Thompson's effort to justify abortion as a matter of moral philoso-

---

39 *See* Nicholas J. Johnson, *Principles and Passions: The Intersection between Abortion and Gun Rights*, 50 RUTGERS L.REV. 97 (1997).

40 410 U.S. 113 (1973).

41 Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979).

42 Cass R. Sunstein, *Neutrality In Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 31 n.120 (1992). *See also* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 383 n.61 (1985) (citing Regan's analysis with approval).

phy.[43] Through a series of self-defense analogies, Thomson argues that even conceding that the fetus is a person at conception with a life interest equal to the mother's, abortion still can be justified. She posits for example the case of a mother trapped in a very small house with a rapidly growing child. The child is growing at such a rate that it threatens to crush the mother against the walls of the house. Here she insists, it cannot be said that the mother "can do nothing, that you cannot attack it to save your life."[44]

There are many objections to Thomson's analysis that she anticipates and endeavors to answer. The point for our purposes is the foundation she builds on. Her analysis rests on a right of self-defense that she presumes is a universal value so fundamental that it can carry by slim analogy the substantial burden of a constitutional right to abortion.[45]

In 1989 Susan Estrich and Kathleen Sullivan argued among other things that the abortion right is properly grounded on the concept of liberty enshrined in the Fourteenth Amendment's due process clause, which they reasoned "requires independence in making the most important decisions in life."[46] Abortion, they said, was at the heart of protected constitutional choices because "few decisions can more importantly alter the course of one's life than the decision to bring a child into the world."[47] The self-defense choice presents obviously higher stakes. It is not the course of one's life, but one's entire existence, at stake. Any conception of liberty that

---

[43] Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

[44] *Id.* at 52.

[45] Judith Thomson's analysis assumed *arguendo* that the fetus was a person. Eileen McDonagh accepts Thomson's argument but refuses to concede the life interest of the fetus.

> Some may object that even if a woman is justified in using deadly force, such force triggers state scrutiny; this scrutiny obligates the state to require that she stand trial to determine whether her use of deadly force was justified. n202. The implied assumption of this objection is that the law must apply the same standards for the use of deadly force in self-defense to a fetus as it applies to a born person because the fetus has the same legal and constitutional rights as does a born person. There is no basis for such an assumption. The Court has ruled that before viability, it is constitutional for the state to protect the fetus only with a profound interest, not a "compelling state interest." The Court ruled in Roe that even if the fetus were a person, it would not be protected by the Constitution because it is not yet born, and the Constitution protects only the rights of born people in relation to the state. Furthermore, when a woman does not consent to be pregnant, the fetus's injury of her is in progress as an ongoing event. Thus, the harm resulting from the fetus is not a threat of injury in the future nor is it an injury of the past. Even if the fetus were a person, if a woman does not consent to pregnancy, the massive alteration of a woman's body and liberty resulting from the fetus justifies the state's use of deadly force to stop it. Since the fetus's harm of a woman when she does not consent to pregnancy is in progress, the first obligation of the state is to stop the fetus from continuing to injure the woman.

Eileen L. McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057 (1999).

[46] Susan R. Estrich & Kathleen M. Sullivan, *Colloquy;* Webster v. Reproductive-Health Services*; Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119,127 (1989).

[47] *Id.*

guarantees the abortion right cannot plausibly deny the right of self-defense.

Estrich and Sullivan presented their arguments explicitly as an appeal to Justice O'Connor, at the time the only woman on the Court. By 1992 Justice O'Connor was writing the decision in *Planned Parenthood v. Casey,* concluding that the abortion right involves

> choices central to personal dignity and autonomy . . . central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

O'Connor explained that liberty includes "more than those rights already guaranteed to the individual against federal interference by the first eight Amendments to the Constitution."[48] Making the case for the abortion right as a liberty interest, she cites Justice Harlan's dissent in *Poe v. Ullman:*

> The full scope of liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This liberty is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures; and so on.[49]

Thus the first eight amendments might form the foundation for fundamental rights—including a right to arms—but the full basket of rights essential to liberty contains much more. From this broader concept of liberty the abortion right stems.

This gives us two levels of support for the right of self-defense. First, within the context of the voluminous scholarship on the individual self-defense pedigree of the Second Amendment, we can understand Harlan's and O'Connor's statements as direct recognition of an individual right to arms. Second, for those who would raise the standard objections that the Second Amendment is a militia-centric political right, observe that the residual conception of liberty referenced by O'Connor yields a right of self-defense earlier and easier than it supports the established right to abortion. Certainly more basic than "*defining ones own concept of existence*"[50] is *preserving ones existence* from wrongful physical threats. This is a point *Casey* seems to acknowledge with its description of foundational rights in the first eight amendments supporting a broader set of unenumerated rights essential to liberty.

---

48 Planned Parenthood v. Casey, 505 U.S. 833, 847-48 (1994).

49 *Id.* at 847-48 (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

50 *Id.* at 851.

It is easy then to list the first eight amendments as part of liberty guaranteed by the Fourteenth Amendment. The abortion right, plainly unenumerated, may be harder to extract but still can be plausibly inferred. But what irony to suggest that the concept of liberty, which necessarily must expand to protect the abortion right, does not guarantee a more basic right of self-defense that also can be found in the constitutionally enumerated right to bear arms. An entirely arbitrary and politicized constitutionalism might achieve such a result, but that really would be no constitutionalism at all.

IV. SELF-DEFENSE AS A CONSTITUTIONAL BUILDING BLOCK: THE DERIVATIVE FOURTH AMENDMENT AND OTHER CONSTITUTIONAL ELABORATIONS GROUNDED ON THE IDEA OF SELF-DEFENSE.

The Supreme Court has been quite explicit about elaborating Fourth Amendment rights from the principle self-defense. In *Payton v. New York*[51] the Court traced the roots of the Fourth Amendment to a right of home privacy grounded in the Castle Doctrine as articulated by Sir Edward Coke in *Semayne's Case*.[52] At issue was New York legislation authorizing police to enter a private residence, without a warrant and with force, to make a routine felony arrest.[53] Noting that the constitutional text and precedent on the question were equivocal, [54] the Court resolved the issue in favor of the position of Lord Coke, whose ideas on the matter were rooted in the Castle Doctrine.

> It is obvious that the common-law rule on warrantless home arrests was not as clear as the rule on arrests in public places. Indeed, particularly considering the prominence of Lord Coke, the weight of authority as it appeared to the Framers was to the effect that a warrant was required, or at the minimum that there were substantial risks in proceeding without one. The common-law sources display a sensitivity to privacy interests that could not have been lost on the Framers. The zealous and frequent repetition of the adage that a "man's house is

---

51 445 U.S. 573 (1980).

52 (1603) 77 Eng. Rep. 194 (K.B.).

53 *See United States v. Watson*, where the Court upheld a warrantless "midday public arrest," expressly noting that the case did not pose "the still unsettled question 'whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest.'" United States v. Watson, 423 U.S. 411, 453 (1976). In this case, the police broke into Payton's apartment intending to arrest Payton. *Id.* It was not argued that the police lacked probable cause to believe that the suspect was at home when they entered. The police used crowbars to break down the door. *Id.*

54 *See Payton*, 445 U.S. at 592 (stating, "A study of the common law on the question whether a constable had the authority to make warrantless arrests in the home on mere suspicion of a felony—as distinguished from an officer's right to arrest for a crime committed in his presence—reveals a surprising lack of judicial decisions and a deep divergence among scholars. The most cited evidence of the common-law rule consists of an equivocal dictum in a case actually involving the sheriff's authority to enter a home to effect service of civil process.").

> his castle," made it abundantly clear that both in England and in the Colonies "the freedom of one's house" was one of the most vital elements of English liberty.[55]

For our purposes, the Court's understanding of the Castle Doctrine illuminated by Coke is salient.

Thus, in *Semayne's Case*, the court stated:

> That the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favoured in law; so that although a man kills another in his defence, or kills one *per infortun'*, without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels, for the great regard which the law has to a man's life; *but if thieves come to a man's house to rob him, or murder, and the owner of his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing . . .*[56]

Thus, the puzzle of warrantless entry to execute arrests within the home was resolved by reference to an idea as old as civilization. Detached from the rancor of the modern gun debate, the ideas imbedded in the Castle Doctrine seem quite prosaic. They are part of our cultural consciousness, and familiar in a way that many important provisions of the Bill of Rights are not.

The Court has continued to use the Castle Doctrine to develop rights in less dramatic contexts. In *Rowan v. Post Office Dep't*,[57] a vendor claimed a constitutional right to mail unwanted material to the homes of potential customers. A federal statute permitted households to bar mailers from sending unwanted materials. Weighing the vendor's acknowledged first Amendment claims, the Court reasoned:

> [I]t seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee . . . .
>
> To hold less would tend to license a form of trespass . . . . *The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality*, and none of the recognized exceptions includes any right to communicate offensively with another.[58]

The *Rowan* decision cites *Camara v. Municipal Court of San Francisco*[59] for the idea that the Castle Doctrine remains vibrant. And *Camara* provides another illustration of the Court deriving detailed Fourth Amendment rights from the root of self-defense. Concluding that the City of San

---

55 *Id.* at 596-97.

56 *See* Thomson, *supra* note 43 [emphasis added].

57 397 U.S. 728, 737 (1970).

58 *Id.* [emphasis added].

59 387 U.S. 523 (1967).

Francisco was required to have a warrant to enter private property for purposes of conducting housing code inspections the Court offered this:

> [W]e cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely "peripheral." It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security .... *[I]nspections of the kind we are here considering do in fact jeopardize "self-protection" interests of the property owner.*[60]

In *Ingraham v. Wright,*[61] the Court plumbs the boundaries of the Eighth Amendment by reference to the fundamental right of personal security. Plaintiffs, school children, claimed that corporal punishment administered by teachers violated the bar on cruel and unusual punishment. The court explained,

> At common law a single principle has governed the use of corporal punishment since before the American Revolution: Teachers may impose reasonable but not excessive force to discipline a child. Blackstone catalogued among the *"absolute rights of individuals" the right "to security from the corporal insults of menaces, assaults, beating, and wounding,"* but he did not regard it a "corporal insult" for a teacher to inflict "moderate correction" on a child in his care. To the extent that force was "necessary to answer the purposes for which [the teacher] is employed," Blackstone viewed it as "justifiable or lawful." The basic doctrine has not changed.[62]

Reflecting the common agreement in our society of the fundamental nature of self-defense, legal scholars are just as prone as the Supreme Court to grounding their emerging theories on the right of self-defense. I not have exhausted the research, but one is struck by the varied and multiple contexts in which the right of self-defense is used by scholars as the foundation to construct other rights or make more "progressive" claims. The model is almost always the same. Self-defense is taken as the uncontested baseline, and the writer reasons by example to show how some contested right or claim should be respected because of its similarity to self-defense. For example, in my treatment several years ago of the intersection between self-defense principles and theories of abortion rights, I highlighted Linda McClain's argument that "The Idea of Castle" (her articulation of the Castle Doctrine on which the *Payton* proceeds) might be used to address an array of concerns women have under patriarchy, including reproductive free-

---

60 *Id.* at 530-31 [emphasis added].

61 430 U.S. 651 (1977).

62 *Id.* at 661.

dom.[63] The point again is that her nascent abortion rights claim is derivative of the Castle Doctrine, which as *Payton* describes is fundamentally about self-defense.[64]

V. THE FOUNDATIONAL RIGHT TO SELF-DEFENSE: THE SUPREME COURT'S SELF-DEFENSE CASES.

The Supreme Court's most direct engagements of the self-defense question are curious. In a series of cases running from 1893 to 1896, the Court treated the idea of self-defense in the same matter-of-fact manner you would expect from any citizen off the street.[65] These cases involve altercations in Indian territory and are nominally federal common law cases. All but one came to the Court on direct appeal from the courtroom of "Hanging Judge" Isaac Parker.[66]

The decisions are quite open in their endorsement of the right to self-defense, and somewhat remarkable considering the racial dynamic of several of them. This was, after all, the Court that rendered the infamous decision in *Plessy v. Ferguson.* David Kopel comments,

> Today the Supreme Court of 1893-1896 is remembered principally for their unprincipled political decision in *Plessy v. Ferguson.*[67]
>
> ....

---

63 Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195 (1995).

64 *See also* Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721, 763 (2003) ("The racial critics act not out of personal aggrandizement, or anarchist sympathies, but rather from the good faith intention to repair the criminal justice system . . . [A]lthough the analogy is not perfect, the tactics are more like self-defense than acts of aggression."); Erica Beecher-Monas, *Domestic Violence: Competing Conceptions of Equality in the Law of Evidence*, 47 LOY. L. REV. 81, 92-95 (2001) (discussing, in the context of self-defense and self-preservation, the manner in which the liberal ideology of social atomism ignores women's experience of connectedness), *construed in* Robert B. Chapman, *Missing Persons: Social Science and Accounting for Race, Gender, Class, and Marriage in Bankruptcy*, 76 AM. BANKR. L.J. 347 (2002); Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1154 (2003) ("The literature devoted to theories of punishment identifies four primary justifications for punishment: incapacitation, deterrence, rehabilitation, and retribution. Incapacitation involves disabling an offender from engaging in further criminal activity. This is perhaps the least controversial of the justifications because it rests on the widely shared intuition that individuals have a natural right to protect themselves from others.").

65 *See* David B. Kopel, *The Self-defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty First Century*, 27 AM. J. CRIM. L. 293 (2000) (examining these cases in detail).

66 *Id.* at 296 n.12.

67 *Id.* at 295.

> The personal background of the defendants in the Self-Defense Cases certainly did not endear them to the Court. The 1890's were the most racially oppressive decade in American History since the abolition of slavery. White supremacy was the legal or defacto rule almost everywhere, including at the Supreme Court [68]
>
> . . . .
>
> Yet in a time when everyone except native-born white males were very much second-class citizens, the Supreme Court reached out to protect the rights of outsiders [Poles who did not speak English, a "half-breed" Cherokee, a Cherokee who did not speak English, a black teenager, and an argumentative Indian].[69]

One aspect of the story is that the Court was reigning in a judge who was working aggressively to enforce his own version of order upon a vast and lawless land by erring on the side of guilty verdicts and capital sentences. Judge Parker's trademark was hours-long charges that left juries little room for acquittal.

In the first of the series, *Gourko v. United States*,[70] Justice Harlan (the lone dissenter in *Plessy*), explains the plain principles of self-defense that permitted defendant to arm himself after being threatened by the decedent. (Parker instructed the jury that the prior altercation showed intent by defendant to murder the decedent.) Defendant was within his rights to arm himself. And, so long as he did not then seek out his adversary, he could claim self-defense if on a subsequent occasion he killed his adversary.

There are no citations, no references to the common law parameters of self-defense, no effort to extract the right of self-defense from the penumbras of the constitutional text or from references to state law cases or treatise writers. Harlan simply lays out the idea of self-defense as if recounting first principles of American society.

Justice Shirus' opinion the next year in *Thompson v. United States* is similar. The decision overturned a murder conviction because Judge Parker's charge again had too narrowly restricted the right of self-defense. Again, the opinion eschews the common law form. There is no redress to that common law staple, reasoning by example from some similar case in a different jurisdiction or extrapolating from a similar problem in another area of the law. Except for a reference to Harlan's earlier opinion in *Gourko*, Shirus elaborates the right of self-defense as if describing the sun setting in the west.[71]

Starr v. United States is a case in contrast. Chief Justice Fuller writes the opinion, and it takes the familiar common law form, citing and reason-

---

68 *Id.* at 324.

69 *Id.* at 324 (Kopel provides a rich description of these cases, including the information that several of the justices writing the opinions had their own episodes involving armed self-defense).

70 153 U.S. 183 (1893).

71 *See* Thompson v. United States, 155 U.S. 271 (1984).

ing from English and state court cases. *Starr* is different, however, in the nature of the self-defense claim. The man Starr killed, Floyd Wilson, was a deputized member of a posse gathered to apprehend Starr. Starr was Cherokee. Wilson was white. The question was harder. Starr sought to use the principle that an arresting officer who kills a resisting suspect commits justifiable homicide. Starr claimed the same privilege because he did not know that Wilson was a deputy and Wilson shot at him first. It is a hard case that goes beyond our core principles of self-defense. The style of the court's treatment puts it firmly within the category of federal common law decision-making. It also highlights my point.[72]

As to whether our law recognizes a basic right of self-defense, the Court has said yes in the same straightforward way it would acknowledge that crops need rain. The source and authority for this affirmation is something more fundamental than the standard federal common law fare. Self-defense is discussed as a matter of judicial notice, like acknowledgment that people must breathe. It is only upon reaching details like those presented in *Starr* that the Court employs the standard common law tools and process.

In 1885 came *Allison v. United States,*[73] another Fuller opinion, with the self-defense issue basically the same straightforward question the Court engaged a year earlier in *Thompson.* Judge Parker's lengthy jury charge tilted toward a blanket denial of the self-defense claim where a defendant previously had been threatened by the decedent. As in *Thompson,* Parker pushed the jury strongly to the conclusion that the sequence of (1) threat or altercation, (2) disengagement where defendant arms himself, and (3) renewal of threats or altercation where defendant kills under a claim of self-defense, cannot satisfy the requirements for acquittal. This sequence was, according to Parker, the model of "spite" or "grudge" killing where the defendant has "hunted up" his antagonist.[74]

The contrast between Fuller's approach here and his opinion in *Starr* is instructive. On a peripheral evidentiary issue, Fuller cites *Wigmore on Evidence* and a series of state law cases. But on the core self-defense question that Parker again had gotten wrong, Fuller offers just a straightforward declaration about the law of self-defense and a citation to the Court's earlier decision in *Thompson* (and *Thompson,* recall, only cited *Gourko,* which cited nothing at all).

This style of analysis continues through the self-defense cases. The character and style of the analysis is different from the typical federal common law fare (with its reliance on state court decisions, treatises, and English common law). On the basic right to self-defense, the Court ignores the common law tool box. Rather, it seems to find the right of self-defense in the culture itself, or as articulated by Justice Holmes a generation later, in

---

72 *See* Starr v. United States, 153 U.S. 614 (1894).

73 Allison v. United States, 160 U.S. 203 (1895).

74 *Id.* at 214.

the "very nature of man."[75] Reasoning not from treatises, stale English precedents, or contemporary state decisions, and aiming instead for "rules consistent with human nature," Holmes illuminated the question of retreat in the famous phrase, "detached reflection cannot be demanded in the presence of an uplifted knife."[76]

David Kopel submits matter-of-factly that the self-defense cases are pronouncements of federal common law. I suppose this is technically right. But there is a suggestion of something more in the definition Kopel borrows from Martha Field: "Federal common law is an important part of our tradition of case-by-case adjudication *allowing the judiciary to resolve unforeseen issues fairly.*"[77] This does not quite capture the Court's efforts. The self-defense cases were not some creative incremental effort to "resolve unforeseen issues fairly." These are a series of cases simply affirming something that no one then or now would need judicial assistance to understand. They are straight forward acknowledgements of a principle as old as civilization.

Contrast for example the treatment of how some relatively more obscure provision of common law tort ought to apply in the odd case of purely federal jurisdiction. *Missouri v. Illinois*[78] is a fair example. It is a federal common law nuisance case in which Missouri claimed that Chicago's diversion of its sewage, into the Mississippi River, impaired use of the water downstream in Missouri. The decision employs all the common law tools—references to customs in early England, a case from the Massachusetts Supreme Court, a treatise on international law, and seven earlier Supreme Court cases that had wrestled with federal common law nuisance claims.

---

[75] Subsequent cases both support and confound my observation. The next Fuller opinion is in *Wallace v. United States*, 162 U.S. 466. Here we finally have an opinion that evokes the familiar common law model. It supports the basic idea that if one who embarks in a quarrel, with no felonious intent, under reasonable belief of imminent danger, inflicts a fatal wound, it is not murder. Fuller cites and reasons from three legal encyclopedias and cases from Missouri, Illinois, Vermont and Texas. *Wallace* at 471-474.

It is fair speculation that at this point the Court is showing some frustration that Parker had not seemed to have gotten the message. As David Kopel points out, Parker certainly had started to take personally the Court's continuous reversals and criticism of his work. *See* Kopel, *supra* note 65 at 320-324. Was the Court sensitive to the fact that its early efforts in this series were not grounded on the traditional common law model and that it was finally offering details to support ideas that seemed obvious?

See also Brown v. United States, 256 U.S. 335 (1921) (holding that in an altercation at a federal facility, a defendant need not retreat before killing in self-defense).

[76] Brown v. United States, 256 U.S.335, 343 (1921). *Brown* is discussed in detail in Fred I. Inbau, *Firearms and Legal Doctrine*, 7 TUL. L. REV. 529 (1932-33).

[77] Kopel, *supra* note 65, at 325 (citing Martha Field, *Federal Common Law, in* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 278 (Kermit L. Hall et. el. eds. 1992)).

[78] Missouri v. Illinois, 200 U.S. 496 (1906).

While the typical federal common law case is bound up in traditions and precedents, the matters treated in the self-defense cases are rooted in more basic values reflected by Holmes: "A man is not born to run away. The law must consider human nature and make some allowances for the fighting instinct at critical moments."[79]

Indeed it is Holmes who provides the rejoinder to the observation that the self-defense cases are nonetheless cases of exclusively federal jurisdiction, and therefore, regardless of the style of reasoning, still rightly cast as federal common law decisions. In *Patsone v. Pennsylvania,*[80] long after the last direct appeal from Hanging Judge Parker, the Court upheld a Pennsylvania ban on aliens' possession of long guns as a hunting control measure. The ban was permissible in part, said Holmes, because it did not extend to handguns, which might be needed "occasionally for self-defense."[81] The plain implication is that a flat ban on armed self-defense is constitutionally problematic. Like Harlan, Fuller, and Shiris before him, Holmes offers no citation for the point. Is he grounding his point on the Second Amendment, the Ninth Amendment, or on some background natural right?

In *Griswold*, Justice Goldberg instructed us to search for unenumerated rights by looking to the traditions and conscience of our people to determine what rights lay at the base of all our civil and political institutions. This is exactly where these self-defense cases place the right to use violence against threats that would stop one's beating heart.

VI. SELF-DEFENSE IN CONTEXT: THE OTHER SIDE OF THE LEDGER

So far I have tried to show that self-defense is a building block of our constitutionalism and our broader culture. Even if not expressly included in the Bill of Rights, it seems difficult to deny that it is one of the core elements of our social, political, and constitutional culture. This is especially true once we separate out the question of particular technology. A flat prohibition on self-defense means that the mugger or rapist who is injured by his resisting victim has a valid claim that he was wrongfully assaulted. It means that *prosecutors* should pursue both the predator and his victim who forcefully resisted. The very idea is an absurdity.

There is broad consensus, joined readily even by people who hate guns, about the basic right of self-defense. Wendy Brown is emblematic. Brown's response to Sanford Levinson's *Embarrassing Second Amendment* was capped by a bigoted screed against a game-scouting, NRA-hatted, RV-driving, porn-loving gunnie who came to her rescue when she was stranded

---

79 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935, at 331 (Mark DeWolfe Howe ed., Oxford Univ. Press 1953).

80 Patsone v. Pennsylvania, 232 U.S. 138, 143 (1914).

81 *Id.*

on a wilderness road.[82] After disparaging him in print, Brown bragged of her "hard won" self-defense skills that might have been overcome if the Samaritan hunter had decided to use his gun to launch a rape. For Brown, once the gun was removed from the picture, self-defense was quite a noble idea.[83]

It is not fair to generalize much further on this point. But more times than I can count, in various settings, I have had people who oppose gun rights admit without hesitation that they support self-defense and would use deadly force to defend themselves and their families, or at least would call upon others to do their fighting and, if necessary, their killing.

I submit, therefore, that if put to a referendum, self-defense (technology aside) would garner more support than many of the express provisions of the Bill of Rights. Self-defense is grounded in Wechsler's words "on the universal judgment that there is no social interest in preserving the lives of aggressors at the cost of those of their victims."[84] Just imagine a place where the rape victim also would be prosecuted for battery because she scratched, kicked and gouged at eyes with keys. Such a place would be the target of our most biting moral invectives.

I expect that respect for self-defense is more widely shared across cultures than our concepts of free press, jury trial, and protections against cruel and unusual punishment, taking without just compensation, or self incrimination. And while I cannot claim to have done an exhaustive search, I would venture that in some form or another, the defense, the justification, or the idea of self-defense is embraced almost universally.[85]

Perhaps someone will do the counting and prove me wrong. But I am not so much concerned about that. My purpose is really to lay the foundation for this: My surmise that the denial of self-defense to our hypothetical rape victim was an absurdity actually overstates the point. Reaching back to the ugliest episodes in our history, one finds baskets of logically reasoned views to the effect that our rape victim did not have the right to gouge, stab, maim, or kill her attacker. These and other equally appalling exercises of logic show what a problematic pool of ideas and values one must wade into in order to begin fashioning an independent, affirmative case against a right to self-defense.

The denial of self-defense was a standard feature of the statutes and decisions defining the relationship of black American slaves to free white

---

82 Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 Yale L.J. 661, 666-667 (1989).

83 *Id.*

84 Jerome Michael & Herbert Wechsler, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 736 (1937).

85 The United Nations Charter declares, "Nothing in the charter shall impair the inherent right of individual or collective self-defense." United Nations Charter art. 51. The United Nations Universal Declaration of Human Rights recognizes a universal right to life and security of person. Universal Declaration of Human Rights art. 3, 1948, G.A. Res. 217A (III) U.N. Doc. A/810, at 71.

society. The illustrations here go far beyond Taney's reasoning in *Dred Scott* that granting freemen the full rights of citizenship would be untenable in part because that would give them the right to "keep and carry firearms wherever they went."[86]

A powerful example of the wickedness of slavery appears in the often-cited passage from Justice Brennan's dissent in *McClesky v. Kemp*[87] about the early Georgia law stating that "black slaves who killed whites in Georgia, regardless of whether in self-defense or in defense of another, were automatically executed."[88]

It was not just deadly force that slaves were prohibited from using. The Virginia Slave Codes commanded, "If any Negro lift up his hand against any Christian he shall receive thirty lashes."[89] Paul Finkleman explains how denial of self-defense to slaves extended also to free blacks:

> The state of statutory law in Virginia in 1705 was free blacks could not testify in court against whites who harmed them, "were equally denied the right to defend themselves in the streets . . . [and] were effectively disarmed. Denied the right of self-defense in the courts and the streets, free blacks were by legal definition classified with criminals and slaves.[90]

Not until 1792 did Virginia recognize the right of self-defense for free blacks.[91] And as a matter of pure logic, all of this was quite sensible. Chief Justice Thomas Ruffin of the North Carolina Supreme Court lent his insight into why granting slaves a right to self-defense was a risky proposition. He posited that if slaves could decide when they were entitled to resist white men, they may be encouraged "to [denounce] the injustice of slavery itself, and, upon that pretext, band together to throw off their common bondage entirely."[92]

Slave codes prevented slaves from offering testimony in court or striking a white person in self-defense. The killing of a slave was rarely regarded as murder, and the rape of a female slave was characterized only as

---

86 Scott v. Sandford, 60 U.S. 393, 417 (1857).

87 McCleskey v. Kemp, 481 U.S. 279, 329-30 (1987) (Brennan, J., dissenting).

88 *Id. McCleskey* was the case in which the Court refused to invalidate a black defendant's death sentence even though there was strong social science evidence that the death penalty was imposed disproportionately against black defendants.

89 A. LEON HIGGINBOTHAM, IN THE MATTER OF COLOR 39 (Oxford Univ. Press 1980) (1978). This and other examples appear in JUNE PURCELL GUILD, BLACK LAWS OF VIRGINIA 45 (New York: Negro Universities Press 1969) (1936); WILLIAM W. HENNING, STATUTES AT LARGE OF VIRGINIA 2, at 18 (Richmond: Franklin Press, 1819-20).

90 Paul Finkleman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2091, n 135, 136 (1993).

91 Leon Higginbotham & Anne F. Jacobs, *The Law Only as an Enemy: The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C.L. REV. 969, 1029 (1992) (citing Act of 1848, ch. XII, 6, 1847-48 Va. Acts 125). In rare and particularly egregious cases, courts made overtures toward respecting a slave's right to self-defense. *Id.* at 1042.

92 Jason A. Gillmer, Note, United States v. Clary: *Equal Protection And The Crack Statute*, 45 AM. U.L. REV. 497 (1995).

a trespass—a claim to be pursued only by the property owner and of course not at all if the owner was also the rapist.[93]

Abolitionist Frederick Douglass wrote:

> While I heard of numerous murders committed by slaveholders on the Eastern Shore of Maryland, I never knew a solitary instance in which a slaveholder was either hung or imprisoned for having murdered a slave. The usual pretext for killing a slave is, that the slave has offered resistance. Should a slave, when assaulted, but raise his hand in self-defense, the white assaulting party is fully justified by southern law and southern, or Maryland, public opinion in shooting the slave down.[94]

And while the freedmen's right of self-defense is enshrined in Lincoln's Emancipation Proclamation,[95] even after the confederacy was defeated, the tenuous nature of freedmen's practical right to defend themselves remained an emblem of their inferiority.

> While insisting that, as citizens, the former slaves enjoyed the right to bear arms, Freedmen's Bureau officers strongly discountenanced any talk of self-defense or retaliation by blacks against violence. They advised freedmen to rely instead on local and federal protection. But many agents found suppressing violence a difficult and frustrating task. "A freedman is now standing at my door," one agent wrote in 1866, "his tattered clothes bespattered with blood from his head caused by blows inflicted by a white man with a stick and we can do nothing for him . . . Yet these people flee to us for protection as if we could give it."[96]

There are plenty of other examples underscoring the denial of self-defense to men and women in, or recently freed from bondage. But it must be said that in some instances, even the dehumanized slave was acknowledged to have some of the basic prerogatives inherent in all God's creatures. Leon Higginbotham observed, "There were only rare instances in which a slave might claim self-defense in the killing of a white person. Such cases generally involved whites of low socioeconomic background."[97] In a critique of Andrew Fede's *People Without Rights,* Ruth Wedgewood writes:

> American slaves did not have political rights or civil rights. *Still, in the view of some judges, they had natural or personal rights: the slave's natural right of self-defense, and his right to be free of malicious assaults, could mitigate, and even excuse the slave's use of force.* Fede dismisses these examples, explaining that these rights were not as fulsome as the civil rights of whites, and were subordinated to the needs of masters for control of their workforce, and

---

93 JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 83, at 124-25 (1994).

94 FREDERICK DOUGLASS, NARRATIVE OF AN AMERICAN SLAVE 205 (1973).

95 "And I hereby enjoin upon the people so declared to be free to abstain from all violence, unless in necessary self-defence." Abraham Lincoln, U.S. President, Emancipation Proclamation (1863).

96 ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 148 (New American Nation Series) (Henry Steele Commager & Richard B. Morris eds., 1988).

97 Higginbotham & Jacobs, *supra* note 91.

> the desire of white society to enforce black servility. The absence of full and equal protection does not establish Fede's claim that a rhetoric of rights meant nothing in slavery cases. The question remains what brought Southern judges to act as they did, in disputes concerning the situation of enslaved African Americans. In some cases, a naturalism that grounded protection in a bondsman's status as a human being had evident importance to the judges themselves.[98]

So even the lowly bondsman was, in the view of some judges, vested with a limited right to use violence in defense of his life. Thus, an effort to flatly prohibit self-defense cannot rely entirely even on the despicable jurisprudence of slavery.

To build the independent substantive case against the right of self-defense, one must wade down into the most despised ideas and institutions ever produced by humankind. And remarkably, even here the principle of self-defense is robust enough to survive in some limited form. This presents Judge Murnaghan's seemingly rhetorical observation in *Griffin v. Martin* as entirely factual: "It is difficult to the point of impossibility to imagine a right in any state to abolish self-defense altogether."[99]

CONCLUSION

Self-defense is a place where judges with widely disparate views of judging and the limits of constitutional interpretation would seem forced to the same result. Justices Scalia and Breyer did an interesting C-Span show that helps make the point.[100] Their bone of contention was the legitimacy of judges using foreign law to answer United States constitutional questions. Scalia naturally argued that the musings of some judge in Zimbabwe are irrelevant to American constitutional interpretation. Breyer said something like, "As I consider whether a life sentence or the death penalty is cruel and unusual punishment for rape, I think it is interesting to know what a thoughtful person trained in the law has said about it, even if that person is not an American judge." Breyer was loose and free, and Scalia articulated a role of judges as interpreters of democratic decisions. Breyer spoke like a judge looking at a new type of tort claim and considering the best way to establish general norms of behavior in a changing environment.

I use this example to suggest the gulf between "conservative" and "activist" modes of judging—and to make a point about our subject. While

---

98 Ruth Wedgewood, Book Note, *The South Condemning Itself: Humanity And Property In American Slavery*, 68 CHI.-KENT. L. REV. 1391 (reviewing ANDREW FEDE, PEOPLE WITHOUT RIGHTS, (1992)) [emphasis added].

99 *Griffin*, 785 F.2d at 1186.

100 U.S. Assoc. of Constitutional Law Discussion: Constitutional Relevance of Foreign Court Decisions (Feb. 27, 2005) http://www.freerepublic.com/focus/f-news/1352357/posts.

divided on many issues, these two modes of judging should come to essential agreement on the basic point of self-defense.

Looking at history, culture, precedent, and text, Scalia would have little difficulty with the question of self-defense. It always has been with us. But Breyer too, should reach this conclusion. And tellingly, he would reach it even as he expanded his search broadly to authorities around the globe.

Surely there will be absurd examples denying the right of self-defense, but these examples are themselves illustrations of my point. A man in bondage might be thought to exist without much of a right to self-defense. But not even the most ardent pacifist wants to rest his argument on such a foundation. And putting aside some obscure Pollyannaish theory that I am sure has been articulated by a very smart, very cloistered person somewhere (and praised as brilliant by a clutch of similarly credentialed souls), there is nothing else to justify the idea that innocents have no right to use force to resist violent attacks.

A CONSTITUTIONAL RIGHT TO SELF DEFENSE?

Nelson Lund[*]

Nicholas J. Johnson's fascinating essay on the right of self defense[1] invites us to reflect on the relation between our Constitution and the presuppositions of our Constitution. Questions about that relation are as old and important as the manifest conflict between our founding political principles and the institution of slavery. They arose in constitutional law at least as early as the debate between Justices Chase and Iredell in *Calder v. Bull*.[2] And they are as contemporary as the legal and political controversies about gun control and abortion.

As I understand it, the central point of Professor Johnson's essay may be stated as follows. If there are any unenumerated rights under our Constitution—and there are—the right of self defense must be one of them. In support of this proposition, he offers three principal forms of evidence. First, he points to the Second Amendment, arguing that it implicitly recognizes a right to self defense. When one guarantees a right to the means of self defense, one would seem to imply that there is a right to use those means for the purpose of self defense. Second, he argues that the existence of a right to self defense may be implied by the right to abortion. Finally, he points to a variety of common law sources that seem to assign a special status to the right of self defense; the most interesting of these common law sources are antebellum cases that sometimes recognized a right of self defense even in slaves.

In light of this kind of evidence, one can hardly doubt that the right of self defense is a fundamental presupposition of our legal culture or legal tradition. Virtually any disinterested and intelligent lawyer would, at any time in American history, recoil from the suggestion that a free citizen living under a republican form of government could be forbidden by the law to defend his own life against violent attacks.

The reason for this revulsion may be captured, at least in part, by one of the quotations that Professor Johnson chose to use in his paper's epigraph. In a modern Fourth Circuit opinion, the court pointed to the absurdity of "abolish[ing] self defense altogether, thereby leaving one a Hobson's choice of almost certain death through violent attack now or statutorily

---

* Vice Dean and Patrick Henry Professor of Constitutional Law and the Second Amendment, George Mason University School of Law. Thanks to Stephen G. Gilles and David Leibowitz for helpful comments, and to George Mason's Law and Economics Center for research support.

1 Nicholas J. Johnson, *Self Defense?*, 2 J. L. ECON. & POL'Y 187 (2006).

2 Calder v. Bull, 3 U.S. 386 (1798).

mandated death through trial and conviction of murder later."[3] Note, however, that the court only claimed that it would be absurd to abolish the right of self defense "altogether." It might be objectionable, but it would not be absurd, if a state were to impose on the defendant in a murder case the burden of proving self defense as an affirmative defense. And what if the law required the defendant to prove that affirmative defense beyond a reasonable doubt? That might well be *highly* objectionable, for it would drain the right of self defense of much of its value as a practical matter. But it would not quite be absurd.

Consider another kind of exception or qualification that our legal system makes to the right of self defense. Notwithstanding our usual assumptions about that right, and notwithstanding the Thirteenth Amendment, we have long accepted the right of the government to conscript men into military service and to send them into battle. Nor, so far as I have been able to ascertain, has our Constitution been held to give conscripted personnel a right to fire back when attacked by the enemy, if the commanders judge that military or political considerations make deliberate passivity advantageous to the war effort.

It is true that current military doctrine imposes a vague obligation on commanders to take "all appropriate action" to defend their troops from hostile acts.[4] And there may be some kind of implicit norm, in what is called international law, forbidding governments to "compel what is tantamount to suicide."[5] But it is not difficult to imagine scenarios in which military commanders might reasonably order some troops not to fire back at the enemy, even if such restraint made the troops' survival extremely unlikely.[6] And it is very difficult indeed to imagine our courts finding that military personnel, whether volunteers or conscripts, have a constitutional right to disobey such orders.

In order to see how important the military example is, it's helpful to turn to Thomas Hobbes, the founder of modern liberal political theory.[7] Hobbes, of course, treats the right of self defense as the fundamental principle in his account of politics. In the state of nature, everyone has an equal right to do whatever he thinks will help him survive, including a right to

---

[3] Griffin v. Martin, 785 F.2d 1172 (4th Cir. 1986), *opinion withdrawn and judgment affirmed by an equally divided en banc court*, 795 F.2d 22 (4th Cir. 1986).

[4] Joint Chiefs of Staff Instruction 3121.01, ¶ 5a, *quoted in* Dale Stephens, *Rules of Engagement and the Concept of Self Defense*, 45 NAVAL L. REV. 126, 141 (1998).

[5] *Id.* at 148.

[6] I'll pick just one. Suppose that some Iraqi insurgents, who are holding the Grand Ayatollah Sistani hostage, are firing at American troops who are in an exposed position but who have weaponry and firepower sufficient to crush the insurgents. If an American officer ordered his troops to hold their fire because responding would likely kill Sistani and thereby touch off a major eruption of violence against Americans by Sistani's followers, it would be hard to call such an order unreasonable.

[7] On Hobbes as the founder of liberalism, *see* LEO STRAUSS, NATURAL RIGHT AND HISTORY 165-202 (1953); HARVEY C. MANSFIELD, THE SPIRIT OF LIBERALISM 43-46 (1978).

preemptively kill other people who he fears might kill him. The exercise of this right leads to a war of all against all in which nobody's life is safe. Faced with this intolerable situation, everyone has an interest in agreeing to relinquish the right of preemptive attack and submit to a common sovereign, who has an interest in protecting everyone's life by imposing order and keeping the peace. This agreement is the social contract.[8]

But the motive for giving up the right to preemptive self defense implies that one retains an ultimate right to self defense. That means that there is a kind of residual space for mortal conflict between the citizen and the sovereign. The most important context in which such a conflict can arise involves military service. According to Hobbes:

> [A] man that is commanded as a Souldier to fight against the enemy, though his Soveraign have Right enough to punish his refusall with death, may nevertheless in many cases refuse, without Injustice: as when he substituteth a sufficient Souldier in his place: for in this case he deserteth not the service of the Common-wealth. And there is allowance to be made for naturall timorousnesse, not onely to women, (of whom no such dangerous duty is expected,) but also to men of feminine courage. When Armies fight, there is on one side, or both, a running away: yet when they do it not out of trechery, but fear, they are not esteemed to do it unjustly, but dishonourably. For the same reason, to avoyd battell, is not Injustice, but Cowardice. But he that inrowleth himselfe a Souldier, or taketh imprest mony, taketh away the excuse of a timorous nature; and is obliged, not only to go to the battell, but also not to run from it, without his Captaines leave. And when the Defence of the Common-wealth, requireth at once the help of all that are able to bear Arms, every one is obliged; because otherwise the Institution of the Common-wealth, which they have not the purpose, or courage to preserve, was in vain.[9]

As the rhetoric in this passage suggests, the theoretically most straightforward way to deal with military necessities in a liberal regime is through what we call a volunteer army. But the logic of Hobbes' basic argument about the centrality of self preservation implies a) that conscripts and volunteers are equally obliged to obey orders,[10] and b) that nobody is obliged to obey orders if his interest in self preservation dictates otherwise.[11]

Even if we granted—as the passage quoted above seems to say—that military volunteers relinquish their right to save themselves by running away from battle, and that civilians have an obligation to fight in the ex-

---

[8] For a somewhat more detailed explanation of my reasons for summarizing Hobbes' position in this way, see Nelson Lund, *Rousseau and Direct Democracy (with a Note on the Supreme Court's Term Limits Decision)*, 13 J. CONTEMP. LEGAL ISSUES 459, 466-72 (2004).

[9] THOMAS HOBBES, LEVIATHAN 167-68 (Oxford University Press 1909) (1651).

[10] In addition to the cryptic references in this passage to finding a "substitute" and to taking "imprest mony," see LEVIATHAN, *supra* note 9, at 107, where Hobbes insists that a promise extorted from an individual by fear—such as an agreement, by a prisoner of war or a victim of kidnapping, to pay a ransom—is binding. Similarly, a military conscript agrees to serve in the military rather than be imprisoned or otherwise punished, and this agreement is binding under Hobbes' stated criteria.

[11] *See, e.g., id.*, where Hobbes says that a "Covenant not to defend my selfe from force, by force, is alwayes void." The reason for this conclusion is that the only purpose one can have in relinquishing any right is to avoid death, wounds, and imprisonment.

tremely rare circumstances that require the *immediate* assistance of *everyone* in battle, we would still have to wonder about the many intermediate cases, where the sovereign may find it more or less convenient to use a military draft rather than to hire soldiers. At the beginning of the passage quoted above, Hobbes seems to acknowledge that an individual will often have a natural right to evade battle at the same time that the sovereign has a legal right to order him to fight the enemy. That would mean that the social contract does not solve the underlying problem of the natural war of all against all nearly so cleanly as it may first appear to do in Hobbes' presentation.

I am confident that Hobbes was fully aware of this difficulty, and I suspect that he regarded it as intractable.[12] For my purposes here, the important point is that we should not overestimate what we've accomplished when we establish—as I think Professor Johnson does—that it would be outrageous for our governments to *completely* abolish the right of self defense. As a practical matter, it is probably going to be much more important, and much more difficult, to agree on the *scope* of the right to self defense.

- Against whom may I defend myself, and with how much force?
- How certain do I have to be that I will be attacked before I respond with preemptive violence, and how imminent must the threat be?
- May I defend myself only against lethal threats or also against threats of serious injury?
- May I use force to defend my honor, which I may value more highly than my life?

---

[12] One sign of this is that Hobbes returns to the nagging problem of military service at the very end of this very long book. *Id.* at 548-49 (Review and Conclusion). This passage contains the following arresting statement:

> But if a man, besides the obligation of a Subject, hath taken upon him a new obligation of a Souldier, then he hath not the liberty to submit to a new Power, as long as the old one keeps the field, and giveth him means of subsistence, either in his Armies, or Garrisons: for in this case, *he cannot complain of want of Protection*, and means to live as a Souldier: But when that also failes, a Souldier also may seek his Protection wheresoever he has most hope to have it; and may lawfully submit himself to his new Master.

Id. at 549 (emphasis added). Armies whose soldiers were imbued with this kind of thinking would be the ones most likely *not* to "keep the field" and *not* to provide their members with the protection that comes with victory. Thus, the very kind of selfish focus on one's own safety that tends to preserve the commonwealth by making peaceable citizens is likely to undermine the commonwealth by making ineffective soldiers.

- May a woman use lethal force to defend herself against any rape, or only those in which she faces an imminent threat of death or maiming?

- Do I have a duty to retreat, or may I stand my ground against a criminal attack?

- After I kill someone, how much proof will I need that I exercised my right of self defense within whatever limits the law prescribes?

- Does the right of self-defense include the right to join with one's fellow citizens in order to resist with force the usurpations of a government turned tyrannical, as some have inferred from the Second Amendment?

Depending on how such questions are answered, the right of self defense could be anything from an important element in republican freedom to a useless memento of natural liberty.

That said, I agree with Professor Johnson that the case for recognizing some kind of meaningful common law right to self defense does seem to be very strong. But I'm afraid that I find it more difficult to identify such a right in the Constitution. I cannot offer a detailed discussion of all the arguments that Professor Johnson advances in his paper, but perhaps it will be useful to make a few remarks about what I think are his weakest and strongest arguments.

In my opinion, the weakest argument in the paper is based on the Ninth Amendment, which I gather is being interpreted to guarantee a right of self defense against infringement by both the federal and state governments. I believe this interpretation is untenable. The Ninth Amendment provides:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

This provision says only that it is improper to infer from the recognition of certain rights that others do not exist. The Ninth Amendment does not say what those other rights might be or where they come from, and it certainly does not say how they are to be protected, or by whom. The Ninth Amendment is a companion to the Tenth Amendment, which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Just as the Tenth Amendment affirms that the enumeration of powers in the Constitution is exhaustive, so the Ninth Amendment affirms that the enu-

meration of rights in the Constitution is *not* exhaustive. This makes perfect sense because individual rights and governmental authorities are correlative: if a government does not have the authority to issue certain commands to its citizens, they have a right not be subjected to those commands by that government.

Thus, the Ninth and Tenth Amendments together serve as an emphatic reminder that the Constitution was designed so as to protect a vast number of unenumerated rights from infringement *by the federal government*, namely all those rights that the federal government is not authorized to abridge in the exercise of its enumerated powers. Some of them may be natural rights, some are positive rights established by state law, and some are political rights exercised in the course of establishing state law. The language of the Ninth Amendment does not give a privileged status to any one of these various kinds of rights, and nothing in the Ninth Amendment implies that the federal Constitution guarantees *any* unenumerated rights against infringement by the *state* governments. Indeed, one important right covered by the Ninth Amendment is the right of the people to make decisions about the scope of the right to self defense through their individual state constitutions and state governments.[13]

If reliance on the Ninth Amendment is Professor Johnson's weakest legal argument, his strongest is based on the doctrine of substantive due process, which the Supreme Court has used to protect a wide range of unenumerated rights over a long period of time. This source of unenumerated rights has the disadvantage of being a pure judicial invention, but it has the advantage of being an established part of constitutional law. One of those unenumerated but judicially recognized rights, of course, is the right to abortion, and Professor Johnson suggests that the best argument supporting *Roe v. Wade* and its progeny would be to derive the right to abortion from the more fundamental right to self defense.

This may be a plausible suggestion, though the scope of the right recognized in *Roe* at the very least tests the outer bounds of what could plausibly be thought to constitute self defense, and even the best argument for *Roe* may not be an adequate argument. In any event, the substantive due process argument for recognizing a constitutional right to self defense can be made even stronger if we look at the range of rights that the Court has recognized in this area. Some of them are even more directly derived from an underlying right of self defense than abortion is. Consider, for example the constitutionally protected interest in refusing unwanted medical treatment. At common law, providing medical treatment without consent would

---

[13] For further commentary on the Ninth Amendment, from which much of the discussion here is drawn, see Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1590-93 (2004); Nelson Lund, *A Libertarian Constitution*, CLAREMONT REV. OF BOOKS, Vol. 5, No. 2 (Spring 2005), at 47.

have been a battery,[14] and the Court has repeatedly used substantive due process to require governments to provide a strong justification before they are permitted to override an individual's refusal to submit to medical procedures.[15]

More generally, even the Court's most conservative tests for recognizing a right under substantive due process would seem easily to include the right to self defense. Self defense must certainly be one of "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[16] Under that conglomeration of phrases, drawn from several Supreme Court opinions and strung together by the Court in one of its less elegant English sentences, a variety of rights that are, as a matter of historical tradition, manifestly less fundamental than the right of self defense have been recognized by the Supreme Court, such as the right to marry and have children.[17]

Under the Court's more adventurous right to privacy doctrines, it is even more clear that a right to self defense is logically entailed in substantive due process. In a famous (or notorious) passage in the *Casey* abortion opinion, for example, the Supreme Court announced that it is now protecting "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[18] As Professor Johnson shrewdly points out, "[c]ertainly more basic than *'defining one's own concept of existence'* is *preserving one's existence* from wrongful physical threats."[19] Once again, the strength of his argument depends on assuming the validity of the Court's abortion jurisprudence, which is perfectly respectable way for a lawyer to proceed.

In the end, therefore, I'm pretty well persuaded that Professor Johnson is right to claim that there must be some kind of constitutional right to self

---

14 Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 269 (1990).

15 *E.g., id., see also* Jacobson v. Massachusetts, 197 U.S. 11, 24-30 (1905); Washington v. Harper, 494 U.S. 210, 221-22 (1990); Parham v. J.R., 442 U.S. 584, 600 (1979). *Cf.* Abigail Alliance v. Von Eschenbach, 445 F.3d 470 (D.C. Cir. 2006) (using the fundamental nature of the right to self defense as a basis for concluding that strict scrutiny should be applied to a government regulation forbidding terminally ill patients to have access to potentially life-saving drugs that have been found by the government to be sufficiently safe for expanded human trials).

16 Washington v. Glucksberg, 521 U.S. 702, 720-721 (1997) (citations omitted).

17 Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (children).

18 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992). The Justices are apparently quite proud of this language, which the Court has since quoted with unabashed approval. *See* Lawrence v. Texas, 539 U.S. 558, 574 (2003). For an argument that the Court should be ashamed rather than proud, see Lund & McGinnis, *supra* note 13, at 1575-78.

19 Johnson, *supra* note 1.

defense. It just happens to be one of those constitutional rights—many of which are well-established in Supreme Court precedents and frequently found under the rubric of substantive due process—that come from somewhere other than the Constitution. But whatever the provenance of the right to self defense that is presupposed in a variety of legal contexts, the most important and difficult questions involve its scope rather than its existence.

BEYOND JULY 4TH?: CRITICAL REFLECTIONS ON THE SELF-DEFENCE DEBATE FROM A BRITISH PERSPECTIVE

Peter Squires[*]

INTRODUCTION

The focus of this article concerns the distinctions between broader public policy goals aiming to reduce the likelihood and frequency of violent (gun-involved) encounters and the contexts and circumstances in which these are likely to arise. This is addressed by attempting to consider the circumstances in which people acquire, seek to acquire, demand, and ultimately carry and employ potentially lethal technologies in their day-to-day encounters. The argument developed here is not about the restriction of personal freedom but about maximising freedom from fear and insecurity by addressing the conditions which drive the demand for defensive weapons and the rates of aggressive criminality. In other words, the article discusses the potential for establishing conditions for 'social defence' as necessarily prior to 'self-defence' while considering the extent to which these 'alternative strategies' may be compatible or incompatible.

It is useful here to draw upon an argument which arose in an 1822 debate in the British House of Commons prior to a vote in which a proposal to establish the first uniformed police force for London was *rejected.* Thus, according to Sir Robert Peel in 1822: 'Liberty does not consist in having your house robbed by organised gangs of thieves and in leaving the streets of London in the nightly possession of drunken women and vagabonds" (cited in Emsley 1996). To paraphrase my own argument, neither does it really consist in the right to kill potential aggressors. Rather, real liberty, and the aim of good public policy, should reside in neither needing to, nor seeking to, act in such ways. Cognisant of the fact that this is a symposium on the right of self-defence, and held in the USA, where these things are seen rather differently, and recognising that the right of self-defence is invariably read as a specific 'right to bear arms' of potentially universal mag-

---

* Peter Squires is a Professor of Criminology and Public Policy at the University of Brighton, England, where he has worked since 1986. His interests relate especially to the politics of law and order and cultural differences in approaches to crime and justice. He began researching the issue of increasing rates of gun crime in the UK in 1994 and in 2000 he published a book, *Gun Culture or Gun Control?* (Routledge) comparing British and US responses to firearms control in the light of similar school shooting tragedies (in Dunblane, Scotland, and Columbine). Other substantive areas of his academic work include Police Studies, the management of Anti-Social Behaviour, and Community Safety policy. Professor Squires characterises his work as falling largely within a 'critical criminology' tradition.

nitude, the paper draws upon British evidence to open a debate about how the arguably separate questions of public policy and of self-defence need not be so readily conflated.

The British criminologist, David Garland, Professor of Law and Sociology at New York University, in a widely acclaimed book, *The Culture of Control* (2001) introduced an important distinction concerning the crime control strategies of modern 'high crime societies'. Such societies, he argued, devoted a major share of their crime control efforts to the relatively unsuccessful 'policing' of the consumers of criminal opportunities, while failing to address adequately the supply of these same opportunities. In this article, I am adopting a similar perspective on the question of self-defence. From a British point of view, a social order based upon mutual dangerousness appears neither safe, nor free, nor particularly desirable.

SELF-DEFENCE OR SELF-DEFENSE? [1]

I approach this topic from the perspectives of criminology, social science and public policy rather than law, posing, quite possibly, some rather different questions about contexts, motivations and responses—and from a British perspective—than might be raised by an American legal scholar. The cross-cultural contrasts between the UK and the USA (in terms of popular attitudes to firearms and to conceptions of the 'right to self-defence') have often been the most fascinating issue of all for me, but they are real and can seriously affect attempts at 'policy transfer'. After all, divided by a common language, we even spell the phrase differently (defence/defense) so are we really even discussing the same issue? The very notion that one can simply 'cherry pick' aspects of a culture and expect them to 'work' successfully in a new environment is anyway rather suspect. The old adage about how to behave 'when in Rome' springs to mind as both a guide and a shield. It would be foolishly naive for any 'non resident alien' to lecture Americans on the way that their self-defence laws might be altered or improved. Yet, that said, it has been no less bizarre to read of equally naive proposals from a number of US (and Canadian) scholars and commentators (some of whom probably ought to know better) about how British rates of crime and violence might be more effectively addressed if only the citizenry were better armed (for example: Roberts 2001; Mauser 2003; Norrell 2005).

In the UK, however, the self-defence issue per se has not generally been a question of the access to weapons—at least it has seldom been *only* or *primarily* about weapon ownership and use. Rather, when considering self-defence actions, the key issues have centred upon questions concerning the intended victim's perception of the threat encountered and his or her 'reasonable' use of 'proportionate' force. In other words, in Britain a distinction has generally been maintained between the assessment of perceptions and behaviour in given situations and the public policy priority which

has sought to reduce overall weapon availability and use. Commentators sometimes fail to spot this important distinction. For example, while Malcolm (2002) makes a telling analysis of the increasing presumption against weapon carrying in British law, addressing in particular the 1953 *Prevention of Crime Act* and the 1967 *Criminal Law Act*, she (like a number of the politicians she cites) conflates the two issues: on the one hand public policy regarding weapons and on the other self-defence rights. The legislation she criticises as an infringement upon the rights of the 'freeborn Englishman' was also the legislation used to disarm youth gangs, racist thugs, skinheads and football hooligans (Hall and Jefferson 1976; Cohen 1979; Buford 1991) of their sharpened steel combs, studded gloves, bracelets and belts, steel toe-capped boots and bicycle chains (in other words, a range of items all with potentially legitimate uses but invariably adapted to cause injury). However even when actual self-defence incidents have occurred, the courts have often found in favour of the person moved to employ a weapon (any weapon) in self-defence provided it is satisfied that the force exerted was reasonable in the circumstances and proportionate and that the person employing the self defensive force believed he or she had few alternative courses of action. Likewise, the Director of Public Prosecutions, in response to media questions on the law of self-defence noted that prosecutions for householders tackling intruders 'are very rare' with only a few undertaken in the past 15 years and even then, only when the circumstances were exceptional or the force used excessive (DirectGov.news: Feb 1st, 2005). In practice it appears that the British courts have been generally sympathetic to 'genuine' self-defence cases, holding to the Holmes doctrine ('detached reflection cannot be demanded in the presence of an uplifted knife') while the public have tended to view self-defenders even more favourably. This approach is eminently more sensible and, it will be argued, markedly preferable to other, rather more (impossibly) abstract and formulaic notions. As an example of the latter, Nozick's formula has been both a source of some amusement and an illustration of an approach perhaps best avoided:

> All other things being equal, one may use more force in self-defense against someone whose **r** is greater than zero . . . [Therefore] one may, in defending oneself, draw against the punishment the attacker deserves (which is **r x H**). So the upper limit of what one may use in self-defense against a clear doer of harm is **f(H) = r x H**. When an amount A in addition to **f(H)** is expended in self-defense the punishment which later may be inflicted is reduced by that amount and becomes **r x h –A**. When **r = 0**, **f(H)+ f x H** reduces to **f(H)**. Finally there will be some specification of a rule of necessity which requires one not to use more in self-defense than is necessary to repel the attack. If what is necessary is more than **f(H) + r x H**, there will be a duty to retreat. (Nozick 1974: 63)

Furthermore, precisely because the Holmes' formula ('detached reflection cannot be demanded in the presence of an uplifted knife') is more real, more human, and based upon what are, arguably, 'instinctive' reactions rooted in the messy reality of human needs and perceptions, it may not

be susceptible to precise statement or regulation. An interpretation of the motive of the actor will always be required. In this sense, the right to self-defence becomes a question not unlike a right to breathe. It is what one does. The real question becomes one of the circumstances under which one does it and the means employed.

In the USA, by contrast, the question of self-defence seems rather more intimately connected with the question of firearms themselves. One does not have to read too closely between the lines to see this. The British distinction between a public policy issue and a self-defence rights issue, outlined above, appears not to exist in this fashion in the USA, for, as a matter of prior public policy, many states specifically permit the civilian ownership of firearms ('shall issue' concealed carry statutes) for purposes of self-defence and public crime reduction. So much of the public policy agenda is given over to discussing directly the question of the Second Amendment, in terms of its essential constitutional and legal legitimacy, rather than its (arguable) subsidiary crime reduction utility. Yet the 2nd Amendment, notwithstanding contrasting interpretations, is understood by its supporters as creating a generic public presumption of firearm availability in the service of public purposes. This is manifestly not the case in the UK and relatively few UK citizens appear to subscribe intuitively to the '*more guns = less crime*' equation. One might begin to discern a reason for this collapsing of the policy question into the self-defence question in US discourse in the work of Zimring and Hawkins (1997), when they argue that "Americans use the terms 'crime' and 'violence' interchangeably. When expressing concern about urban conditions we commonly talk about 'the crime problem' or 'the violence problem' as if they were the same thing" (1997:3). It is plausible to argue, therefore, that where common sense, common parlance and popular conceptions of criminality so conflate violence into crime, then all criminals become potentially malevolent aggressors and all crime a question of self-defence whereby a gun becomes an essential prerequisite of modern living. A case of life imitating *Resident Evil*, perhaps?

None of this is to suggest that there are no important relationships between crime, and firearms and self-defence in the UK—or even that these relationships are not becoming more significant. It is simply that (as I hope to demonstrate), these relationships are not constituted in the same fashion as they are in the USA. For example, firearm related crime represents a mere 0.17% of all recorded crime in England and Wales. The number of murders may have risen slowly and steadily to around 850 per year but only a relatively constant 10-12% of these are attributable to the criminal use of firearms (79 gun homicides in the year ending Sept. 2004—no change on the previous year).

As a social scientist (rather than a lawyer) I feel it imperative to explore the contexts within which the recent debate about self-defence rights has arisen in the UK before moving on to speculate upon the options for

public policy development. Arguably, part of our problem has been that commentators have often been too ready to propose solutions without an adequate analysis of what the real issues are. This often happens in ideologically driven controversies—ideologically driven putative 'solutions' go off in search of problems. Rather than adopt this approach, I am going to start with a tried and tested social scientific method and attempt to convey to you what our problems might be. Consequently, in the first part of this paper I intend to discuss the contexts out of which the 'self-defence' debate arose in the UK, before moving on to consider the various ways in which this debate was understood and interpreted. This is an essentially sociological approach to firearms which I attempted to develop in an earlier work (Squires 2000) and where, I argued, any attempt to comprehend the role and significance of firearms had to be "contextually, culturally and ideologically determined. This is not a retreat into relativism, but simply a recognition that there is unlikely to be a single truth, a single solution or right answer to the problem(s) of the gun" (ibid: 204). In this paper an attempt is made to approach the question of self-defence in the same manner. Having set up the discussion in this fashion, I will finally move on to reflect upon the wider lessons which might be derived from this British illustration in order to enjoin with the broader themes of this symposium.

IGNITING THE DEBATE IN BRITAIN

A series of questions surrounding the claimed right of self-defence (in English law and legal culture) have arisen within the UK in the context of a number of incidents and developments. But by far the most significant single development igniting these public debates has been the Tony Martin case. In a number of respects, however, it might be considered surprising that the Martin case ever really arose as a 'self-defence' cause-celebre at all. Nevertheless, the case was frequently represented within an ideological narrative: 'An Englishman's home is his castle'. This was a rather tragic story of a beleaguered Englishman defending his home although, on closer inspection, the story actually corresponds rather more closely to what, in the USA, might be described as a 'fleeing felon' shooting (Brown 1991). And there were a number of other issues.

Tony Martin was an elderly tenant farmer living in a run down cottage on a dilapidated farm in rural Norfolk. In the past, both he, and a number of his neighbours, had been victims of a series of repeat burglaries. The perpetrators were believed to members of a group of traveller families who returned periodically to the area. There seems little doubt that Mr. Martin firmly believed that the burglars, having returned to the area, were going to pay him another visit. At the time of the trial there were also suggestions that threats had also been made to the effect that these people were going to 'get' Mr. Martin. That said, during Mr. Martin's eventual trial, psychiatric evidence was presented showing he suffered from a long standing paranoid

personality disorder, and this rather complicated the answering of important questions relating to Mr. Martin's 'genuine fear' and assessments of his 'proportionate' use of 'reasonable' force. Nonetheless, Mr. Martin clearly had a long-standing grievance with his local police, whom he accused of taking neither his earlier complaints nor the more recent threats sufficiently seriously. Accordingly Mr. Martin resolved to take matters into his own hands. He attempted to secure his property by building traps and rigging up look-out posts and hideouts in nearby trees. He also removed the lower part of a flight of stairs in his cottage. He then concealed himself in a hiding place armed with a pump-action shotgun (illegal in Britain since 1988).

In due course two intruders did arrive, gaining entry to the cottage by forcing open a ground floor window. When they entered the room Martin confronted them with his gun. The intruders panicked and tried to escape. Martin shouted no warning nor tried to detain them but fired at both as they sought to escape. Both were hit in the back, one man died and the other was seriously injured. Aside from the question as to whether the force used was 'proportionate' and 'reasonable' and notwithstanding Martin's genuine belief that he was in danger at the moment he pulled the trigger, the case also illustrated the point that self-defence could only be cited as a defence if the defensive (or aggressive) actions taken were relatively spontaneous. Here, the fact that both men were shot from behind and the evidence of Martin's planning and premeditation did not help the claim of self-defence during the subsequent murder prosecution. Martin's plight elicited much sympathy and many people, including the then Leader of the British Conservative Party, people living in rural areas where police resources were thinly stretched and victims of persistent crime, criticised the decision to prosecute. In due course, almost a year later, following a trial conducted in the full glare of the media, Martin was found guilty of murder and sentenced to life imprisonment (in the British criminal law 'life' is the mandatory sentence for murder although the trial judge often recommends a minimum tariff). The case was appealed to the Court of Appeal, where the evidence of Martin's psychological condition was emphasised to enable the Court to reduce the murder conviction to a manslaughter conviction, thereby allowing the imposition of a substantially reduced sentence. Martin was released in 2003 after approximately three years of imprisonment.

THE BACKSTORY

The Martin case certainly brought the question of self-defence to a head in the UK although it was far from being the origin of the issue. My concern here is not primarily with the specific legal history, what Malcolm (2002) has described as the historical erosion of the English right of self-defence, but rather with the self-defence issue as a salient political question surfacing in popular consciousness, extensively debated in public and political discourse, in Parliament and the mass media. There is a difference.

Malcolm and other commentators have described the growing presumption against armed self-defence in Britain as a virtual 'conspiracy of silence' to disarm the British public by administrative fiat (Malcolm 2002; Greenwood 1972, 1996; Law and Brookesmith 1996). As Colin Greenwood, former editor of *Guns Review*, put it in 1995:

> "the right to keep guns for the defence of one's home has not been removed by law, but by an ongoing conspiracy between the police and civil servants, doubtless fully supported by some politicians. It has never been the subject of debate, study or consideration beyond the corridors of Whitehall" (Greenwood 1995).

It is not my purpose or intention here to disagree with this interpretation of the 'erosion of the right of armed self-defence' the point is simply that, in the wake of the Tony Martin case, the self-defence issue did become a major item of public and political discourse, it surfaced as a (failed) amendment to a new Criminal Justice Bill being debated in Parliament, featured as a key theme in the political advertising and campaigning of the British Conservative Party during the 2005 General Election, was extensively commented upon in the press, and ultimately resulted in the issue of new guidance, purportedly clarifying the law on the 'proportionate use of reasonable force in self-defence', by the Home Office, Police and Crown Prosecution Service.

In the UK, discussion of self-defence is not inevitably and exclusively a question of firearms. That said, there are many very obvious reasons for access to personal protection firearms being considered, in many other contemporary cultures, a primary association. At the level of the individual, access to an affordable, personalised, easily portable, reliable, simple to operate, convenient, safe (for the user), relatively instantaneous and potentially lethal (to an aggressor) hand-held tool probably meets the ideal design brief for a personal self-defence technology. But of course, in 'last resort' situations, or in societies where, either as a matter of culture or as a principle of broader public policy, handguns are not widely available, people will generally resort to anything that comes to hand, including their own hands an feet, to resist an attacker. Yet even in cultures, such as Britain, where handguns were, after WW1 at least, seldom widely available and, since WW2, increasingly disallowed for personal defence, discussion of self-defence often turns to questions of firearms. And likewise discussion of gun control often throws up questions of self-defence. That said, and in the light of more recent debates, the self-defence arguments were remarkable by their absence in 1996-7 during the deliberations following the Dunblane school shootings. At this time most British shooters were very careful to develop a case almost entirely focussing upon the preservation of sports shooting (Squires 2000). Recognising the very 'class divided' character of the different UK shooting disciplines, there are grounds for suspecting that this may have been part of a political tactic employed by the rather more established and elite sections of the UK shooting fraternity designed to in-

sulate their sport from the more recent, less well established and more 'downmarket' handgunners. In other words, handgunning was 'sold out' in an effort to keep the critical spotlight away from the 'more legitimate' and rural-traditional shooting activities of a rather better class of persons (Ibid.).

Even in the UK, where handguns are prohibited in private ownership there is still the question of the Northern Ireland exception, or anomaly. When the handgun prohibition legislation of 1997 was introduced for England, Scotland and Wales, Northern Ireland was exempted. In the wake of the 'Troubles' in that part of the UK, there are still thought to be in excess of 11-12,000 personal protection firearms held by specified private citizens considered to be at risk from terrorism or paramilitary retaliation (Penn 2005). Whatever view we might take regarding the prohibition of handguns in mainland Britain, the NI exception drives a coach and horses through the presumptions of disarmed citizenship which form the basis for the civilian handgun prohibitions of the rest of the UK. It concedes precisely the point made by advocates of armed self-defence—the utility of the personal protection firearm. If the judgement made in respect of Northern Ireland is that, in an especially risky and troubling environment, personal protection firearms have some positive utility, then the problem for the rest of the country is merely one of degree (How dangerous UK society has become? How great the need for protection? How much one can rely upon the Police?) rather than a matter of fundamental principle.

As we will see, there are further ambiguities relating to guns and self-defence in the UK's history of firearms control. However, firearms have not been the only dimension to the self-defence debates arising in the UK. They were certainly neither mentioned nor envisaged in the recent re-issue of Home Office guidance on 'proportionate' and 'reasonable' use of force in pursuance of self-defence, yet whenever questions of self-defence are raised, the firearm question never seems very far away. This was emphatically the case in the Tony Martin case for, as we have seen, he killed his would-be burglar with a shotgun and this inevitably aligned, once again, the self-defence question with the gun control question.

Yet, while the Martin case provided the incident which launched a thousand editorials, the event itself and the reaction to it, can only be understood in a wider context. Indeed, it can—and probably should—be argued that, the Martin case incited such a reaction precisely because it touched a nerve in popular consciousness.

THE SELF-DEFENCE DEBATE IN THE UK: THE WIDER CONTEXTS

This wider context for the emergence of the UK self-defence debate will include a number of factors relatively familiar to a US audience. Writing over 20 years ago, and referring to the demand for self-defence handguns in the USA, McDowell and Loftin reported findings suggesting that:

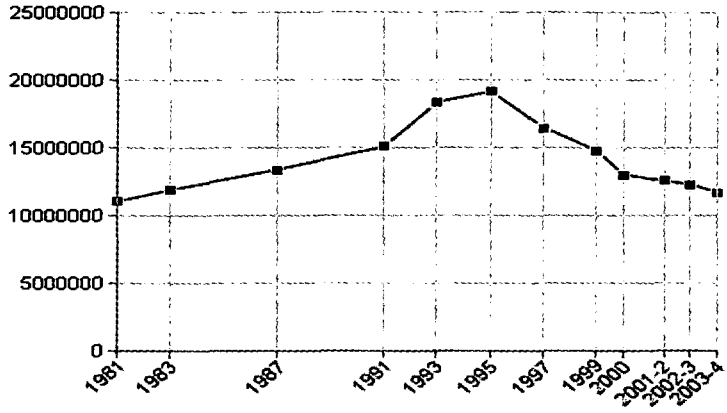
> "the demand for legal handguns is positively related to riots and crime rates and negatively related to a measure of resources devoted to collective security, the number of police per capita. We interpret this as evidence that legal handgun demand is responsive to evaluations of the strength of collective security" (McDowell and Loftin 1982: 1,147).

Such associations have been confirmed in a wide range of subsequent scholarship (eg. Kleck 1991: 27-33; Kleck 1997: 191-98; Sheley and Wright 1995). Similar factors also relate to the UK.

CRIME RATES AND CONFIDENCE IN THE POLICE AND CRIMINAL JUSTICE SYSTEM

During the decade and a half after 1980, recorded crime in Britain rose at an unprecedented rate, climbing from just over 2.4 million recorded offences to around 5.5 million (Wilson and Ashton 2001: 4-6). The growth in recorded crime is matched by similar rates of increase reported in the British Crime Survey. This Survey began in 1982 and now takes place on an annual basis, utilising a sample base of 40,000 respondents, reporting their experiences of victimisation over the past 12 months. Although there are known weaknesses in the Survey design (for example, it concentrates almost entirely upon personal victimisation but offences against young people under 16 are not included) it has consistently revealed that around 50% of crime incidents are never reported to the police in the first place. Therefore we can corroborate the rapid growth in crime in the 15 years after 1980 but also show that public experiences of crime were far more familiar and even more endemic than the rates of crime recorded by the police might suggest. Since the mid 1990s, however, the trends for both police recorded crime and BCS reported crimes began to fall.

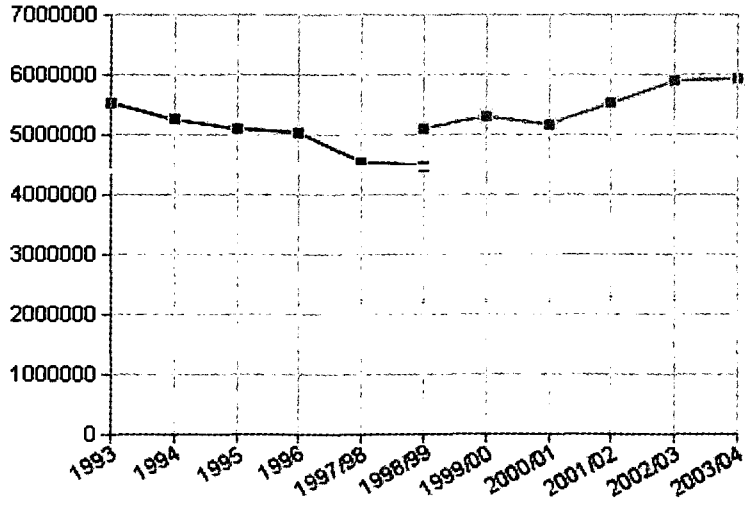
Figure 1: Total Crime Reported to the British Crime Survey: 1981-2003/04



Source, Home Office, 2005 [http://www.homeoffice.gov.uk/crime-victims/crime-statistics/]

By 1997, the year before a range of new offence categories were introduced and before the full operationalisation of the National Crime Reporting Standard (in 2002), the police had recorded 4.7 million crimes and corresponding reductions in crime were being reported in the annual BCS surveys.

Figure 2: Total Crime Recorded by the Police: 1993-2004



Source, Home Office, 2005 [http://www.homeoffice.gov.uk/crime-victims/crime-statistics/]

As Figure 2 shows, the full impact of the NCRS was not felt until 2002, since which time it is thought to have inflated rates of crime recording by 10%. The new crime recording system is undoubtedly more accurate than its predecessor especially as it has been designed to capture more effectively the impact of crime upon victims and, along with changes in police recording practices, certainly reflects more accurately current levels of inter-personal violence. So although the data (and the graph) suggest a seven per cent rise in total recorded crime in 2002/03, this actually represents a three per cent fall when the impact of the National Crime Recording Standard (NCRS) is taken into account. The diagram above does not take account of this NCRS impact.

There is convincing evidence of year on year overall reductions in total crime in the late 1990s and especially the past five years, with year on year *reductions* in crime being reported within a 3–7% range. Home Office national crime reduction priorities focusing on a series of 'target' high volume crimes all show significant and sustained reductions: domestic burglary, vehicle theft and violent crime (Allen and Wood 2003). Rates of street robbery had seen relatively steep increases in the late 1990s, especially relating to the theft of mobile phones and personal stereos, but even these offences now reveal significant reductions following a new national 'street crime initiative' launched during 2002. However, although reports of violent crime appear to be falling according to the BCS, people are continuing to report more violent crime, both serious and minor, to the police. This almost inevitably fuels considerable, though often relatively uninformed, media debate. While the Home Office rightly claim that a large part of such increases will be attributable to improved recording practices, it is nevertheless important to register the especial significance of violence in shaping public fears and perceptions (Zimring and Hawkins 1997)

There are a number of explanations for the scale of increase in violent crime reporting and the disparity with BCS trends. First, the NCRS has undoubtedly inflated the levels of reporting and recording of interpersonal violence—it was intended to achieve precisely this. In particular, rates of recording of historically under-reported categories of domestic and acquaintance violence and sexual and racially motivated offences, including 'hate crime' offences are now increasing. Secondly, the BCS, as noted earlier, does not address victimisation of people under the age of 16 whereas young people suffer the highest rates of violent victimisation.

Taken together these trends confirm a picture of falling overall crime in England and Wales, with the possible exception of violence, following a period 1980-1994 during which crime rose rapidly. Keen to give the more recent figures a positive political spin a Home Office minister commented:

> "We are witnessing the longest sustained fall in crime in living memory, with people less likely to be a victim of crime today than since the British Crime Survey started more than 20 years ago" (Hazel Blears, Home Office Press Release 21 Oct. 2004).

To complete the picture, the British Crime Survey data indicated that levels of fear of crime, regarding both overall crime, and specific crime types (violence, burglary, vehicle crime) had all fallen compared with previous years (Allen and Wood 2003: 6) although concern about particular categories of 'disorder' (anti-social behaviour, nuisance and incivilities) appeared unchanged (to some degree there are a set of peculiarly British issues wrapped up in this 'anti-social behaviour' problem which, has been discussed elsewhere: see Squires and Stephen 2005). Finally, while crime and fear of crime might be falling, confidence in the criminal justice system appeared to reveal a continuing decline. Although just under two-thirds of people surveyed described themselves as satisfied with their personal encounters with the police, people with no actual experience of police contacts were less likely to think they were doing a good job (Finney 2004).

DISORDER AND SOCIAL CONTEXT

In the 1980s and early 1990s the rising rates of crime and disorder in the UK are generally attributed to a complex of social changes impacting especially upon the family life, living conditions, educational experiences and the opportunities and life chances of a generation of children and young people. These issues have been particularly problematic for young people growing up in the lower and relatively unskilled socio-economic groups and especially acute those living in more traditional working class areas, or the inner cities. Race and racism has frequently exacerbated the resulting experiences of social exclusion and political and economic marginalisation. The 1980s began with major riots in a number of British cities in which the breakdown of consent between the police and inner city black and minority ethnic populations was evident for all to see (Scarman 1981). Widespread rioting occurred again in the middle of the decade whilst a large part of 1984-85 was taken up with a protracted miners' strike which saw the development of a particularly confrontational policing approach as the government sought an emphatic victory over the Trade Unions to facilitate the restructuring of the UK coal industry (Coulter, Miller and Walker 1984; Beynon 1985). In the process, thousands of jobs were lost and the economic viability of whole communities destroyed. In practice, however, events in the coal industry were simply a more abrupt and confrontational version of the process of change in a number of the UK's heavy industries (steel production, car manufacturing, ship-building).

A number of writers have described the 'hard' masculinity (and the associated values and culture) forged within traditional working class industrial lifestyles and the displacement and crystallisation of these values (heavy drinking, 'manliness', competitiveness and self-centredness, aggression, risk-taking, pursuit of instant gratifications and casual violence) into criminal activity once mainstream employment opportunities ceased to be available (Newburn and Stanko 1994; Hobbs 1994; Hall 1997; Collier

1998). Summarising these socio-economic changes associated with the dawn of 'late-modernity': profound labour market restructuring, growing inequality, increasing dislocation of youth and especially the virtual collapse of the unskilled youth labour market have laid the foundations for a highly unstable political culture. Commentators have spoken of 'lost generations', 'status zero' (Williamson 1997), 'wasted lives' (Bauman 2004) and the 'manufacture of criminal careers' (Ruggiero 1994). The impact is not just felt in relation to rising rates of crime, but in broader fears, insecurities and intolerances (Young 1999) and as we shall see, a marked demonisation of the young people caught up in these transitions.

Developing this picture, around 1990, a number of commentators (including Charles Murray whose work sought to draw parallels between the USA and the UK) revived the 19th century concept of an 'underclass' to describe the new social divisions emerging in late modern Britain (Murray 1990; Mann 1992; Morris 1994; MacDonald 1997). Social scientists and policy analysts debated the precise meanings attributed to this notion of an underclass and the degree of its relative deprivation, judged in terms of mainstream lifestyles and opportunities (Dean 1991; Smith 1992). Others engaged directly with Murray's largely pejorative and personalist account of the social and moral failings of the poor (Field 1989; Lister 1990; Byrne 1999) favouring more structural and determinist explanations located within the social and economic transformations occurring in late 20th Britain, changes that the Thatcher Governments after 1979 had, in many ways, sought to accelerate—with long term consequences (Brake and Hale 1992; Campbell 1993; Jones and Novak 1999).

Notwithstanding the precise causal combinations offered by the rival schools of thought (which, in due course, were to be transformed by administrative—or 'fixit'—criminology into a manageable series of risk and protection factors and antecedents: Graham and Bowling 1995; Farrington 1996; Audit Commission 1996) the late 1980s and early 1990s bore witness to an undeniable sense that Britain was becoming increasingly disorderly, disrespectful, challenging and insubordinate. A large part of the time this charge was levelled at the seemingly increasingly intolerable behaviour of young people: 'yob culture' (Pearson 1983; Davies 1986; Furlong and Cartmel 1997; Brown 1998; Muncie 1999a, 1999b; Measor and Squires 2000). Later, in the wake of the 'Broken Windows' criminology (of Wilson and Kelling, 1982) and 'zero tolerance' policing initiatives, British policy makers began to acquire, from the USA, a language, a political rationality and modes of intervention to begin to address the question of these widespread incivilities becoming so intolerable to middle-England. By the mid 1990s, these issues had crystallised into the now very dominant British 'Anti-Social Behaviour' agenda which many have argued has represented something of a virtual crusade for Prime Minister Tony Blair (Home Office 2003; Grier and Thomas 2003, Blair 2004; Tonry 2004; Burney 2005; Squires 2006).

A colleague and I have recently explored the evolution of the ASB agenda in the UK (Squires and Stephen 2005). Briefly put, our argument is that, while there is obviously very little that is new about youth and juvenile misconduct (Pearson 1983), the novelty of ASB relates primarily to the enforcement opportunity it defines and then provides. We have argued that, implicit in the recent establishment of ASB as an enforcement point, there lies a profound criticism of the resourcing, prioritisation and activities of existing police and crime prevention agencies. Detailed scrutiny of many of the activities now said to constitute ASB reveals that many of them already comprised criminal acts (criminal damage, graffiti, verbal abuse, drunken and disorderly behaviour, harassment and intimidation, obstruction and so on) (Home Office, Research and Statistics Directorate 2003). The problem has been that none of these activities, in themselves, constituted 'serious crime or disorder' and consequently they received relatively little priority or resources in police and criminal justice terms. Where the perpetrators were under sixteen, the police, reflecting their apparently longstanding lack of confidence in the sanctions available for minor juvenile offenders (Loader 1996; Faulkner 2001), often appeared doubly reluctant to intervene. This is said to have helped cultivate a culture of 'impunity' whereby young people were said to believe they could do pretty much as they liked without a fear of the consequences (Campbell 2002).

In the traditional framing of the problem, what was lacking was any means of addressing the *cumulative* impact of a range of nuisance and anti-social behaviours (Hansen et al. 2003). The criminal justice system typically responds to individual acts of nuisance or disorder (or rather, the problem was that it did not do so, especially when these acts were individually fairly trivial) but lacked any means of registering the accumulating impact, of disorder and anti-social behaviour, endured on a daily basis by victims. As a key component of the Blair Government's Crime and Disorder Agenda had been precisely to reorient criminal justice services around the needs of individual victims and victimised communities, this problem was considered a serious shortcoming. Hence the new methods of ASB enforcement were to be victim centred, pre-emptive and flexible and, importantly, allowing 'hearsay' witness and victim testimony, subjective assessments of impact and requiring of a lower standard of proof than the usual 'beyond reasonable doubt' threshold applicable in criminal cases. Successful 'prosecutions' were rewarded with a range of penalties similar to injunctions, curfews, exclusions and banning orders (supported, in the event of breach, by tough custodial sentences of up to five years in the case of adults) (Brown 2004; Squires and Stephen 2005; Burney 2005). Set in this context, the Tony Martin case might appear in a rather different light.

AN ALTERNATIVE PERSPECTIVE ON THE PERCEIVED NEED TO FIGHT

From a police point of view, perhaps the eccentric, rather dishevelled and decidedly miserable old farmer was always complaining about intruders on his land. He seemed to have a particular grievance about the travellers who camped nearby. He lived miles from anywhere and, on the occasions that police had attended, by the time they'd arrived, any intruders were long gone. Sometimes, in between complaints about how long it had taken them to get there, the old man would show the attending officers some damage that he said had been done or he would complain of items stolen. Who could tell? The whole place was a rundown mess anyway. He seldom followed through with reporting a complaint.

There are probably many versions of a similar narrative in cases involving domestic violence (Dobash and Dobash 1992), racial harassment (Cashmore and McLoughlin 1991) youth victimisation (Canada 1995; Loader 1996) or hate crime. Narratives arising in a variety of settings, rural areas, notorious 'sink' estates, inner city ghettos, problem neighbourhoods (Campbell 1993) and the like, where policing practice—street-level policing—no doubt reflecting police officer estimations of the value of the local citizenry, took on forms seldom reflected in any official manual (Skolnick 1966).

Accordingly, just like Martin, many residents are forced to fend for themselves—self-defence—relying upon family, friends, relationships, strategic alliances, 'reputation', 'front', 'bottle', personal skills and resources but also weapons. Criminological scholarship has only relatively recently begun to take seriously, once again, these interior worlds of perception and risk in relation to people's motivations and coping strategies. To do so is to explode some of the fallacies inherent in the supposedly consensual and all-inclusive 'community' driven crime prevention discourses of recent times (Jefferson and Hollway 2000; Measor 2006). As Lacey and Zedner have argued there is an intriguing contradiction between "the demise of community and the growth of its rhetorical appeal" (1995: 301). Yet notions of community entail inclusion and exclusion, not everyone will share equally in the experience of collective security and individuals will need to make their own personal adjustments and compromises. People have always relied (and will probably always need to rely), upon others, upon unofficial and illegal practices, defences and personal precautions.

In the past one form this has taken has involved vigilantism, which as Brown has argued, "arose as a response to . . . an absence of law and order . . . the normal foundations of stable orderly community" (1975: 94). In more recent times criminologists and social scientists have been unearthing new evidence of a revival of modern vigilantism (Johnston 1996), flourishing in the very social conditions which encourage a more frequent resort to self-defence: growing lawlessness, the perceived fragmentation of communities, heightened perceptions of risk, widespread fears, diminishing confi-

dence in the police and public authorities. Many of the resources for safety and security adopted by people in such 'risk' situations relate to the somewhat more benign factors that community development commentators tend to refer to as 'social and cultural capital' (friendships and reciprocities), but equally, insofar as we are concerned with questions of personal capacity, security and physical empowerment (Clancy 1994), then resources, skills and technologies—including weapons—also come into play.

The insights of 'strain theory' might illuminate this issue (Downes and Rock 2003: 144-54). Thus we might argue that the social contexts giving rise to an increase in the frequency with which individuals perceive a need to resort to 'exceptional' measures (perhaps either flight, self-defence or violent retaliation—weapon facilitated or not) in social interactions believed to be threatening indicate a range of cultural and normative strains and contradictions wherein an individual's expectations of a safe and orderly collective existence are frustrated by (perceived) signs of chaos all around and few reassurances that the authorities are able or willing to help. We might draw a parallel here with the allegedly growing incidence of 'road rage'. Here, for example, the car culture values, accentuating the freedoms of the open road, run headlong into traffic jams, congestion and the impossibility of finding a parking space when everyone else seeks to drive at the same time. The anticipated benefits of swift and trouble-free journeys are denied and tempers fray as the reality fails to match the expectation—or the advertisement. Such contexts are obviously culturally specific. There are profound differences of which we need to be aware when moving between cultures.

Making this very point, although from a US context, Alba and Messner, in a review of Gary Kleck's book *Point Blank* speculate upon the consequences for, and psychological well-being and quality of life of, a society of citizens 'armed and dangerous to one another':

> "We wonder about the quality of life in the kind of society where routine social order depends upon the massive armament of the citizens . . . what is the psychological effect on a community's residents of the knowledge that many guns are in its homes, on its streets, and even in its schools. These are the conditions in many urban inner-city, minority communities in the USA, and a great deal of persuasive personal testimony . . . indicates that fear is the dominant emotion inspired by the pervasiveness of guns and gun crime" (Alba and Messner 1995: 208-209).

Above all, this suggests a self-fulfilling prophecy, of guns acquired to empower and reassure in a culture believed to be awash with guns, although it is surely stretching a point to imply that 'routine social order' actually depends (entirely—on a daily basis) upon widespread gun-ownership. But it does describe a (hypothetical) context and a set of anticipated relationships in which carrying a concealed firearm for personal defence might have some personal and collective utility. Furthermore at least the members of such a society or community have a somewhat better chance of

knowing where they stand. The implied cultural reality is admirably captured in the beguiling bumper-sticker fiction that 'an armed society is a polite society' although even here there is strain and contradiction. After all politeness itself is said to be another endangered civic virtue. It is quite a different matter where outsiders are concerned. A recent advertisement (possibly familiar to many at the symposium) posted in English national newspapers during October 2005 and sponsored by the *Brady Campaign* and *Shootfirstlaw.org* appealed to British tourists: "Thinking about a Florida vacation?"

The advertisement continued, "a new law in the Sunshine State may encourage Floridians to 'shoot first' when they feel threatened. In Florida, avoid disputes that could escalate into violence. Use special caution in arguing with motorists on Florida roads.' The advertisement presents a rather chilling scenario, scarcely representing Florida or its citizens in a favourable light or as an attractive holiday destination. The *ShootFirst* website depicts the state as a culture endangered by the 'short-tempered and trigger-happy'. Yet not unlike many other controversies in the US gun debate, the immoderate language of the campaign literature betrays a fundamental clash of values, philosophy and ideology rather more than it suggests constructive debate about community safety and effective public policy.

From my perspective there seems an intriguing parallel between the British government's attempt to address the problem of anti-social behaviour by pre-emptive forms of enforcement and the so-called 'Shoot First' Law. The defining characteristic of ASB is that it is behaviour which 'causes alarm, fear and distress' to third parties, whereas the new Florida Law confers a right to the use of force, up to and including deadly force, and removing a 'duty to retreat' where a serious threat to the person (or third party) is perceived. Both British and American new laws deal in the 'perceptions' of those on the receiving end of the aggressive, disorderly or threatening behaviour, perceptions which may ultimately be tested in court. These are similar kinds of problems located in fundamentally different contexts and it is the values populating these contexts (and, no doubt, the availability of firearms) which makes the differences. The British model is apparently premised upon the avoidance of lethal encounters and an assertion of collective principles of security (this has the consequence of endangering some exposed and victimised individuals from time to time), the Florida approach, by contrast, privileges a more individualistic right to resist aggression with lethal (if necessary) force. This, on the other hand implies that, from time to time, some people will be shot and killed. The sponsors of the Florida law no doubt hope that such victims will all be criminal aggressors, rather than bystanders and innocents, and not just people unlucky enough to pick an argument with, or dent the fender of, someone all too 'short-tempered and trigger-happy'. Given this, Tony Martin's mistake was to assert a putative American right in an English context, although for the reasons referred to already, he might still have lost his case. Martin shot a

fleeing felon in the back and might therefore have had difficulty arguing that he faced an imminent threat.

IMITATING SELF-DEFENCE

If Tony Martin's case was the watershed from which recent British preoccupations with self-defence rights flowed, it was also a rather untypical case in a number of important respects. Mr. Martin's situation was relatively unusual in that he actually owned a gun and used it, although this was not the first occasion that someone had been driven to such measures. Well before the Martin case, another incident had attracted a degree of notoriety in 1988. This case involved an elderly Derbyshire gardener who had grown tired of the thefts from and vandalism to his vegetable garden. He concealed himself overnight in his garden shed and, when thieves attempted to break in, fired at them through the wooden door. One man was seriously injured and the gardener was prosecuted. As in the Martin case, the story attracted attention for its human interest angle and especially because it conformed to an ongoing complaint about police ineffectiveness and unresponsiveness. At trial, the old man was found not guilty of intentional wounding, public opinion seemed firmly on his side throughout and, as it later transpired he also had an ally on the judge's bench. Interviewed on a TV show examining the question of self-defence in British law several years after the case, the trial judge expressed the view that a firearm might be a useful protection against burglars and a gun might be the most practical form of self-defence (Squires 2000: 41). In the sensitive months shortly after the Dunblane school shootings, these remarks resulted in a considerable public reaction, leading to a public intervention by the Lord Chancellor who restated the current law on self-defence.

The case of the Derbyshire gardener shares with the Martin case the fact that in both instances a real firearm was used and fired in an act of self-defence or retaliation. Yet during the 1990s evidence had been accumulating in cases where householders (or, in one case, a woman car driver) employed imitation firearms to threaten intruders or aggressors. A case in 1994 had provoked the anger of the editor of the *Guns Review* magazine. A householder had come home to find two men had broken into his home; he confronted them with a blank firing pistol, called the police and detained the intruders until the police arrived. When the police arrived they also arrested the householder and he was charged with a firearms offence. The same year saw new legislation passed by Parliament prohibiting the use of imitation firearms to threaten or intimidate. An editorial in *Guns Review* complained that such legislation was typical of a perverse British tendency to punish innocent people doing no more than stand up for their individual rights (Greenwood 1994: 579). The following year a Government minister sought to justify the new legislation to the effect that "tackling crime and protecting citizens is a job for the police . . . I would discourage anyone

from keeping an imitation firearm to ward off intruders. This could well increase the risk of violence." Contributors to *Guns Review* were outraged by this, viewing the pronouncement of yet further evidence of Britain 'going soft' on crime, and allowing the criminally inclined to walk all over the law abiding. The editor of the magazine was moved to comment:

> "the right to own a firearm within one's own home and to use it against an intruder when the householder feels endangered is a right at common law and a right in common decency. The current trend in sympathising with the criminal and penalising the victim must end. It is now time to start exerting pressure on Parliament to state the law clearly so that we may all sleep more soundly in our beds" (Greenwood 1995: 751).

These were bold sentiments, and forcefully stated, all the more surprising, perhaps, in that they were initially prompted by an original act of self-defence undertaken with a replica weapon. Perhaps, above all, such skirmishes indicated the growing significance of the self-defence issue as it began to surface in the UK. For all the reasons discussed already, the self-defence question was exposing an awkward area of uncertainty in British public life. More incidents were now being reported (Johnston 1996), sometimes it was a question of self-defence and on other occasions the action more closely resembled violent retaliation or retribution with guns or knives (often labelled 'vigilantism' by the media) and, just as in many earlier cases, if prosecutions were brought against the self-defenders, not only were the self-defenders often acquitted but public opinion also seemed firmly on their sides. Yet the ambiguities in the British attitude to this issue came to be tested again, this time during 2004. On this occasion too, the defensive weapon in question was a low-powered and unloaded—but very real in appearance—gas cartridge pistol.

Linda Walker was a special needs teacher who confronted a group of youths with an unloaded replica air-pistol. She believed the youths had been abusing her family and damaging her property over a period of weeks, but repeated calls to the police had failed to have any effect. During a final call to the police control centre she gave up, exasperated, and announced she was going out to shoot the youths. Despite a warning from the police call centre operator she collected the gas powered replica pistol—having tested it indoors to ensure it was empty—and an air rifle and went out to confront the youths. (The pistol, a Walther CP88 gas-powered pellet pistol, belonged to her partner and had been kept in her underwear drawer for four months following a burglary; the air rifle belonged to her teenage son). Goaded on by the youths, she twice fired the empty pistol into the ground at their feet. Walker was arrested by the police and charged with firearms offences and affray, later being convicted and sentenced to six months imprisonment. Subsequently the sentence, but not the conviction, was overturned following a rapidly expedited hearing before the Court of Appeal and she was released on 'time served'. Each stage of the case was accompanied by considerable media attention and commentary. The case cer-

tainly encapsulates many of the themes and issues we have already encountered regarding problems of crime and disorder, fear and reaction and the perceived inadequacies of the police in the UK. However, it also helps us to mark a number of issues relating to the scope for individual agency in pursuance of self-defence in the UK while introducing us to a number of complications and consequences regarding the ownership and use (criminal or otherwise) of firearms.

PUBLIC POLICY AND CRIME QUESTIONS

As we have seen, the general case for establishing a stronger right of self-defence, excepting in those cultures where it is defended as an absolute principle and where each *exemption* requires consequential justification (Barnett, 2004: 348), has often been advanced in broadly utilitarian terms. As I have argued earlier, however, (Squires 2000: 178), such utilitarian arguments about self-defence cut very little ice with Lord Cullen's Inquiry following the Dunblane shootings. But notwithstanding the Inquiry's conclusions, in a context of rising crime and disorder, fear, insecurity (or at least widespread public perceptions of such problems) and declining confidence in the police, the case for a stronger right of self-defence has invariably been based upon assumptions about beneficial public safety outcomes. In the UK at least, public policy benefits have tended to trump absolute principles. Thus any assertion of a right to self-defence and especially the right to use potentially lethal force in self-defence is considered in terms of the scale of the problems to which it is construed as a solution. Broadly speaking, there are three dimensions to these problems which we need to address: firstly, the scale of the property crime problem, secondly, the scale of (illegal) interpersonal violence and, thirdly, the extent of illegal ownership and use of weapons (in particular firearms).

Property Crime

The question of property crime—but not just property crime itself—high volume crime as an indicator of a broad social malaise and an 'insecurity index' has been addressed earlier in the paper. It was especially the rapid rise in crime during the 1980s and early 1990s which prompted recent uncertainties, ultimately creating the conditions within which, in the relative absence of effective, or reassuring, policing, private citizens have been encouraged to become 'active citizens' who: refuse to tolerate victimisation (Home Office Car Crime Prevention Year Initiative: Hyena propaganda 1992-1993; Campbell 1993) and acquire such security as they could afford (marketing of alarms, lights, sensors etc). The late 1980s and 1990s saw a major commodification of private security just as a 'consumerist revolution' (Squires 1998) was also impacting public perceptions of the service

they were receiving from local police and criminal justice agencies. Finally, the public was encouraged to organise and 'responsibilise' (Garland 2001) their communities (Neighbourhood Watch, Local Crime Prevention Panels, *Crimestoppers*: Together we can Crack it). The combined impact of these disparate shifts in public policy practices and discourses concerning citizens and crime is not in any simple sense a 'cause' of increasing contemplation of and resort to acts of self-defence (and/or vigilantism: Johnston 1996), but it renders a culture more susceptible to individuals seeking personal resolutions for problems of the wider culture. As has been argued before (Squires 1990), cultivating a notion of the 'active citizen' can be something of a Pandora's Box.

In 2003, on the back of continued attention to the Martin case an English national newspaper with a firmly populist and right wing leaning began to orchestrate a campaign to allow householders a stronger right to confront intruders. The idea gathered steam following a national poll conducted by a prominent BBC news and current affairs programme designed to select 'the one law that Britain really needs'. A member of parliament had agreed to sponsor the winning proposal under what is known as the 'private member's bill' procedure. However, amidst acrimonious claims about organised vote rigging and the supposedly shadowy influence of the 'gun lobby', the winning proposal, tellingly referred to as the 'kill a burglar Bill', was disowned by its potential sponsor. Undeterred, a number of opposition Conservative MPs later picked up a version of the proposal (now officially titled the Criminal Law (Amendment) (Householder Protection) Bill, though more popularly referred to as the 'Bash a Burglar' Bill) and subsequently tabled it as an amendment to a Criminal Justice Bill then before parliament. Tackled at Prime Minister's Question Time in the House of Commons (Dec. 8th, 2004), by the leader of the Opposition, about why the Government had declined to support the new amendment, Tony Blair replied, referring to what have already been depicted as the 'first principles' of British public policy, by asserting the priority of reducing crime and reassuring the public through effective policing (thereby removing the sources of anxiety encouraging the increasing resort to self-defence) rather than by committing the Government to a more liberal self-defence law. Accordingly the Government was happy to claim credit for the declining levels of crime—especially the high-volume targeted property crimes referred to earlier.

Violent Crime

The question of violent crime raises a range of issues in the British context, but, as Zimring and Hawkins have argued in *Crime is not the Problem* (1997), its special significance means it has to be taken particularly seriously. "What citizens fear is not the theft of their property, but the prospect of lethal violence" (1997: xi).

In the UK in 2003-04 the police recorded 1.1 million offences of violence against the person (18.3% of total recorded crime). British Crime Survey data, generally a much more reliable indicator of levels of crime, suggested a total figure of around 2.7 million offences, suggesting around 1.6 million violent offences going unrecorded. However, of the 1.1 million recorded offences, only just under 44,000 were recorded as 'serious' (life threatening) and fully 52% of the recorded offences resulted in no injury. While there are obviously many questions about the rate of reporting of particular types of offences a reasonable assumption of the BCS study is that the majority of the BCS offences not reported to the police will probably comprise the less serious and/or non injurious offences (Dodd et al. 2004). The trend on BCS total violent crimes is unambiguously falling (the number decreasing by 36% over the decade since 1995) although 'serious' (life-threatening) violent crime recorded by the police, even factoring out the changes in offence counting rules in 1998-99, shows a 95% increase since 1995. However, according to the Home Office statistical analysis, "the contrasting trends in BCS and recorded crime can be largely explained by the increase in violence reported to and recorded by the police, which will have affected a wide range of types of offence" (Dodd et al. 2004: 69). In other words, the apparent wave of violent crime sweeping the UK may largely be an artefact of changing statistical recording practices (especially regarding 'domestic violence', acquaintance violence and sexual offences) and more effective policing. None of this is to diminish the seriousness of the issue of violent crime, simply to put it into some proportion.

There are certainly significant patterns to the overall form taken by violent offending in the UK and the USA (young males are increasingly more likely to be the victims, a significant proportion of violence involves acquaintances rather than strangers), but where the USA and the UK differ substantially is in relation to the proportion of offences committed by firearms. In 2004-04, firearms were involved in only 3% of serious (life threatening) violence against the person (1,210 recorded offences) or 0.4% of all violence against the person (3,490 offences). The most frequently employed weapons in British violent crime are not firearms but 'blunt objects', and knives, fists and feet. Taking the use of weapons in homicide as an indicator, 32% of British murder victims in 2003 were stabbed, 21% hit or kicked, while only 12% were killed with a firearm (Cotton 2003).

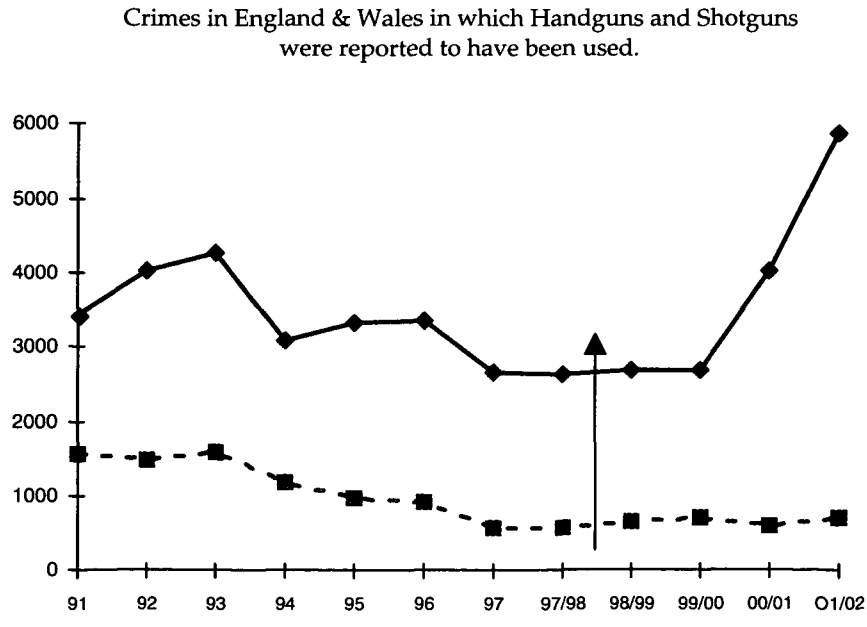
Another telling aspect of British violence is the fact that around two-thirds of it is alcohol related (Jones 2000). Taking this data together we can establish a picture suggesting that the 'typical' violent offender may be drunk but (except in a few known gun crime 'hotspots' which we will shortly address) is highly unlikely to be carrying a gun. Of course, none of this implies that a gun might not be (in the hands of any given individual) a suitable deterrent—or even a remedy—to the kinds of threats implied by the profile of criminal violence in the UK. However, enthusiasm for this as a public policy solution is substantially tempered by a recognition that if

firearm availability within the general population were increased to any meaningful degree so as to even begin to enable their use as instruments of self protection then it is even more likely that potential criminal assailants would be carrying firearms too. As a public policy to tackle crime, fear or violence increasing gun availability would be counter-productive and ultimately self-defeating. Despite the media attention devoted to the British gun crime problem, criminal incidents involving firearms are rare and, for the most part, understood in a very specific range of contexts and offence patterns, rather than as just one component of an all-embracing and singular 'crime problem'.

Firearm related crime

Although a great deal has been made of the apparently rapid growth in firearm offending in the UK in the years after 1998 (ironically the very year in which the post-Dunblane handgun prohibition was introduced), the situation is more complex than it may, at first sight, appear. Police recorded incidents of handgun crime rose sharply—by as much as 122%—between 1997/98 and 2001/02 (see Figure 3, below).

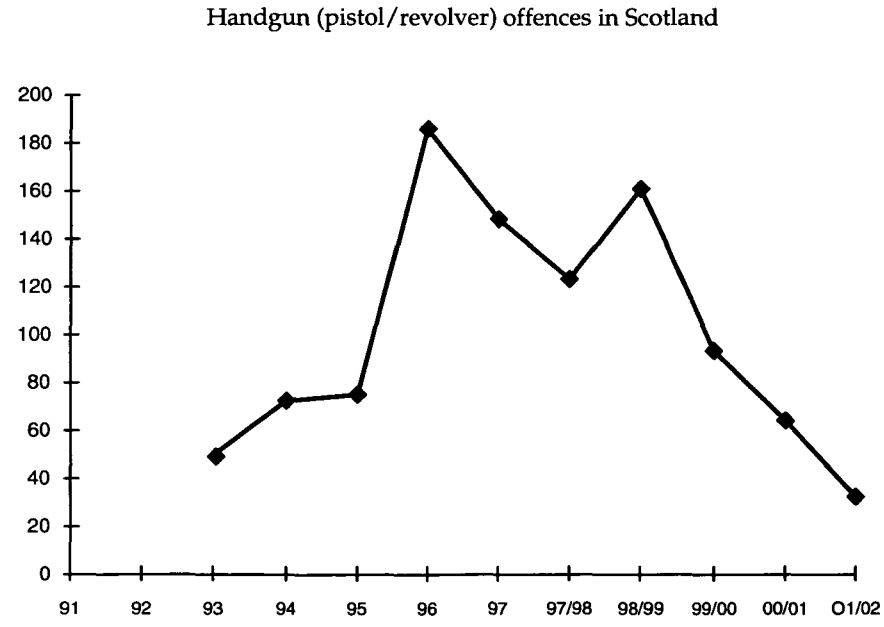
Figure 3: Gun crime in England and Wales (Handguns and Shotguns) 1991-2002



Source: Home Office: Criminal Statistics

Unfortunately, some ill informed commentary has taken this data too much at face value and tried to suggest, doubtless driven by a preconceived ideological predilection, that the alleged failure British efforts at gun control predict the failure of gun control initiatives anywhere (Mauser 2003). However, the UK evidence does not lend itself to such a conclusion. Problems regarding the interpretation of the English evidence might have been suggested by the evidence on handgun related crime coming out of Scotland—the society which is undoubtedly culturally, socially and politically the closest to England (and Wales)—and where identical firearms controls were introduced in 1998. Handgun crime in Scotland appeared to *fall* by 80% in the four years after 1998 (see Figure 4 below).

Figure 4: Gun crime in Scotland (Handguns only) 1991-2002



Source: Scottish Executive, Crime Statistics

It has been noted already that gun crime in the UK has been climbing steadily since the 1960s, at first the fastest growth involved armed robberies. The rate of increase in the gun crime trend accelerated noticeably during the mid 1980s and there was a corresponding shift in the criminal firearm of choice during this decade as 'handgun crime' began to pull away from crime involving shotguns (see tables in Squires 2000: 10-16). It is no accident that handgun crime began to appear to increase so dramatically (142% increase in recorded gun crime in the decade before 1996) at a time

when the marketing of authentic looking replica firearms began to take off in the UK. Whether these replicas were 'airsoft', 'BB', air-pistols, or compressed gas cartridge pistols is of secondary significance. The point is that they looked real and were beginning to find ready employment in opportunist robberies (Taylor and Hornsby 2000). Research undertaken with convicted armed robbers (Morrison and O'Donnell 1994, 1997) and intelligence derived from police investigations (Matthews 1996) tend to suggest that up to 40-50% of recorded armed crime could actually involve replica (or otherwise less than lethal) handguns rather than the real thing. The criminal statistics presented a picture of significant increases in armed crime, albeit rising from a relatively low base, but of the 10,340 firearm offences recorded by the police in 2003-04, the suggestion that between a third to a half of them might represent 'replica only' offences, presents a rather different perspective. In any given year there are likely to be as many as 12,000 additional 'air weapon' offences, although these almost entirely comprise 'criminal damage' or animal cruelty offences: air weapons are more often involved in crime when they are fired, genuine firearms when they are not fired but used to intimidate.

The point to this discussion is the observation that when we speak of the UK 'gun problem' we are discussing a rather more complex and multi-layered phenomenon, where replica and low-powered air weapons undoubtedly outnumber the 'real' thing. In the past three years, the Home Office has begun to record separately the numbers of crimes involving replica firearms. The data is inevitably flawed and partial, being based upon only those incidents when a gun is recovered following a crime, moreover the trend is rising from a low base because the figures have not long been compiled. Furthermore, when guns are not recovered, it cannot be known how many of these were replicas. Nevertheless, taking all these factors into account, crime involving replica handguns is now by some way the fastest growing type of British gun crime.

From September 2003 to September 2004, crimes involving replica guns grew by 48%, whereas crimes involving real handguns fell by 15% (790 offences), and shotgun crimes fell by 3%. There were only 50 offences involving rifles, the other firearm categories were unidentified firearms (down 3%) and where 'other' types of firearms were used, chiefly air and gas powered weapons (ie. less powerful and less lethal weapons) because all converted, re-engineered and reactivated weapons capable of firing a live round are included in the handgun category (Allen, Dodd and Salisbury 2005). Recent legislation, including the Anti-Social Behaviour Act 2003 and a new Violent Crime Reduction Bill both entail tighter control over the sale, distribution and use of replica guns, air guns and firearm components and ammunition. Not unlike other UK gun control initiatives, this new legislation has sought to address firearm related offending as a collective supply side issue, the public policy imperative being to reduce the supply of crime facilitation resources and opportunities. Evidence that

this may be proving to be generally successful, taken overall, may be found in the exceptional measures that would-be gang members and offenders are resorting to in order to arm themselves. According to the authors of a report collating data derived from a range of studies on gun and gang-related offending in the UK, the availability of genuine firearms has often been overstated (Marshall et al. 2005: 12). The issue of converted firearms is a case in point.

The issue of converted, activated and reactivated firearms is itself a fascinating sub-set of the overall UK gun crime question, a very 'English' loophole in country's gun control legislation. Data emerging from Operation Trident, the Metropolitan Police operation to address 'black on black' and gang-related armed crime in London has revealed that something like 75-80% of 'guns' recovered as a result of police investigations "did not start out as purposeful firearms" (Brown 2003), but rather comprised 'conversions', 'reactivations' or outright replicas. In fact, an astonishing 80% of the incidents in which firearms were *used causing injury* involved air or gas-powered weapons, or blank-firers, which had been illegally converted to fire a live bullet, or were otherwise 'reactivated'. Subsequent research examining the results of a range of targeted policing initiatives against gang-related shootings in Manchester (Bullock and Tilley 2002; Shropshire and McFarquhar 2002), Birmingham and different areas in London (Hales 2005), and a national survey undertaken by Her Majesty's Inspectorate of Constabulary (HMIC 2004) have found offenders to be employing a motley collection of weapons: including converted and re-engineered gas-powered guns and blank firers which were often inaccurate, single-shot, low-powered and sometimes dangerous to their users. That offenders resort to such weapons may suggest something about the relative effectiveness of existing gun control measures in limiting the access of less experienced, serious and organised crime groups—disorganised criminal gangs—to more lethal and reliable 'fit for purpose' top grade handguns in the UK.

Completing this picture, the Police Complaints Authority published an analysis in 2003 of twenty-four shootings by armed police officers, based on incidents outlined in police reports during 1998 to 2001. The report demonstrated that in seven out of twelve cases where a person was shot carrying what appeared to be a firearm and apparently placing police officers or members of the public in danger, the weapon was subsequently found to be a replica. (PCA 2003)

A recent report from *Communities That Care*, The Safer London Youth Survey (CTC: 2004) gained predictable headlines with its finding that one in ten (out of 11,400 young people under 16 surveyed in London) young people had carried a knife during the past year while one in seventeen boys claimed to have carried 'some kind of gun'. Consistent with earlier research undertaken on either side of the Atlantic, a dominant justification offered for this weapon carrying seems to relate to a fear of victimisation and 'self-defence.

It no longer appears to matter greatly that a large majority of these guns are not likely to be genuine firearms at all (but replicas, blank-firers, airsoft, BB guns or air weapons) for only 1% of those surveyed claimed to have carried a real firearm (although 6% said they to had fired one). A complex set of concerns have coalesced around the whole 'gun question' in recent years—in the process definitions and perceptions have changed markedly. No doubt ten years ago (and pre-Dunblane) a large proportion of the 'guns' carried by school age children, especially the airsoft and BB types, would have been widely regarded as little more than toys. Until relatively recently, a similar, still relatively benign view, attached itself to air pistols and air rifles even though signs of future trouble were there for those who cared to look.

Taken together this evidence has an important bearing on how the policy questions regarding the range of weapons collected under the 'firearm' label are constructed and how, in turn, any self-defence questions might be addressed. The available data do give some indication of the scale and dimensions of the UK's gun crime problems, and the emerging trends. The generic label 'gun crime' may give the issue a misleading degree of uniformity (any more than we have a single 'theft' problem). In fact, the UK may have several different 'gun problems'. The simple fact of gun usage in criminal activity may not necessarily give the various criminal activities (committed with the aid of a real or replica firearm) any particular coherence.

This brings the argument to the very particular form of inner urban, gang-related, drug-economy related gun problem which, especially between 1998-2002, did rise very sharply but which has subsequently begun to stabilise and, as noted earlier, even to fall.

GUNS AND GANGS IN THE CITY

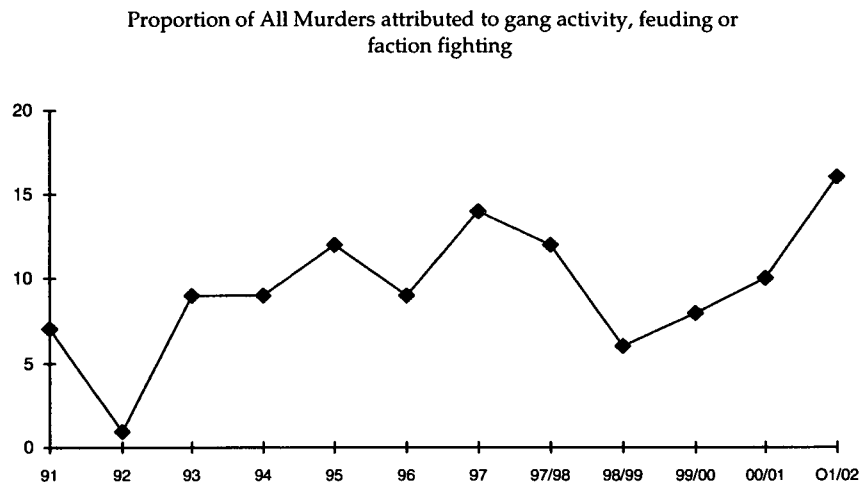
Much of the gun crime debate in contemporary Britain has been driven by the 'guns and gangs' phenomenon. In part this is attributable to the 'London effect', a concentration of Afro-Caribbean populations in inner city areas and a tendency of British crime reporting to 'externalise' and racialise crime threats (Edwards and Gill 2002; Gilroy 2003). As many commentators have added, while race is often a factor in the 'guns and gangs' phenomenon, the problem is not—and never was—solely a 'black on black' question. The launching of dedicated police operations, Operation Trident, by the Metropolitan Police in London, followed by similar operations in a number of large cities (Liverpool, Manchester, Nottingham, Birmingham) has given greater focus and attention to these issues, ultimately providing more information. Home Office evidence reveals that over three quarters of recorded gun crime occurs in only seven police force areas, which take in the major urban centres referred to above.

Evidence from Operation Trident and from a Home Office Research Study in Manchester tends to confirm an overall picture of 'black on black' gang-related criminal violence (mainly but not entirely black, often but not exclusively gang related). On the whole, offenders (and their victims for that matter) tend to be relatively young, male, black or mixed race and not particularly criminally experienced—certainly not experienced in more familiar 'organised crime' terms (Brown 2003; Bullock and Tilley 2002). Seventy per cent of the London shootings had black victims and a similar proportion of the Manchester shootings were identified with the Afro-Caribbean community (8 out of 11 murders, 22 of 35 attempted murders and 44% of serious woundings, where data on ethnicity was available). Similar evidence emerged from the West Midlands (Birmingham) where police reported that 'local gun crime has risen by more than 49 per cent since 2000, reaching a total of 2,240 incidents in 2001-02. Between April and October last year there were 33 'black-on black' gun attacks in Birmingham' (Burke et al. 2003).

Data on gun offenders in Manchester were less complete, but in 32 cases where the offender was known, 69% were recorded as black. Interestingly, 8 of the 32 'known shooters' had previously been shot themselves and, subsequent to the research, three more were shot dead. In Manchester, 60% of the shootings were thought to have been gang-related, which included elements of drug dealing, property crime and wide range of other criminal behaviours. However, 'gang membership is not just about criminality; for some young males it incorporates a credible lifestyle choice. "Gang membership [also] comprises a mix of same-age local friendship groups, blood relatives and other recruits. [Moreover], the carrying of firearms by gang members is part protective, and part symbolic, though they are also used in the commission of violent crime" (Bullock and Tilley 2002, p. iv).

Evidence from the Operation Trident records in London reveal a very similar criminological profile and characteristics, with both suspects and victims previously 'known to the police', offenders having previously been victims and all seemingly within a context of persistent low-level criminality involving drugs, robberies and stolen property. Motives and modus operandi for the London shootings, 82% of which occurred in public places, involved an apparently wide range of criminal, social, inter-personal and 'turf' related conflicts. Thus, 14% of the Trident recorded incidents were said to involve robbery, 13% a 'drugs rip-off', 16% were 'gang-related', 13% were for 'revenge' or reasons of 'disrespect', 7% of the incidents involved 'drive by' shootings (Brown 2003). As in Manchester, 'gang-related' violence and the use of firearms has a spill over effect into other inter-personal conflicts and tensions (Shropshire and McFarquhar 2002).

Figure 5: Murders attributed to gang-related activity



Supplementary analysis of shooting incidents undertaken by the Home Office (Figure 5 above) reveals an increasing number of murders attributed to 'gang activity, feuding or faction fighting' in England and Wales and a sharp upturn after 1998, even though the overall numbers per year remain relatively low (Cotton 2003).

It is in such contexts, of inner urban, gang-related and routine low level criminality, that a self-defence question does arise. Gun carriers in these contexts undoubtedly carry weapons for self-defence (Hales 2005; Bullock and Tilley 2002), because they live in a social milieu in which violence is relatively common and shootings likely (Hoggarth and Wright 2002). The groups most likely to carry a gun, young black males in urban areas who are involved in criminal activity and gang networks are precisely the group most likely to get shot and also the group most likely to undertake the shooting. The patterns and the lifestyles, choices, gang involvements and weapon carrying habits which they both reflect and influence will probably be familiar to a US audience acquainted with the guns and gangs phenomenon (Katz 1988; Sheley and Wright 1993; DuRant 1995; Huff 1996; Zimring 1998).

In the UK such problems have triggered a predictable, in part implicitly racist, reaction blaming the arrival of this 'alien' form of crime upon black communities themselves (Gilroy 2003). Of course, this is certainly not the first time that this has happened (Hall et al. 1978; Edwards and Gill 2002). On occasions this condemnation has extended to criticisms of black youth culture, music and cultural forms (Goodchild 2003; Gibbons 2003; Graef 2003) which has also led to wider debates, again, not unknown in the US, regarding media effects upon forms of criminal violence.

Elsewhere, except in relation to a fairly specific debate regarding the use of reasonable force against burglars, the self-defence debate with which the USA has become familiar has seldom arisen in the UK and hardly ever as a serious proposition regarding self-defence with a firearm.

CONCLUDING THEMES: BEYOND THE HUMAN RIGHT TO BEAR ARMS?

This paper set out to approach the question self-defence from a critical social science perspective and specifically by introducing a distinction (which, it has to be acknowledged, is more consistently followed in some contemporary societies than the USA) between the generic public policy goals of safety, security and crime reduction and the specific legalities of self-defence.

Notwithstanding many important cultural and legal differences and some vital differences of scale and seriousness in relation to crime, violence, lethal dangers and levels of gun availability when comparing British and American societies, there are still many important parallels to acknowledge. First, we began by discussing the social factors generating the demand for more robust self-defence rights in Britain and the USA. Significant here were questions about public perceptions of crime and disorder and attitudes relating to the effectiveness of the criminal justice system and levels of confidence in the police. These factors appear relevant either side of the Atlantic. Second we addressed the discourses of consumerism and 'responsibilisation' each of which had served to further legitimise 'active'—rather than 'passive'—citizenship, whereby citizens were encouraged to assume responsibility for aspects of public well-being—to resist criminal behaviour or by 'taking a stand against anti-social behaviour' (in the UK), or as the NRA self-defence programme for women put it—by 'refusing to be a victim' (Quigley 1989; Stange 1995, Hill 1997). Third, we considered the manifestations of firearm related violence and victimisation in certain communities in the UK where gun problems are especially concentrated but, by the same token, highly atypical of the problems of the wider society. These problems, again, are not unknown in the USA, as the data analysing gun-related death and injury by sex and race (eg. Zimring and Hawkins 1987) would seem to suggest. The lesson to be drawn from such communities, where guns proliferate, especially in the UK where the most socially atypical concentrations of illegal firepower (and a whole lot more besides) can be found, is that it is in precisely such relatively deprived urban centres that notions of self-defence do make sense. But rather more than this, for in such cultures and such fragmented, dangerous, hostile and oppressive communities, the skills and practicalities of weapon-based self-defence are themselves but a component of a much broader personal and collective agenda: the defence of the *self*.

By this we are referring to the ways of living and being that are necessary to personal well-being, forms of integrity, character and purpose—the

maintenance of what, for a given group, is valuable and worthwhile. The London Borough of Hackney '*Guns, Knives and Gangs*' Report (2004) addressed precisely this phenomenon, while describing

> "a street culture of masculinity and an honour-based culture in which all slights to the groups are interpreted as attacks upon the person that must be defended with the same force if 'respect is to be sustained'. In the 'semi-unregulated' world of the street, where matters are dealt with by force and retribution and where reporting problems to an adult is not an acceptable option, 'honour slights' can turn into feuds that reverberate around the youthful community. Some of these young people engage in tit-for-tat violence where the escalation into lethal violence is a permanent possibility" (Hackney CDRP 2004: 9-10).

This is far from being an exclusively British 'culture' (as Katz has argued: 1988), indeed, there are good grounds for suggesting that the British gang phenomenon derives a great deal in terms of styles, language, and modes of 'being and belonging' from its US predecessor. In the US case, and with the legacy of the Second Amendment and fairly widespread gun availability as a public policy context, these broadly psycho-social perspectives on personal security come much more to the fore, and are brought to bear upon questions of gun ownership. Yet while the question of 'Second Amendment rights' forms a substantive demand on the part of significant sections of the American public, what these rights mean at the personal, individual and even emotional level is often less clearly developed. While aspects of 'tradition', or certain 'values' and personal attributes may well be promoted by and associated with firearms ownership and use (such as 'manliness', moral courage, toughness, confidence, and freedom or 'rugged independence' so frequently celebrated in media culture: Slotkin 1992; Gibson 1994; Wright 2001) this broader moral, psychological, emotional and anthropological repertoire is seldom much further interrogated (although there are exceptions: eg: Kennett and Anderson 1975; Tonso 1982; Dizard et al. 1999; Kohn 2004). At other times the existence of this hinterland of ideals is taken to be so obvious as not to require further comment.

Such discourses have a direct bearing upon the question of the gun, they concern ideas of republicanism, the 'citizen-soldier' ethic, the responsibility to defend one's country or protect the weak, freedom from fear and the paramount right (or duty) of self-defence and so on. Yet these ideas are not merely abstract notions or dry formal statuses, each is filled with meanings that animate and motivate us, informing our characters, measuring our worth and telling us who or what we really are, what we believe, and why.

Consequently, this paper is not an argument about any exclusively negative and anti-social characteristics of weapon possession, ownership and use, for in dangerous environments one must take appropriate care—though, perhaps above all, by trying to avoid dangerous environments. However, rather than criticising the efforts of individuals and communities to safeguard and reassure themselves, this article has, firstly, sought to address the factors responsible for rendering these communities insecure to

begin with. Secondly, it has sought to unpack the self-defence question in search of what it might tell us about our worst fears and for what it might convey about our notions of individuality, human agency and wider social relationships.

So, just as in the UK a language of 'responsibilisation' has attached to 'community crime prevention' then similarly gun ownership, in Lott's work (1998), like conscription in time of war, becomes a duty (for Lott, it is the *unarmed* who represent the problem, they are 'free-loaders' benefiting from the collective security afforded by the conscientious and armed). Here, however, the 'war against crime' ceases to be just a metaphor, when the discourse implies a substantial collective risk. Thus, when pro-gun advertising urges that '*Responsible citizens protect themselves*' or '*Responsible parents defend their children*', gun ownership becomes more of a duty than a right. Following this line of argument, stipulating a human duty of self-defence might take us quite some distance. Concrete practical and political duties in respect of principles of social defence might ultimately serve us rather better than abstract individual rights, "the prized possessions of alienated persons" (Campbell 1983: 5), which carry no more integrity than any other act we might undertake alone. For example a discussion of our duties of social defence in concert with others might shift the agenda onto a more familiar public policy terrain, for (notwithstanding certain historical dilemmas regarding the maintenance of a standing army) effective defence (and effective social order) is likely to be more efficiently and effectively achieved when publicly collectivised rather than by relying upon the individual choices of private citizens keeping a gun under their mattresses or in the glove boxes of their cars. It might then be a question as to the compatibility of—or the balances to be struck between—these alternative defensive practices.

In recent debates with gun control advocates, NRA vice-president Wayne LaPierre has tellingly employed a number of 'backs to the wall', 'worst case scenarios' featuring murderous aggressors, to help develop a case for responsible gun ownership (see also, for example, LaPierre 1994). LaPierre's question is invariably one which asks what one might do in a given situation. My interest, by contrast, has centred upon the emergence of his 'situations', upon what his question really means and, finally, what his own answer, 'responsible gun ownership' tells us both about society and ourselves.

So, in this paper I have tried to draw out a number of what seem to me to be hitherto rather overlooked lines of analysis and perspective that may have considerable potential for developing some neglected social scientific questions in respect of self-defence and society. In the process I have tried to demonstrate how these issues are, despite important connections, differently constructed and understood in Britain and the USA and how the putative American 'solutions' might not solve British problems—nor indeed, perhaps, anyone else's problems either. That such issues do not easily or

immediately lend themselves to political appropriation, is not my concern. My original, broadly sociological, interest in the firearm question was not primarily concerned with providing 'politically acceptable' answers, but rather more with coming to understand what firearms, our contrasting attitudes towards them, our uses for them, and maybe our fears about them, told us about our society(ies) and ourselves. Given the significantly different orientations to firearms in Britain and the USA (although, in either society, this is a rather more multi-layered issue than it might at first appear) an initial area of interest concerned the apparent ideological and cultural contrasts (but seen simply as 'alternatives' and not 'right' and 'wrong' ways of being).

NOTE

[1] On spelling—throughout the paper I am using the English spelling, except when quoting US sources.

REFERENCES

Alba, Richard D., and Steven F. Messner. 1995. *Point Blank* against itself: Evidence and Inference about guns crime and gun control. *Journal of Quantitative Criminology* 11 (4): 391-410.

All Party Parliamentary Group (APPG). 2003. *Combating the threat of gun violence: A report of parliamentary hearings.* London: Saferworld.

Allen, Jonathon, and Martin Wood. 2003. Crime in England and Wales: Quarterly update to June 2003. *Home Office Statistical Bulletin Issue 13/03.* London: Home Office.

Allen, Jonathon, Tricia Dodd, and Heather Salisbury. 2005. Crime in England and Wales, Quarterly update to September 2004. *Home Office Statistical Bulletin Issue 03/05.* London: Home Office.

Audit Commission. 1996. *Misspent youth: Young people and crime.* London: HMSO.

Barnett, Randy E. 2004. *Restoring the lost Constitution: The presumption of liberty.* Princeton: Princeton University Press.

Bauman, Zygmunt. 2004. *Wasted lives: Modernity and its outcasts.* Oxford: Polity.

Beynon, Huw. 1995. *Digging deeper: Issues in the miners strike.* London, Verso.

Blair, Tony. 2004. A new consensus on law and order. British Prime Minister's speech at the launch of the Home Office and Criminal Justice System strategic plans.

Brake, Michael, and Chris Hale. 1992. *Public order and private lives.* London: Routledge.

Brown, Alan. 2003. Operation Trident: Tackling gun crime in London's black communities. Unpublished presentation to "Guns, Gangs and Youth Culture" at the Nexus Conferences, London.

Brown, Alison P. 2004. Anti-social behaviour, crime control and social control. *Howard Journal of Criminal Justice,* 43 (2): 203-11.

Brown, Richard Maxwell. 1975. *Strain of Violence: Historical studies of American Violence and Vigilantism.* New York: Oxford University Press.

Brown, Richard Maxwell. 1991. *No duty to retreat: Violence and values in American history and society.* Norman: University of Oklahoma Press.

Buford, Bill. 1991. *Among the thugs.* London: Secker & Warburg.

Bullock, Karen, and Nick Tilley. 2002. Shootings, gangs and violent incidents in Manchester: Developing a crime reduction strategy. *Crime Reduction Series Paper no. 13*: Home Office.

Burke, Jason, Tony Thompson, Martin Bright, Gaby Hinsliff, Antony Barnett, and David Rowan. 2003. Where the gun rules and the innocent go in fear. *The Observer*, January 27, 2003.

Burney, Elizabeth. 2005. *Making people behave: Anti-Social behavior, politics and policy.* Cullompton Devon: Willan Publishing.

Byrne, David. 1999. *Social exclusion.* Buckingham: Open University Press.

Campbell, Beatrix. 1993. *Goliath: Britain's dangerous places.* London: Methuen.

Campbell, Siobhan. 2002. A review of anti-social behaviour orders. *Home Office Research Paper Series no. 236.* London: Home Office.

Campbell, Tom. 1983. *The left and rights: A conceptual analysis of the idea of socialist rights.* London: Routledge.

Cashmore, Ellis, Ernest Cashmore, and Eugene McLoughlin. 1991. *Out of order: Policing black people.* London: Routledge.

Clancy, Tom. 1994. Introduction to LaPierre, Wayne, *Guns, crime and freedom.* Washington: Regenery.

Cohen, Phil. 1979. Policing the Working Class City. In *capitalism and the rule of law*, edited by B. Fine, *et al.* London: Hutchinson University Press.

Collier, Richard. 1998. Masculinities, crime and criminology: men, corporeality and the criminal(ised) body. London: Sage.

Communities that Care (CTC). 2005. "Findings from the Safer London Youth Survey 2004." London: CTC.

Cotton, Judith. 2003. Homicide. In *Crime in England and Wales 2001/02: Supplementary Volume*, edited by C. Flood-Paige and J. Taylor. Home Office Statistical Bulletin, 2003.

Coulter, Jim, Susan Miller, and Martin Walker. 1984. *State of siege: politics and policing in the coalfields*. London: Canary Press.

Cullen, Lord William Douglas. 1996. *The Public Inquiry into the Circumstances leading up to and surrounding the events at Dunblane Primary School on Wednesday 13th March 1996*. The Scottish Office, http://www.scotland.gov.uk/library3/justice/dunblane/day02.pdf.

Davies, Bernard. 1986. *Threatening youth: towards a national youth policy*. Buckingham: Open University Press.

Dean, Hartley, and Peter Taylor-Gooby. 1992. *Dependency culture: the creation of a myth*. London: Harvester Wheatsheaf.

Dizard, Jan, Robert Merrill Muth, Robert Merrill, and Stephen P. Andrews. 1999. *Guns in America: a reader*. New York: University Press.

Dobash, R. Emerson, and Russell P. Dobash. 1992. *Women, violence and social change*. London: Routledge.

Dodd, Tricia, et al. 2004. Recorded crimes involving firearms. In *crime in England and Wales 2003/2003: homicide and gun crime*, edited by David Povey. Home Office Statistical Bulletin, 2004.

Downes, David, and Paul Rock. 2003. *Understanding deviance*. Oxford: Oxford University Press.

DuRant, R.H. et al. 1995. The association between weapon carrying and the use of violence among adolescents living in or around public housing. *Journal of Adolescence* 18 (5).

Edwards, Adam, and Peter Gill. 2002. The politics of 'transnational organised crime': discourse, reflexivity and the narration of threat. *The British Journal of Politics and International Relations* 4 (2): 245-270.

Emsley, Clive. 1996. The origins and development of the police. In *Controlling crime*, edited by Eugene McLoughlin and John Muncie. London: Sage & Open University Press.

Farrington, David. 1996. *Understanding and preventing youth crime.* Joseph York: Rowntree Foundation.

Faulkner, David. 2001. *Crime, state and citizen.* Winchester: Waterside Press.

Field, Frank. 1989. *Losing out: the emergence of Britain's underclass.* Oxford: Blackwell.

Finney, Andrea. 2004. Perceptions of changing crime levels. In *Crime in England and Wales 2002/2003 Supplementary Volume 2: Crime, Disorder and the Criminal Justice System—public attitudes and perceptions*, edited by S. Nicholas and A. Walker. London: Home Office Research and Statistics Directorate.

Furlong, Andy, and Fred Cartmel. 1997. *Young people and social change: individualisation and risk in late modernity.* Buckingham: Open University Press.

Garland, David. 2002. *The culture of control.* Oxford: Oxford University Press.

Gibbons, Fiachra. 2003. Minister labelled racist after attack on rap 'idiots'. *The Guardian*, January 6, 2003.

Gilroy, Paul. 2003. A new crime, but the same old culprits. *The Guardian*, January 8, 2003.

Goodchild, Sophie. 2003. Rap stars and record companies to blame for gun culture, say police. *Independent on Sunday*, January 5, 2003.

Graef, Roger. 2003. How the US cracked its teenage gun crisis. *The Observer*, January 5, 2003.

Graham, John, and Ben Bowling. 1995. *Young people and crime.* London: Home Office.

Gray, Alan. 2003. Recorded crimes involving firearms. In *Crime in England and Wales 2001/02: Supplementary Volume*, edited by C. Flood-Paige and J. Taylor. Home Office Statistical Bulletin 1/03.

Greenwood, Cadmus. 1972. *Firearms control: a study of armed crime and firearms control in England and Wales*. London: Routledge & Kegan Paul.

Greenwood, Cadmus. 1994. Editorial. *Guns Review* 34: 579.

Greenwood, Cadmus. 1995a. Arms for self preservation and defence, part I. *Guns Review* 35 (9): 750-751.

Greenwood, Cadmus. 1995b. Arms for self preservation and defense, part II. *Guns Review* 35 (10): 668-670.

Greenwood, Cadmus. 1996. Memorandum of evidence, appendix 21. In *The possession of handguns* II. House of Commons: Home Affairs Committee, Minutes of Evidence, HMSO.

Grier, Angela, and Terry Thomas. 2003. 'A war for civilisation as we know it': some observations on tackling anti-social behaviour. *Youth and Policy*, no. 82, Winter 2003/04.

HMIC (Her Majesty's Inspectorate of Constabulary). 2004. *Guns, community and police: thematic inspection report into the criminal use of firearms*. London: HMIC.

Hall, Steve. 1997. Visceral cultures and criminal practices. *Theoretical Criminology* 1 (4): 453-78.

Hall, Stuart, Charles Critcher, Tony Jefferson, John Clarke, and Brian Roberts. 1978. *Policing the crisis: mugging, the state and law and order*. London: Hutchinson University Press.

Hansen, Rod, Larry Bill, and Ken Pease. 2003. Nuisance offenders: scoping the public policy problems. In *Confronting crime: crime control policy under new labour*, edited by Michael Tonry. Cullompton: Willan Publishing.

Hales, Gavin. 2005. *Gun crime in brent: a report commissioned by the London Borough of Brent Crime and Disorder Reduction Partnership*. Portsmouth: ICJS University of Portsmouth.

Hill, Cindy. 1997. Guns are the tools by which we forge our liberty. Reprinted in *Guns in America*, edited by Jan Dizard, Robert Merrill Muth, Robert Merrill, and Stephen P. Andrews. New York: New York University Press. 1999.

Hobbs, Dick. 1994. Mannish boys: crime masculinity and business. In *Just boys doing business: men, masculinities and crime*, edited by Tim Newburn and Elizabeth A. Stanko. London: Routledge.

Hoggarth, Liz, and David Wright. 2002. Partnership against crime: targeting violence in Handsworth. *Year One Evaluation Report.* Birmingham: Crime Concern Ltd.

Home Office. 2003. *Respect and responsibility—taking a stand against anti-social behaviour.* London: Home Office.

Home Office, Research and Statistics Directorate. 2004. *Defining and Measuring Anti-Social Behaviour.* Briefing Note. http://www.homeoffice.gov.uk/rds/pdfs04/dpr26.pdf#search='Defining%20and%20Measuring%20AntiSocial%20Behaviour%20home%20office'.

House of Commons, Home Affairs Select Committee. 2000. *Second Report, Controls over Firearms*, Volume One, Report and Proceedings of the Committee, Volume Two, Minutes of Evidence and Appendices. London: HMSO HC 95 I/II.

Huff, C. Ronald. 1996. *Gangs in America.* London: Sage.

Jefferson, Tony, and Wendy Hollway. 2000. The role of anxiety in the fear of crime. In *Crime Risk and Insecurity*, edited by Tim Hope and Richard Sparks. London: Routledge.

Johnston, Les. 1996. What is vigilantism? *British Journal of Criminology* 36 (Spring): 220-236.

Jones, Chris, and Tony Novak. 1999. *Poverty, welfare and the disciplinary state.* London: Routledge.

Jones, Stephen. 2000. *Understanding violent crime.* Buckingham: Open University Press.

Katz, Jack. 1988. *Seductions of crime.* New York: Basic Books.

Kennett, Lee and James LaVerne Anderson. 1975. *The gun in America: The origins of a national dilemma.* Westport: Greenwood Press.

Kleck, Gary. 1991. *Point blank: guns and violence in America.* New York: Aldine De Gruyter.

Klech, Gary. 1997. *Targeting guns: firearms and their control.* New York: Aldine De Gruyter.

Kohn, Abigail. 2004. *Shooters: myths and realities of America's gun cultures.* Westport: Oxford University Press.

Lacey, Nicola and Lucia Zedner. 1995. Discourses of community in criminal justice. *Journal of Law and Society* 22(3): 301-325.

LaPierre, Wayne. 1995. *Guns, crime and freedom.* New York: Diane Publishing.

Law, Richard and Peter Brookesmith. 1996. *The fighting handgun: an illustrated history.* London: Arms and Armour Press, Cassell.

Lister, Ruth. 1990. *The exclusive society: citizenship and the poor.* London: CPAG.

Loader, Ian. 1996. *Youth, policing and democracy.* Basingstoke: Macmillan.

London Borough of Hackney CDRP. 2004. *Guns, knives and gangs problem solving day: Summary report*, Hackney Crime and Disorder Reduction Partnership.

MacDonald, Robert. 1997. Dangerous youth and the dangerous class. In *Youth, the Underclass and Social Exclusion*, edited by Robert MacDonald. London: Routledge.

Malcolm, Joyce L. 2002. *Guns and violence: the English experience.* Cambridge, MA: Harvard University Press.

Mann, Kirk. 1992. *The making of an English underclass.* Philadelphia: Open University Press (Orig. pub. 1991).

Marshall, Ben, Barry Webb, and Nick Tilley. 2005. Rationalisation of current research on guns, gangs and other weapons: Phase 1. Jill Dando Institute of Crime Science, University College London.

Matthews, Roger. 1996. *Armed robbery: two police responses*, edited by Barry Web. Crime Detection and Prevention Series Paper, no. 78. London: Home Office Police Research Group.

Matthews, Roger. 2002. *Armed robbery.* Cullompton, Devon, UK: Willan Publishing.

Mauser, Gary A. 2003. The failed experiment: gun control and public safety in Canada, Australia, England and Wales. Public Policy Sources Paper, no. 71. Vancouver, Canada: The Fraser Institute.

Measor, Lynda, and Peter Squires. 2000. *Young people and community safety: inclusion, risk, tolerance and disorder.* Aldershot, UK: Ashgate.

Measor, Lynda. 2006 Young women, community safety and informal cultures. In *Community Safety: Critical perspectives on policy and practice*, edited by Peter Squires. Bristol, UK: The Policy Press (forthcoming).

Morris, Lydia. 1994. *Dangerous classes: the underclass and social citizenship.* London: Routledge.

Morrison, Shona, and Ian O'Donnell. 1994. Armed robbery: a study in London. Centre for Criminology Occasional Paper, no. 15. University of Oxford.

Morrison, Shona, and Ian O'Donnell. 1997. Armed and dangerous? The use of firearms in robbery. *Howard Journal of Criminal Justice* 36(3):305-20.

Muncie, John. 1999a. *Youth and crime: A critical introduction.* London: Sage.

Muncie, John. 1999b. Institutionalised intolerance: youth crime and the 1998 Crime and Disorder Act. *Critical Social Policy* 19:147-75.

Murray, Charles. 1990. *The emerging British underclass.* London: Institute of Economic Affairs.

Newburn, Tim, and Elizabeth. A. Stanko (Eds.). 1994. *Just boys doing business: men, masculinities and crime.* London: Routledge.

Norrell, James O. E. 2005. Will Britain rise up? *Americas First Freedom.* February, 42.

Nozick, Robert. 1974. *Anarchy, state and utopia.* New York: Basic Books.

Pearson, Geoffrey. 1983. *Hooligan: A history of respectable fears.* London: Palgrave Macmillan.

Penn, D. 2005. The criminal use of firearms in Great Britain. *ESPRC Gun Crime Seminar Background Paper.*

Police Complaints Authority. 2003. *Review of shootings by police in England and Wales 1998-2001.* London: The Home Office/PCA.

Povey, David. 2004. *Crime in England and Wales 2002/2003: Homicide and Gun Crime.* London: The Home Office.

Quigley, Paxton. 1989. *Armed and female.* New York: St. Martin Paperbacks.

Roberts, Paul Craig. 2001. "Gun control" advocates make Britain safe for thieves, rapists and muggers. *Capitalism Magazine*, March.

Ruggiero, Vincenzo. Punishing children: the manufacture of criminal careers in hellion town. Theoretical Criminology 1: 341.

Scarman, Lord. 1981. *The Brixton disorders.* London: HMSO.

Sheley, Joseph F., and James D. Wright. 1993. *Motivations for gun possession and carrying among serious juvenile offenders.* Behavioural Sciences and the Law 11: 375.

Sheley, Joseph F., and James D. Wright. 1995. *In the line of fire: youth, guns and violence in urban America.* Berlin: Aldine De Gruyter.

Shropshire, Steven, and Michael McFarquhar. 2002. *Developing multi-agency strategies to address the street gang culture and reduce gun violence amongst young people.* Shropshire and McFarquhar Consultancy.

Skolnick, Jerome H. 1995. *Justice Without Trial?* New York: J. Wiley & Son.

Smith, David. 1992. *Understanding the underclass.* Policy Studies Institute.

Squires, Peter. 1990. *Anti-social policy: welfare, ideology and the disciplinary state.* Hemel Hemstead, Harvester/Wheatsheaf Books.

Squires, Peter. 1997. Reviewing the firearms control. Brit. J. Criminology 37: 680.

Squires, Peter. *Cops and customers: consumerism and the demand for policing services: Is the customer always right?,* Policing & Society 8: 169.

Squires, Peter. 2000. *Gun culture or gun control.* London: Taylor & Francis/Routledge.

Squires, Peter. 2006. New labour and the politics of anti-social behaviour. *Critical Social Policy*, 26(1) 144.

Squires, Peter, and Dawn E. Stephen. 2005. *Rough justice: anti-social behaviour and young people.* Cullompton, Devon: Willan Publishing.

Stange, Mary Zeiss. 1995. Arms and the woman: A feminist reappraisal. In *Guns: Who Should Have Them?,* edited by David B. Kopel. Amherst, New York: Promethius Books.

Taylor, Ian, and Rob Hornsby. Replica Firearms: A New Frontier in the Gun Market. (October 2000). http://www.gun-control-network.org/PR02.htm (accessed February 12, 2006).

Tonry, Michael H. 2004. *Punishment and politics: evidence and emulation in the making of English crime control policy.* Cullompton, Devon: Willan Publishing.

Tonso, William R. 1982. *Gun and society: the social and existential roots of the American attachment to firearms.* Lanham, Maryland: University Press of America.

Williamson, Howard. 1997. Status Zer0 youth and the 'underclass'. In *Youth, the 'Underclass' and Social Exclusion*, edited by Robert MacDonald. London: Routledge.

Wilson, David, and John Ashton. 2001. *What everyone in Britain should know about crime and punishment.* 2nd. ed. Oxford: Oxford University Press.

Wilson, James Q., and George L. Kelling. 1982. Broken windows. *The Atlantic Monthly* 249, no. 3: 29-38.

Young, Jack. 1999. *The exclusive society.* London: Sage Publications.

Zimring, Franklin E., and Gordon Hawkins. 1987. *The citizen's guide to gun control.* New York: Macmillan.

Zimring, Franklin E., and Gordon Hawkins. 1997. *Crime Is not the problem: lethal violence in America.* New York: Oxford University Press.

Zimring, Franklin E. 1998. *American youth violence.* Oxford: Oxford University Press.

SELF-DEFENSE AND HANDGUN RIGHTS

Lance K. Stell[*]

THESIS

Law-abiding civilians have a claim against the state, based on liberal principles of justice, that it not restrict unduly their carrying handguns for personal defense against bodily attack.[1] When the state disables civilians' carrying handguns for personal defense but refuses to acknowledge incurring a special duty of care to protect those it disables, it demotes them from full citizenship, commits a serious injustice and diminishes the state's legitimacy.

OVERVIEW

In Part I, I clarify the concept of self-defense and distinguish it from conceptions of self-defense, recognized in positive law, that privilege committing homicide in limited circumstances. In Part II, I pose the problem for a liberal theory of justice when the state, putatively founded on liberal, republican principles, (1) legally disables law-abiding individuals from

---

[*] Lance K. Stell (M.A., Ph.D. Michigan) is the Charles A. Dana Professor and Director of Medical Humanities at Davidson College. Dr. Stell regularly teaches Ethics, Philosophy of Law, and Clinical Ethics. He holds a faculty appointment in the Department of Internal Medicine at Carolinas Medical Center, a teaching hospital in Charlotte with which Davidson College has formal institutional ties. He publishes in medical ethics, ethics, and the philosophy of law. Dr. Stell serves as a consultant to hospitals and professional medical associations, and also serves on the Committee on Ethical and Judicial Affairs of the North Carolina Medical Society and on the Grievance Committee of the 26th Judicial District of North Carolina.

[1] Since Aristotle first elaborated the concept of citizenship, (by which he meant not merely those who *de facto* rule the community, but those who have *a right* legitimately to rule it), the right to possess and carry arms has been recognized within the republican tradition of political philosophy as partially-constitutive of full and equal citizenship. *See* Lance K. Stell, *Gun Control and the Regulation of Fundamental Rights*, CRIMINAL JUSTICE ETHICS, Winter-Spring 2001, at 28-33. For Aristotle, a constitution is its community's fundamental ethical understanding. It enables identifying how those with "standing" in its political life should be identified, namely by telling who are its full and equal citizens, those who have a right to have rights. In a nutshell, citizens are identified first, by the rights they bear—rights to participate in political affairs, to hold offices of public trust, to own property in land, to possess and carry arms. The constitution recognizes who has a right to have these rights. Necessarily, a person under legal disability with respect to any of these rights implies that he is less than a full-and-equal citizen. *See* ARISTOTLE, POLITICS III.5.1278b *in* THE BASIC WORKS OF ARISTOTLE, 10-15 (R. McKeon ed., Random House 1941). Aristotle further argued that those who are full members of the political community, its citizens, "must have arms, and in their own hands too."

carrying handguns for defense against bodily attack, but (2) refuses to recognize *any* resulting special duty to protect those under disability.

In Part III, I consider the moral and legal implications of the state's provision of police protection. The state encourages civilians to depend on its protective services against criminal violence (*"To Protect and Serve"*). The data indicate resisting criminal attack with a firearm lowers one's risk of injury more than unarmed resistance or non-resistance.[2] Nevertheless, the state's officers commonly and falsely advise civilians that: (1) it is more prudent to submit to criminal attack rather than to resist it;[3] (2) only officials like themselves are competent to use firearms to fight crime,[4] and; (3) civilians possessing firearms for defense only increase personal and public danger.

Public promises of police protection notwithstanding, the state invariably claims immunity when citizens claim relief for having suffered harm in reliance on police false assurances—even when these have been given specifically in response to a citizen's repeated urgent requests. Her abject dependency on official protection notwithstanding, she will discover that she relies on such assurances *at her peril.* Even when a court-awarded restraining order against a violent spouse declares that the police "shall" enforce its provisions by arresting and jailing him, the order's beneficiary has no *reliance right* to its enforcement. Even when the state commands a person to appear at its courthouse unarmed to face her violent spouse for purposes of determining financial support arrangements, and despite her having obtained a restraining order directing him to refrain from possessing any firearms and despite that she has provided evidence to the court of his threat to kill her in the courthouse, the state owes her no duty to protect her from him while in its courthouse. Fair play and equity say the theory of promissory estoppel supports the citizen, but she will be disillusioned in case she invokes it. Analysis of Constitutional and state case law exposes as romantic nonsense the idea that the state is a fiduciary, entrusted with and accountable for reasonably exercising the citizen's right of self-defense on her behalf.

In Part IV, I will consider and refute commonly-raised prudential and moral objections to recognizing civilian handgun carrying rights, namely, that American gun-carrying practices explain the differential rates of homicide between the G7 countries and the U.S., that it increases personal and public peril, that guns are unsafe, and that gun-carrying increases one's own violent tendencies, insidiously undermines one's self-control, and reduces rather than enhances one's autonomy.

---

[2] *See* GARY KLECK, TARGETING GUNS 167-75 (1997).

[3] *Id.* at 175.

[4] *Id.* at 168 (citing MATTHEW G. YEAGER, JOSEPH D. ALVIANI & NANCY LOVING, HOW WELL DOES THE HANDGUN PROTECT YOU AND YOUR FAMILY? (1976)).

PART I

The Concept of Self-Defense

By self-defense I mean an act *to preempt* a threatened bodily attack or *to repel* it, by means of deadly force or by the threat to use such force. To accept the concept of self-defense implies accepting the concept of preemption which encompasses acts of preemptive intimidation that *deter* the materialization of a threatened attack as well as a preemptive attack that *prevents* it.[5]

The concept of preemption does not logically preclude unwitting causes or unintentional behavior that makes an aggressor decide to step back and stand down. However, the essence of preemption is strategic.[6] At a minimum, preemption implies defender's recognition of aggressor's threat before it materializes in attack, an assessment of the threat's evil-potential, motivated, intentional use of means that either deters aggressor's materializing his threat, or a preemptive attack that renders aggressor unable to materialize his threat. In the latter case, defender's (successful) preemptive attack is the only attack that actually occurs.

Threat-recognition is diagnostic. "Menacing" and "innocent" are in the differential. Making the correct diagnosis presupposes sufficient worldly experience and imagination to read the signs correctly and proper motivation that avoids two obvious errors: dismissing signs of impending danger by wishful thinking and too-quick-on-the trigger impulsiveness. Ordinary moralizing probably overemphasizes the risk of the latter error with the result that much evil that might have been preempted actually materializes. The resulting costs of repelling or stopping the attack increase many-fold.

Most acts of self-defense involve *preemptive intimidation*, not preemptive attack. In the largest national survey ever done on defensive gun use, Kleck found that instances of gun-armed preemption probably occur as many as 2.5 million times a year and perhaps more often.[7] Only a small percentage (probably 2-3%) of armed self-defense involves preemptive attack, much less wounding or killing.

Successful preemption *forestalls* aggressor's attack, so it should be distinguished from uses of force to repel attack or retaliate for it. Both *answer* an attack, hence presuppose having been attacked. Repellant and retaliatory force may serve a defensive interest. Each may render aggressor unable to continue his attack or deter his repeating it. However, the justification of retaliation derives from the principle of retributive justice which

---

5 *See* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 126-30 (1974).

6 MICHAEL WALZER, JUST AND UNJUST WARS 75 (1977).

7 KLECK, *supra* note 2, at 150.

says that one may answer aggression "fittingly" or proportionately—slap-for-slap, shove-for-shove, blow-for-blow, a model that assumes defender's ability to answer in kind.

Preemption, by contrast, not only forestalls the unfolding of the ordered sequence of escalating force envisioned by the retributive paradigm; it anticipates an unacceptable level of harm and *prevents* it. If so, the justification for self-defense must derive from a principle of *preventive justice*,[8] not from retributive justice.

The concept of self-defense is not inherently moralistic. Thinking so confuses preemption from limitations imposed on its exercise with an eye toward making it acceptable as a legal privilege to commit homicide. For example, it is a mistake to suppose that *the concept* of self-defense implicitly involves *fault selection*, implying culpability of aggressor and innocence of defender. During a bank hold-up, the robber shoots a guard who goes for his gun. The robber acted in self-defense, but without justification because he had no right to defend himself in the circumstances.[9] Or, one thug, having been beaten within an inch of his life by another thug for stealing last month's drug money may ultimately shoot his attacker to death in self-defense. Their criminal history of provocation/counter-provocation, assault-counter-assault must frustrate a time-slice identification of Mr. Culpable and Mr. Faultless.

Or a troubled person may feign aggression in order to get himself killed. In a "suicide by cop" case,[10] for example, a man menaces the neighbors with a shotgun. Police are dispatched to a "man with a gun" call. The guy refuses to obey the officer's repeated commands to drop the shotgun. Instead he knowingly fires the gun's only cartridge over the officer's head, shouts expletives, and menacingly advances. He does all this with the intent of provoking his own victimization. It works. The man is shot to death. Afterwards, a note is found that outlines the suicide's plan in detail.

Nevertheless, the officer killed the victim in self-defense. He used deadly force preemptively from a sincere but mistaken belief that he faced life-threatening danger. He shot the victim intentionally but unintentionally facilitated his victim's suicide.[11] That the responding police officer is a good shot under stress was *unlucky* for him in the circumstances. Had a less skillful, less self controlled officer-colleague answered the "man with a

---

[8] *See* Allen Buchanan & Robert O. Keohane, *The Preventive Use of Force: A Cosmopolitan Institutional Proposal*, 18.1 ETHICS & INT'L AFFAIRS 1 (2004).

[9] WALZER, *supra* note 6, at 128.

[10] *See, e.g.*, REBECCA STINCELL, SUICIDE BY COP: VICTIMS FROM BOTH SIDES OF THE BADGE (2004). This book examines various studies conducted, including the author's interviews with hundreds of police officers across the United States. It also includes selected case studies of officer-involved shootings and their outcomes as well as photographs, illustrations, and a complete bibliography. The example presented is my hypothetical.

[11] Assistance of others' acts necessarily is intentional, but one may facilitate another's acts unintentionally.

gun" dispatch, one whose fright would have caused him to empty his gun missing, the victim's plot of vicarious self-destruction might have unraveled. In each instance of "suicide by cop" a cop is victimized by the one who dies.

Jeff McMahan's justice-based theory of self-defense says that it is "precisely [attacker's] culpability that justifies the use of violence against him. For in cases in which a person's culpable action has made it inevitable that someone must suffer harm, it is normally permissible, *as a matter of justice*, to ensure that the culpable person himself suffers the costs of his own wrongful action rather than to allow those costs to be imposed on the innocent."[12]

On the contrary, it is the officer's *apprehension* that he faces mortal danger that makes his preemptive use of deadly force an instance of self-defense. And what privileges his doing so is *not* the principle that says the culpable person should suffer the costs of his wrongful conduct because that confuses retributive justice with preventive justice. What wrongful conduct? The suicide's deserts have not been established. Which costs? Due process of criminal law would have assessed the social costs of the troubled man's *actual wrongdoing* (brandishing an empty gun, communicating threats, disturbing the peace).

What makes the officer's use of preemptive deadly force permissible is that the law cannot remedy the loss if the officer allows the suicide's apparent threat to materialize, and in those circumstances, he is entitled to assume the worst about the threat and is entitled to act on that assumption, even when it turns out to be wrong. In such circumstances, preventive justice says "let the burden of reasonable mistake fall on the *apparent threat*."

Retributive justice authorizes retaliation but denies straightforward permission for strategic defense (preemptive attack). Retributivists are burdened to explain why victims must suffer an attack before they may use proportionate force to repel but not necessarily trump it. An adequate theory of preventive justice must not only explain why preemptive attack is just, but it must also explain why it distributes the risk of reasonable mistake as it does, a task that exceeds the scope of this paper.

The concept of self-defense straightforwardly applies to innocent-threat cases, for example, to one's preempting a grizzly bear mauling by blasting it in the face with pepper spray.[13] Doing so does not become non-

---

12 JEFF MCMAHAN, THE ETHICS OF KILLING 401 (2002).

13 According to Locke, the aggressor "exposes his Life to the other's Power to be taken away by him . . . one may destroy a man who makes War on him . . . *for the same Reason, that he may kill a Wolf or a Lyon*." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 279 (Peter Laslett ed., 1988) (1690) (emphasis added). If Locke is correct, and I think he is, that the self-defense privilege covers the use of force against both aggressors who are agents and aggressors who are non-agents, it must be wrong to *define* self-defense as "the right to use necessary and proportionate lethal force against an imminent unjust threat to life." DAVID RODIN, WAR AND SELF-DEFENSE 127 (2003).

self-defense when one intentionally enters or blunders into the bear's home range or approaches its kill or its cubs too closely. If one shoots the charging bear with a firearm instead of pepper-spray, it counts as self-defense irrespective that a percentage of bear-charges are known to be feigned.[14] One need not wait to find out. As in the suicide-by-cop case, one cannot be faulted for assuming the worst. "Detached reflection cannot be demanded in the presence of an uplifted knife."[15]

Self-defense as Justification

Why should the law privilege preemptive attack in self-defense? In 52 BCA, Cicero argued, "There exists a law, not written down anywhere, but inborn in our hearts; a law . . . which lays it down that, if our lives are endangered by plots or violence, any and every method of protecting ourselves is morally right. When weapons reduce them to silence, the laws no longer expect one to wait their pronouncements. For people who decide to wait for these will have to wait for justice, too—and meanwhile they must suffer injustice first."[16]

Cicero may be correct that approval of preemptive attack is hard-wired into human moral psychology.[17] He may also be correct that preventive justice rationalizes the psychological disposition in circumstances when the law cannot remedy materialization of the threatened harm. However, his bald assertion that one may always do *whatever it takes* in self-defense prompts us further to distinguish between the concept of self-defense and a conception of preemptive attack that properly balance a personal interest in avoiding remediless victimization against the social interest in minimizing needless violence and in properly allocating the risk of reasonable mistake. Obviously, the greater defender's burden of restraint in the face of aggressor's threat, the greater defender's risk that he will not survive aggressor's attack in case it materializes. On the other hand, lightening defender's burden of restraint increases the risk that his strategic errors will inflict preemption on the innocent.

Consider the conception "perfect self-defense" currently recognized in many jurisdictions. To avail oneself of this legal theory in the face of a murder charge, one admits to one element of the offense (that one has

---

[14] Suppose the law were to impose the following disabilities on humans in bear country: no firearms, no knives, no pepper spray, no air horns. The law shifts the balance of power increasingly to the bear. At some point, legal disabilities rule out self-defense as a privilege, deterring but not preventing entry into bear country.

[15] *See* Brown v. United States, 256 U.S. 335 (1921).

[16] CICERO, *Pro T. Annio Milone* (On Behalf of Milo) *in* THE SPEECHES OF CICERO 17 (N.H. Watts, trans., 1931).

[17] Pro forma recognition of self-defense seems to be a universal feature of law codes. Even the Charter (Article 51) of the United Nations recognizes it.

committed homicide) in order to assume the burden of putting on an affirmative defense that otherwise plausibly fits the forecast of facts. To elicit the desired jury instructions, after all is said and done, one must have proved by credible evidence each of several specific elements that one's having committed homicide was privileged by necessity in the circumstances.[18] Only if one thereby creates reasonable doubt in the jury, is one entitled to acquittal.

"Imminence," or better, "the reasonable apprehension of imminent bodily attack by means likely to cause crippling injury or death," is a criterion of art for limiting the privilege to use preemptive deadly force under "necessity." The criterion is and must be interpreted with a measure of allowance. When one faces a gang of attackers, "imminence" does not require forbearance until one perceives that the first thug has poised to strike. The imminence criterion does not require one to assume the expectable attacks will come serially rather than in concert. If so, one's defensive act(s) and the privilege to perform them must onset in time to enable preempting them all.

Jeff McMahan, however, proposes a case that seems to flummox the imminence requirement. Suppose "a gang of villains . . . invade one's home, lock oneself and one's family in, and [give one good reasons for supposing that they will] kill everyone the next day. If the only way—or perhaps the best way—to prevent these killings is to kill the gang members in their sleep, that is certainly permissible."[19] Killing the gang members in their sleep counts as self-defense because it preempts their (reasonably) expected attack. But how can one reasonably regard sleeping men as posing an imminent danger?

At least one state supreme court has held that it is unreasonable, as a matter of law, to regard a sleeping person as an imminent threat.[20] So if McMahan is right that killing sleeping men may be permissible, then either

---

[18] A defendant is entitled to an instruction on perfect self-defense as justification for homicide when the evidence, viewed in the light most favorable to the defendant, tends to show that at the time of the killing:

1. It appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm;
2. Defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness;
3. Defendant was not the aggressor in bringing on the affray, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
4. Defendant did not use excessive force, that is, did not use more force than was necessary or reasonably appeared necessary to him to be necessary under the circumstances to protect himself from death or great bodily harm.

[19] Jeff McMahan, *War as Self-Defense*, 18 ETHICS & INT'L AFFAIRS 75, 76 (2004).

[20] State v. Norman, 324 N.C. 253 (1989), *rev'g*, 89 N.C, App. 384 (1988) ("The evidence tended to show that no harm was 'imminent' or about to happen to the defendant when she shot her husband. The uncontroverted evidence was that her husband had been asleep for some time when she walked to her mother's house, returned with the pistol, fixed the pistol after it jammed and then shot her husband three times in the back of the head.").

he supplants the imminence criterion with "first clear chance," or the court was wrong about imminence. Namely, McMahan may be suggesting that when victims have been taken by force and held captive, then so long as they are under the control of their captors, they are entitled to believe that danger is imminent throughout, that they are under a "continuous reign of terror" irrespective of their captors' wake-sleep cycles.[21] Since the gang's control of the captives enables them to move forward with their murderous plan willy-nilly, in which case the "imminence as about-to-happen criterion" should be interpreted as having less to do with a countdown to attack-time and more to do with attacker's control and intent, reasonably inferred.

PART II

Justifying the Defense of "Self-Defense": The Values at Stake

Since law cannot promise to remedy the injuries of bodily attack by violence, no plausible theory of justice can require that one should suffer it before one may use force defensively. Therefore, preempting an attack that threatens to inflict crippling injury or death cannot not be unjust *per se*. And if the use of preemptive deadly force is sometimes permissible, it is not obvious why it should matter morally whether it is used in defense of others, or of one's country or of oneself. And indeed, self-defense and defense of another are recognized legal theories in all jurisdictions in the United States. Yet, commentators regularly confess to having great difficulty explaining why using preemptive deadly force should ever be privileged.[22]

Many commentators think a successful rationale for recognizing a privilege of preemptive attack must be utilitarian.[23] But if so, a problem immediately arises, because utilitarianism focuses primarily on *what happens* and its net effect on aggregate value as determined by some theory of non-moral value. To whom it happens or who brings it about matters only indirectly. Considerations of *moral* (dis)value such as aggressor's culpability matter only indirectly.

---

[21] *Norman*, 89 N.C. App. at 394 ("[A] jury, in our view, could find that decedent's sleep was but a momentary hiatus in a continuous reign of terror by the decedent, that defendant merely took advantage of her first opportunity to protect herself . . . .").

[22] GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 857-58 (1978). Defensive killings draw the most moral and legal scrutiny. Yet, most often, acts of self-defense preempt attack by intimidation—no killing, no serious wounding if any. A gun-display that preempts attack by intimidation makes preemption by gun shot unnecessary.

[23] For a sophisticated utilitarian rationale for recognizing a legal justification for killing in self-defense, see Dan Polsby, *Reflections on Violence, Guns, and the Defensive Use of Lethal Force*, 49 LAW & CONTEMP. PROBS. 89 (1986).

Utilitarian impartiality says that, *prima facie*, defender's survival is of no greater (non-moral) value than aggressor's. If so, defender's preference about the outcome of a close encounter of the lethal kind cannot straightforwardly trump aggressor's. If defender's survival would result in fewer quality-adjusted life years than aggressor's, aggressor's survival interest should trump defender's. Were the calculus of social interest to determine that the victimization of smaller, weaker, or more elderly individuals is not net-disadvantageous, then a categorical prohibition of possessing equalizers by which these victims might offset *a natural disparity of force* is simply unfortunate but not morally objectionable.

These implications offend the widely-shared, liberal moral intuition that just social rules should nullify the effects of natural inequalities, even when social welfare decrements result.[24] Indeed, Ronald Dworkin has argued that taking rights seriously requires willingness to accept this cost.

Utilitarianism's failure to give primary and independent importance to the distributive effects of social rules has prompted a search for non-utilitarian justifications of self-defense.[25] However, Bernard Williams has challenged whether any impartialist theory of right can explain straightforwardly why we should enjoy the privilege of giving preponderant weight to our own projects, commitments and interests, as one clearly does when preempting aggressor's threat in self-defense.

Obviously, defender will be burdened with "one thought too many," if she must reason validly about a threatened attack, "from an impartial point of view, the interests of the least culpable person should prevail, my interests in avoiding bodily attack are less culpable than attacker's apparent threat to inflict it on me, therefore I may use preemptive force to eliminate his threat." This line of reasoning makes defender the judge in her own quarrel when she infers permission to use preemptive force from her comparative innocence. And her major premise may turn out to be irrelevant to the permission she infers, namely, when she makes an apparent-attacker bear the costs of her reasonable-but-mistaken belief about her risk, as in the "suicide-by-cop case."

Self-Defense and Disparity of Force

Using deadly force to preempt aggressor's threat presupposes having the means enabling one to do so. If so, an analysis of what one *may* do in self-defense presupposes what degree of force one *might* effectively apply

---

[24] JOHN RAWLS, A THEORY OF JUSTICE 15 (1971).

[25] *See* Phillip Montague, *Self-Defense and Choosing Between Lives*, 40 PHIL. STUD. 207 (1981); Cheyney C. Ryan, *Self-Defense, Pacifism, and the Possibility of Killing*, 93 ETHICS 508 (1983); Susan Levine, *The Moral Permissibility of Killing a "Material Aggressor" in Self-Defense*, 45 PHIL. STUD. 69 (1984); MCMAHAN, *supra* note 12; DAVID RODIN, WAR AND SELF-DEFENSE (2003).

in the circumstances. And, if compliance with legal disabilities has rendered one effectively helpless in the face of an assault, farther discussing the degree of force one *may* legally resort to in self-help becomes moot.

Judy Thompson, in a thought-provoking discussion of self-defense, poses the following hypothetical. Aggressor says to Victim that, if he succeeds in getting hold of a tank, he will get in it and run Victim down. Aggressor gets hold of a tank and proceeds with apparent harmful intent against Victim. Fortunately, Victim has in the meantime armed himself with an anti-tank gun. Thompson says, "I think most people would say that it is morally permissible for Victim to use that anti-tank gun: surely it is permissible to kill a man if that is the only way in which you can prevent him from killing you!"[26]

To reach the interesting question of what Defender *may* do in self-defense, Thompson stipulates that what Defender *might* do is fire an anti-tank gun at Aggressor. This is something Defender *might* do because Thompson's hypothetical has so armed him. Of course, it could be true that Defender *may* fire an anti-tank gun at Aggressor in self-defense even though it is false that this is something Defender *might do* in the circumstances, because he lacks an anti-tank gun (say, he happened to leave it at home that day). What rights one has and what makes those rights valuable are distinct, namely, possessing the means enabling the exercise of one's rights in the circumstances.

But suppose Defender were (legally and morally) prohibited to possess the anti-tank gun. If so, then in addition to having a disability (no right to possess it), he would have no right to load it, no right to aim it at Aggressor, nor discharge it, nor kill Aggressor with it, nor do anything with it whatsoever. The disability would nullify the exercise of a right Defender supposedly has (on moral and legal grounds), namely, to use preemptive deadly force. If, by hypothesis, the only act whereby Victim might save himself from being run down by Aggressor's tank involves his using means he is disabled from possessing, then it would appear that Defender has a right to self-defense but is disabled from performing the only act by which he might effectively defend himself (firing the anti-tank gun). This is incoherent if the privilege and the disability have the same normative foundation.[27]

Jeff McMahan senses but does not discuss explicitly the means-to-apply-force issue when, in developing his "justice-based account of self-defense" he says, "it is Culpable Attacker's moral culpability that establishes a strong moral asymmetry between him and his potential Victim, an asymmetry that makes it permissible, as a matter of justice *to ensure* that he

---

[26] JUDY JARVIS THOMPSON, RIGHTS, RESTITUTION, AND RISK: ESSAY IN MORAL THEORY 33 (W. Parent ed., 1986).

[27] Suppose Defender were armed with "Atomic Annie" instead. Firing it at Aggressor will repel the tank attack. However, many innocent bystanders will be killed. Then one might argue that Defender has a duty to forego exercising his right to self-defense.

rather than the potential Victim suffers any harm necessitated by his culpable action."[28]

McMahan overstates what justice can do. Justice cannot "ensure" that Attacker rather than Victim suffers any harm necessitated by Attacker's culpability. However, it would seem to follow from his account that if society burdened (smaller, weaker, female) Victim[29] with a weapon possession disability, its rules would not only fail to "ensure" that (larger, stronger, male) Attacker would suffer any harm necessitated by his culpability, society's weapon-possession disability *requires* Victim to suffer the resulting harm.[30] Rather than empowering Victim, society's rules would declare that Victim shall be helpless in the face of Attacker's culpability.

Social rules cannot "ensure" that Attacker shall suffer any harm resulting from his culpability, but in so far as they are just, they should block the imposition of "equalizer" disabilities on the law-abiding, otherwise, the rules do nothing to redistribute the costs of wrongs that have no remedy.

Handguns[31] are force-multipliers. They create disparity of force. They also equalize it.[32] A handgun is the only practical means to enable smaller, weaker defenders to nullify the advantage that larger, stronger, or more numerous assaulters would otherwise enjoy in close encounters of the lethal kind.[33] And indeed, the data show that citizens who put up gun-armed re-

---

28 MCMAHAN, *supra* note 12, at 402.

29 *Id.* at 400-01 ("I will, in general, use masculine pronouns to refer to Attackers and feminine pronouns to refer to Victims. This reads quite naturally given that, in those actual situations in which self- or other-defense is possible, the overwhelming majority of Attackers are male."). McMahan is right about the sex of attackers. They are not only overwhelmingly male, they are overwhelmingly males between the ages of 18 and 35. However, McMahan is wrong to suggest that females are disproportionately represented among victims. On the contrary, the overwhelming majority of victims are also male.

30 Social rules that permitted Victim to hire armed professionals as her 24/7 body guards but disabled her from possessing arms personally would not necessarily disadvantage Victim, were she wealthy enough to afford the service. However, these rules would say to less well-off Victims: "let them eat cake."

31 "Handgun" refers to a firearm designed to be operated with one or both hands, but otherwise unsupported. They vary in size. At one extreme are match-box size handguns that weigh but a few ounces. On the other extreme are handguns that weigh over four pounds and have considerable bulk. This paper focuses on handguns that are not only useful for personal defense but also convenient to carry routinely. The selection of a handgun involves tradeoffs. Very small ones are convenient to carry. They enable projection of lethal force, but their toy-like appearance reduces their value for intimidation. Larger, big-bore handguns have greater intimidation value, but are difficult to conceal and less convenient to carry.

32 *See* KLECK, *supra* note 2, at 220. The data indicate that gun use in homicide is more likely when the attacker, if not armed with a gun, would be less powerful than the victim, due to sex, age, or numbers.

33 *See* Lance K. Stell, *Close Encounters of the Lethal Kind: The Use of Deadly Force in Self-Defense*, 49 Law & Contemp. Probs. 113 (1986).

sistance to criminal assault suffer injury less often than non-gun resisters or than non-resisters.[34]

Even more important from an overall injury-reduction standpoint, handguns are *widely-perceived* as force-multipliers. For purposes of intimidation, no conveniently portable weapon beats a handgun. There are bilateral implications. Gun display, or even the insinuation of gun possession, enables a criminal to extract victim submission by intimidation. And indeed, available evidence finds that gun-armed criminals injure their victims less often in assaults.[35] Similarly, a defender's gun display may preempt criminal attack by *intimidation* rather than by gunshot. There is credible evidence to support this conjecture.[36] When bodily attacks are preempted by intimidation, total injury tends to decline.

Guns are useful for preemptive intimidation because people perceive a gun-armed person as having the power to inflict crippling injury or death. An alternative weapon might be equally or even more lethal, but not useful for preemptive intimidation because its lethality is unapparent. Its usefulness would be limited to preemptive attack—the actual infliction of disabling injury or death. Because preemptive intimidation depends on aggressor-belief, a gun-facsimile or an empty gun may be useful for preemption despite its non-lethality. By contrast, technologically innovative weapons, whether more or less lethal than firearms, may promote more preemptive attacks if their intimidation value is low.

The relation between self-defense and gun rights is central to arguments about gun control. Pro-controllers argue that a civilian has no right to carry a handgun for self-defense. On prudential grounds, they argue that armed resistance to criminal attack increases one's chances of being injured or killed, and that a civilized person has a privilege to summon armed officials who will exercise one's self-defense rights on one's behalf. The question how officials' gun carrying privileges are derived is not explained.

A romantic appeal to social contract theory might run as follows: In civil society, citizens should be understood as having voluntarily surrendered to the government the primary exercise of their self-defense rights, although a vestigial, but non-arms-bearing privilege remains. Thus officials' handgun carrying privileges derive from pre-political, individual gun rights being transferred to the state by (hypothetical) consent. Good citizens rely on armed officials more effectively to exercise their self-defense rights. This theory makes the state into a fiduciary, holding in trust, rights (including self-defense rights) belonging to its citizens. The state, as the citizens' servant, is accountable for how it manages these rights.

The accountability-corollary of this theory implies that the state must adhere to a reasonable standard of care in exercising the rights of its citi-

---

34 KLECK, *supra* note 2, at 171.

35 *Id.* at 225.

36 JOHN R. LOTT, MORE GUNS, LESS CRIME (2d ed. 2000).

zens. Police must timely show up when summoned, or be liable when it is shown that they failed to adhere to reasonable standards.[37]

PART III

Sovereign Immunity Trumps Detrimental Reliance

It is axiomatic that a state has authority to suppress criminal violence within its jurisdiction. Yet, contrary to the romantic theory of fiduciary responsibility sketched above, the courts have consistently found that the state has no duty to protect any individual from criminal violence.

Warren v. DC Metropolitan Police Department[38]

In the early morning hours of March 16, 1975, Carolyn Warren, her house mates, Joan Taliaferro, and Miriam Douglas were asleep. Warren and Taliaferro shared a room on the 3rd floor. Douglas and her four-year old daughter shared a 2nd floor room. The women were awakened by the sound of their back door being broken down by two men, Marvin Kent and James Morse. The men entered Ms. Douglas' 2nd floor room where Kent forced her to sodomize him then Morse raped her.[39]

Warren and Taliaferro heard Douglas' screams from down stairs. Warren called police requesting immediate assistance at 6:23 a.m. She reported that their house was being burglarized. A Metropolitan Police Department employee assured her that police assistance would be dispatched promptly. Three minutes later, a call was dispatched to officers on the street. However, the dispatcher mistakenly designated the call Code 2, despite that a "crime in progress" report should have carried a Code 1 designation. Three police cruisers responded.

Meanwhile, Ms. Warren and Ms. Taliaferro had crawled onto a roof adjoining their apartment window to wait for the police to arrive. From this vantage point, the two women watched as one officer drove through the

---

[37] It takes approximately 1.5 seconds for an able-bodied knife-armed aggressor to close a 7-yard distance to stab his victim to death. It takes approximately 1.5 seconds for an attentive victim to recognize the attack and draw his/her handgun to preempt it. On average, fewer than 25% of calls for police assistance reach the scene in 20 minutes.

[38] Warren v. District of Columbia, 444 A.2d 1 (1981).

[39] The case report makes no further reference to Douglas' daughter. So it is not entirely unclear whether the child was present during the assault on her mother, or whether she was subsequently kidnapped along with her mother and housemates. I assume not. Were the child to have been present, it is speculative whether the state's well-recognized *parens patriae* protections of persons under disability would have been the basis for a special relationship with Douglas' daughter, triggering a duty to protect her, if not the adults.

alley behind their house and, without checking the back entrance to the house, proceeded to the front. A second officer knocked on the front door but left when he received no response. The three officers departed 5 minutes after arriving, at 6:33 a.m.

Warren and Taliaferro crawled back into their room. Again they heard Douglas' screaming down stairs. They called the police again, this time telling the dispatcher that intruders had entered the house. And once again, they were assured that help was on the way. The second call was received at 6:42 a.m., but logged merely as "investigate the trouble". In fact, no call was dispatched to officers on the street this time.[40]

Having become quiet downstairs, Warren and Taliaferro inferred that the police must have arrived. They called down to Douglas. However, since no police had been dispatched, let alone arrived, calling down to Douglas served only to alert Kent and Morse that there were more potential victims upstairs. Kent and Morse kidnapped all three women, forcing them at knife point, to go to Kent's apartment where, during the next 14 hours, the women were held captive, raped, robbed, beaten, forced to perform sexual acts on each other, and generally made to submit to the sexual demands of Kent and Morse.

Warren and her house mates sued the Metropolitan Police Department for negligent failure to provide minimally adequate police services; failure to code correctly the 6:23 a.m. call; failure by the responding officers to follow standard investigative procedures; and failure to code correctly or to dispatch the 6:42 call.

At trial, the suit was dismissed for failure to state a claim upon which relief could be granted. However, on appeal, a 3-judge panel reversed (2-1, Nebeker, dissenting), holding that the women were owed a special duty of care by the police department. However, an *en banc* rehearing concluded that Warren, et al., did not fall within the class of persons to whom a special duty of protection was owed. The panel's decision was vacated and the trial court's dismissal upheld.

Writing for the entire DC Circuit Court, Judge Nebeker invoked the public service doctrine, that when a municipality or other government entity offers police services, it assumes a general duty to the public at large. To an individual member of the public, however, the police department remains "a stranger," owing him or her "no duty."

The Court considered a variety of theories on which a special relationship might be predicated in the circumstances. The clearest bases for a duty to protect would be when the state has taken someone into custody, or when

---

[40] Under the "too true to be good" category, is the following, perhaps an urban legend: a wife calls police to report that someone is breaking into their attached garage. The dispatcher says that all officers are currently busy but will *investigate the trouble* when they have time. She calls back a minute later to say that the police need not bother because her husband has gotten his gun and gone to the garage to investigate. Two police cruisers arrived on the scene in minutes.

an individual, at substantial personal risk, agrees to cooperate with authorities in a prosecution in exchange for police protection. In the former case, "taking someone under control," generates a special duty of care and in the latter case, there's a contract, complete with "consideration." An enforceable performance duty arises. No relevantly similar fact patterns were found in the instant case.

Detrimental Reliance and Parens Patriae

Detrimental reliance is a theory rooted in law and equity which says that plaintiff should have a remedy for harm suffered from his reliance on a false promise, especially when defendant has induced plaintiff's reliance.

Parens patriae refers to the state's sovereign power of guardianship over persons under disability,[41] the inherent power of the state to provide protection of the person and property of persons *non sui juris*, such as minors, insane, and adjudicated incompetent persons.[42] Criteria of impairment that warrant involuntary commitment to the state's protective custody include those who, "would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities . . . or to satisfy his need for . . . self-protection and safety."[43]

By contrast, a competent adult is autonomous (*sui juris*), has all *the rights to which a freeman is entitled*, is not under the supervision of another, not under disability by virtue of age or mental deficiency, and is presumed able to look after and to protect herself. Since by definition, a competent adult is a free, full and equal citizen, the state owes her no special duty of care or protection. With respect to these interests, the state and the competent adult are (friendly) strangers to each other.

However, when the state disables a person from acting in her own interests, especially if it disables her from armed self-protection from bodily attack, the theory of *parens patriae* suggests that the state thereby incurs a fiduciary responsibility to provide what it has disabled the citizen from providing for herself. This does not imply strict liability but rather that the state's agents must adhere to that standard of care reasonably expected from those who hold themselves out as professionally competent to provide police protection.

Blanket handgun possession/carrying disabilities *take* an interest whose monetary value can be estimated—the price of one's next-best op-

---

41 Meaning "Father of his country," applied originally to the king, and is used to designate the state, referring to its sovereign power of guardianship over persons under disability. *See In re Turner*, 94 Kan. 115 (1915).

42 McIntosh v. Dill, 86 Okla. 1 (1922).

43 N.C. Gen. Stat. § 122C-3(11)a.1.I (2005). Dangerous to himself.

tion. In jurisdictions that permit regulated concealed handgun carrying, citizens who can afford the "time-tax," the fees and mandatory instruction, have the option of paying for the regulated privilege. Wealthier, politically well-connected individuals may gain a discretionary exemption from the disability altogether. Chicago's aldermen, for example, exempt themselves from the blanket handgun possession/carrying disability they impose on the city's general population. Those who can afford it have the option of living in gated communities which typically feature private security services.

Because felons are under life-time firearm possession disability, by federal law, blanket handgun carrying disabilities burden the law-abiding, despite their law-abidingness. Such disabilities also have distributional wealth effects among the law-abiding, shifting the risks of victimization even more to poorer citizens who cannot afford the security options wealthier citizens buy.

D.C.'s Firearms Control Regulations Act (FCRA) of 1975 imposed disarmament on its law-abiding citizens. By making civilian handgun possession illegal, the law dramatically emphasized that the city's residents must depend on the police for armed protection against criminal attack. FCRA not only disabled virtually all civilians from possessing handguns, it prohibited the sale of handguns within the District and further required anyone who owned guns legally to maintain them in their residence unloaded and disassembled.[44] Having assured the City's criminals that they need not fear an armed response when assaulting law-abiding civilians, it would have seemed ethically imperative that those placed under legal disability from effective self-help should enjoy a special relationship with the guardian of all persons under disability (*parens patriae)* to provide minimally-adequate protection from attack.

In light of their legally imposed, abject dependency on the police for protection, wasn't it reasonable for the women to rely on the specific assurances they received (twice) from an agent of the police department that armed officials of the government were on the way to lend assistance? Didn't their reliance on the dispatcher's promise lead them to forego precautions (e.g., continuing to keep quiet) and actually to increase their danger (by calling out)? Why doesn't non-provision of specifically promised assistance count as a state-created danger? Indeed, had the dispatcher candidly warned the women that they had no right to rely on his promises, that they could not rely on his exercise of due care in coding their calls for help properly, that they had no right to expect responding officers to adhere to established procedures when investigating a reported crime, the women would been invited to consider how helpless they really were and what self-help they might muster.

---

[44] GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 302 (1991) (citing Edward D. Jones, *The District of Columbia's 'Firearms Control Regulations Act of 1975': The Toughest Handgun Control Law in the United States—Or Is It?*, 455 ANNALS AM. ACAD. POL. & SOC. SCI. 138 (1981)).

But no, the Court held that even when an official specifically promises an individual citizen that police protection will be forthcoming immediately, she has no personal right to rely on it.[45] Promising to provide a gratuitous benefit does not create a personal entitlement to receive it. Failing to receive a benefit to which one is not entitled is neither a contractual breach nor negligence, and it cannot count as a *legal cause* of one's harm.

But didn't the police incur a duty to the housemates once they actually undertook the provision of service? Justice Benjamin Cardozo once opined, "one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all."[46] Wouldn't this theory imply that, once the police undertook to provide service in the Warren case, they incurred a duty to act with due care? If so, wasn't their failure to adhere to standard police investigative procedures the legal cause of resulting harm?

No. The omissions and failures on the part of the police were not tortious. The only harms the women suffered were criminal, inflicted by Kent and Morse. And even if it were found that the dispatcher and the responding officers grossly violated their duties (shocking the conscience of a decent person, presumably not difficult to establish), it would avail the women nothing unless it were proved that they had a private cause of action against the police department for harms resulting from the sub-par behavior of its agents. That has never been found in such circumstances.[47]

Gonzales v. Castle Rock: No Property Right in Police Protection?

At approximately 3:20 a.m. on June 23, 1999, Simon Gonzales drove his pickup truck to the Castle Rock police station. He got out and opened fire on the station. Police officers returned fire, killing him. In the cab of his truck were the bodies of his three daughters, ages 10, 9 and 7 whom he had murdered after abducting them from their mother's home the previous afternoon.[48]

---

[45] In law a covenant may be distinguished from a contract in that it does not require consideration flowing to the covenantor in order to be binding upon him. At common law, any contract made under seal is considered a covenant. Today, contracts under seal are uncommon, except for the transfer of real property (by deed), but may still be entered into when the covenantor shows express intent to be bound by his seal. On the theory of covenant, multiple assurances by the state's agent might be taken to express *bona fide* intent on which a citizen might reasonably rely.

[46] Moch v. Rensselaer Water Co., 247 N.Y. 160 (1928).

[47] Police officers remain liable for their personal negligence, however, e.g, for negligent handling of a police dog, their vehicle or their firearm when injury results. *See Warren, supra* note 38, rejecting a novel theory of "professional malpractice" by police officers. One federal court announced baldly, "there is no constitutional right to be protected by the state against being murdered by criminals or madmen." Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).

[48] Gonzales v. City of Castle Rock, 366 F.3d 1093 (10th Cir. 2004).

On May 21, 1999, Jessica Gonzales, Simon's estranged wife, had won a temporary restraining order (TRO) from a trial judge who made factual findings as to her need for protection from him. The order commanded Mr. Gonazles "not to molest or disturb the peace of [Mrs. Gonzales] or . . . any child." It further directed him to stay at least 100 yards away from the property at all times. The TRO was entered in the state's central registry, accessible to all state and local law enforcement agencies. The order's enforcement provisions, printed on the reverse side, directed the police that they "shall use every reasonable means to enforce" it and they shall arrest, or where impractical, seek an arrest warrant for those who violate the restraining order, and they "shall take the restrained person to the nearest jail or detention facility." These extraordinarily detailed, mandatory enforcement provisions had been enacted by the state of Colorado in response to police under-enforcement of domestic violence laws.

On June 4, 1999, the TRO was served on Mr. Gonzales and on that same day was made permanent, with slight modifications to include a detailing of his parental rights. However, the command that Mr. Gonzales was excluded from the family home remained in force as well as the provision that he not molest or disturb the peace of Ms. Gonzales or the girls.

In disregard of the restraining order, sometime between 5:00 and 5:30 p.m. on Tuesday June 22, 1999, Mr. Gonzales abducted the girls while they were playing outside their home. When Ms. Gonzales discovered her daughters were missing, she suspected her husband had taken them. She made her first call to the police around 7:30 p.m. requesting assistance in enforcing the restraining order against her husband. Two officers came to her home. She showed them a copy of the TRO. She asked that they enforce it and return her children to her immediately. In blatant disregard of the order's enforcement provisions, printed on it in large block letters, the officers stated there was nothing they could do about the order. Instead, they suggested that she call the Department again if the children were not returned by 10:00 p.m. Throughout the course of the evening, Ms. Gonzales called the Department four more times only to be instructed on each occasion that she should wait. During the fifth call, the dispatcher told her to wait at her apartment until responding officers arrived, however none ever came. Finally, at 12:50 a.m., she traveled to the police station. An officer took her incident report, but he made no effort to enforce the restraining order. Instead, he went to dinner. Nearly eight hours after Jessica Gonzales first contacted the police department, Simon Gonzales arrived at the police department with bodies of his three murdered daughters in the cab of his pickup. The police shot him dead in the ensuing gunfight.

Ms. Gonzales brought an action on behalf of herself and her deceased daughters against the City and three of its police officers. Pursuant to 42 U.S.C. §1983, wherein Congress provided a private right of action against

the state for "deprivation of any rights, privileges, or immunities secured by the Constitution and its laws,"[49] Gonzales claimed the City and three of its police officers violated her 14th Amendment due process rights by failing to enforce the restraining order against her husband as required by state law.

All defendants moved to dismiss for failure to state a claim. The district court granted their motions, finding that Gonzales had neither a substantive nor a procedural due process right to enforcement of the restraining order. On appeal, a panel of the 10th Circuit affirmed in part and reversed in part. It agreed that Gonzales had no substantive due process claim, but it held that she had a valid procedural claim in light of the mandatory enforcement provisions of Colorado's domestic violence arrest statute.

On review *en banc,* a divided 10th Circuit affirmed, holding that Jessica Gonzales was the direct and intended beneficiary of the restraining order's protection and that its mandatory enforcement provisions gave her a (14th Amendment) *property interest* in due process. The City of Castle Rock and its police violated that interest by providing her with no due process whatsoever. For authority, the court invoked the *Roth* framework which declared that "[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."[50]

However, the Supreme Court reversed, 7-2.[51] Writing for the Court, Justice Scalia built a devastating argument against a citizen's ever having a personal right to police protection. He cited *DeShaney v. Winnebago County Dep't of Social Services*, where child-protection officials failed to protect a male child from beatings by his father that left him severely brain-damaged. There, the Court held that "substantive" due process does not "require the state to protect the life, liberty, and property of its citizens against invasion by private actors."[52] *DeShaney* said that substantive due process would impose on the state an affirmative duty to protect an individual when an affirmative exercise of its power (such as incarceration, institutionalization or similar restraint of liberty) limits a person's freedom to act on his own behalf to ensure his own safety. The Court also suggested that an individual may have a due process complaint when a *state created danger* renders the victim more vulnerable.[53]

---

49 42 U.S.C. §§ 1983, 2803 (2005).

50 Bd. of Regents v. Roth, 408 U.S. 564 (1972).

51 Castle Rock v. Gonzales, 125 S. Ct. 2796 (2005). Ms. Gonzales sued on Fourteenth Amendment grounds alleging that police officers failed to respond to her repeated reports over several hours that her estranged husband had taken her three children in violation of her restraining order against him. Ultimately, the husband murdered the children.

52 Deshaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989).

53 This suggestion birthed "state-created danger" theory. "If a state actor creates the danger causing harm, the individual harmed may recover." According to this theory, plaintiff must prove four elements: (1) the harm caused was foreseeable by the state actor and fairly direct; (2) the state actor's conduct "shocks the conscience; (3) there existed some relationship between the state and the plaintiff;

Justice Scalia recognized that *DeShaney* had not resolved the question whether one might have a personal right to police protection on purely procedural grounds, as the 10th Circuit had found in the instant case. But he slammed the door on that possibility, "the benefit that a third party may receive from having someone else arrested for a crime . . . does not trigger protections under the Due Process Clause, neither in its procedural nor in its substantive manifestations."

Jessica Gonzales had persuaded a trial judge to find that she needed legal protection from her husband and that she seemed to be the direct and intended beneficiary of the restraining order, yet she had no personal right to the order's mandatory enforcement provision because it is a settled matter of law that one has no entitlement to a benefit if there is any degree of discretion in granting it. Indeed, Justice Scalia noted Gonzales' difficulty in stating precisely what police action she claimed an entitlement to.

The apparent "mandatoriness" of the restraining order's enforcement provisions notwithstanding, Justice Scalia opined that some mandatory enforcement provisions are "more mandatory" than others, and even the most mandatory provisions must be interpreted with a measure of allowance since police enforcement necessarily involves a degree of non-eliminable discretion. And even if Colorado had created a personal entitlement to police enforcement of a restraining order, it is doubtful that the so-called entitlement could ever constitute a 14th Amendment "property interest" because it has no ascertainable monetary value.

The dissent challenged Justice Scalia's "ascertainable monetary value" theory by pointing out that one may contract with a private security firm to provide protection for one's family. Therefore, the monetary value of enforcement to Gonzales can indeed be determined, namely, by the amount she is enriched by not having to pursue her next-best alternative. Justice Scalia brushed this gambit aside because the dissent had merely sketched a plausible basis for roughly estimating the monetary value of a benefit. A private security firm would not have had the power of arresting Simon Gonzales since his crime would not have occurred in its presence, nor would a private firm have power to obtain an arrest warrant. Therefore, the dissent's theory fell fatally short of establishing "an abstract personal right" to police protection.

Notably, Justice Scalia never directly confronted *Roth's* claim that the majestic essence of a property interest is "reliance." However, in so far as we may speculate about the prospects for reliance theory, the Court in *Castle Rock* has suggested that, except in very narrow circumstances, a citi-

---

and (4) the state actor used state authority to create an opportunity that otherwise could not have existed for the harm to occur. *See* Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996); Uhlirg v. Harder, 64 F.3d 567 (10th Cir. 1995); Reed v. Gardner, 986 F.2d 1122 (7th Cir. 1993); Dwares v. City of New York, 985 F.2d 94 (2d Cir. 1993); Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990).

zen's reliance on police protection is *misplaced*, if not unreasonable as a matter of law.

Zelig v. County Of Los Angeles[54]

A woman's surviving minor children sued the county of Los Angeles for failure to provide adequate security against third-party violence inside its courthouse. The woman, Eileen Zelig, was murdered by her former husband, Harry, inside the courthouse. Their six-year-old daughter, Lisa, witnessed her father shoot her mother in the chest at point-blank range.

Eileen and Harry were in the courthouse pursuant to a court ordered appearance for the purpose of determining spousal and child support. On at least three occasions, Eileen had informed the family court's bailiff that she feared Harry and that she feared he might attack or kill her in the courthouse. She had previously provided the bailiff and the court copies of letters and telephone messages in which Harry had threatened to kill her.

Additionally, Eileen had secured restraining orders prohibiting Harry from possessing or carrying any firearms. He had been ordered to turn over his firearms to his lawyer. He was further prohibited from being "within 100 yards of any firearm" while in the presence of Eileen and the children. Nevertheless, on the day of their hearing, on the court's second floor, Harry pulled a concealed .38 caliber revolver from his clothing and shot Eileen in the chest. She died soon after.

California's Supreme Court rejected various theories for seeking relief. It held, "it is well established that public entities are not liable for failing to protect individuals against crime." Despite that the Eileen was not merely "invited" by the State to appear at her convenience but was ordered to make a joint appearance at the courthouse with her former husband, a man who had made death-threats against her, perhaps even intimating where he planned to do it (in the courthouse), and despite that she was expressly prohibited by state law from bringing a weapon into the courthouse whereby she might have protected herself from him (a point raised in the complaint), the State's order to appear and its weapons-possession disabilities should not be understood to be *actions* that created a dangerous condition, putting her in peril. In the court's view, the most that could be said on her behalf was that the State's employees failed to take affirmative steps to protect her. She was not imperiled by State action. (Disabling Eileen from possessing effective means of self-protection, under the color of law, apparently was "no act").[55] According to the Court, the only harm-causing acts in the circumstances were the crimes perpetrated by her violent ex-husband.

---

[54] 27 Cal. 4th 1112 (2002).

[55] Deprivation of Rights Under Color of Law (18 U.S.C. § 242 (2000)) would seem to be implicated in the circumstances, but California declined to adopt state-created danger theory.

The court mused, "No one really knows why people commit crime, hence no one really knows what is adequate deterrence in any given situation." Indeed, whether police protection should be provided at all, and the extent to which it should be provided are political decisions which are committed to the policy-making officials of the government. The farther decision whether and how to equip and deploy available police personnel falls within the immunity enjoyed the State.[56]

Republican Political Philosophy and Gun Control in American History [57]

In colonial America, a widely-shared republican political philosophy recognized four citizen-constituting rights: the right to participate in the communities' political decisions; the right to hold offices of public trust; the right to hold property in land; the right to keep and bear arms. Gun-possession disabilities were a hallmark of political inequality. Whole classes of individuals who were regarded as ineligible or unfit for citizenship, namely, the indigenous population[58] and imported slaves, were legally disabled from gun possession on grounds that they were naturally servile, untrustworthy, violence-prone and/or incompetent.[59] Inequality-linked dis-

---

[56] Should the state waive immunity on justice grounds, that is, there is no defensible basis for its assertion of immunity? Washington State waived its "sovereign immunity" forty years ago. Joyce v. State, 119 P.3d 825 (Wash. 2005).

[57] Additionally, a wide array of institutional measures are used (and are proposed) to burden lawful gun purchase, possession and use. These include permit-to-purchase restrictions on handguns and waiting period requirements. Both are "time taxes." Citizens who are willing to pay time taxes tend not to be among the violence-prone. Excise taxes, strict liability, and public nuisance have been proposed on "internalization of social cost" grounds. All ignore or sharply discount the social benefit in deterrence resulting from civilian gun prevalence. Lawsuits based on strict liability and public nuisance have had little success on their merits. However, the resulting litigation costs imposed on manufacturers has been substantial. I cannot discuss these in detail here.

[58] Restrictions on selling guns to Native Americans were instituted in the Colonial period and perpetuated after independence by statutory law in the states. Whether citizenship should have a racial or ethnic definition was debated heatedly after the Civil War. The Civil Rights Bill of 1866 provoked some senators from the Western states who wanted to exclude Indians and Chinese from citizenship. Their interest in suppressing Indians and seizing Indian lands conflicted with recognizing them as citizens having the right to keep and bear arms. Senator Williams of Oregon argued that if Native Americans were afforded recognition as citizens, then state laws disabling them from arms possession and prohibiting selling or providing them arms and ammunition would be void. The U.S. Senate resolved this problem by defining as citizens all persons born in the United States without distinction of color "excluding Indians not taxed." *See* STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876 13 (1998).

[59] *See generally*, A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS (1978). According to Higginbotham, American gun laws date to at least 1639 when Virginia enacted *Act X*. It provided, "All persons except Negroes are to be provided with arms and ammunition or be fined at the pleasure of the governor and council." *Id.* at 32. This statute made gun possession by (adult, white male) civilians a duty, albeit underwritten at public expense.

abilities were given a racist elaboration in the early days of the Republic as America's population of black freemen grew ever larger.[60]

Whites' unwillingness to recognize free blacks as political equals was expressed in gun control laws that imposed disabilities on "free persons of color."[61] For example, Georgia's Supreme Court distinguished between *citizenship-constituting rights*, from which black freemen were barred and personal liberty. "*Free persons of color have never been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office . . . They have no political rights, but they have personal rights, one of which is personal liberty.*"[62]

Race-conscious interpretation of facially-neutral laws occasionally elicited candid commentary from the courts. Thus in 1824, the Supreme Court of Virginia opined, "*The numerous restrictions imposed on this class of people [free persons of color], many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States, as respects the free whites, demonstrate, that, here, those instru-*

Blacks were excluded from the responsibility (and its subsidy), but they were not prohibited from possessing guns. However, in 1680, Virginia passed America's first explicit gun-possession restriction. "Whereas the frequent meetings of considerable numbers of Negro slaves under pretense of feasts and burials is judged of dangerous consequence . . . no Negro or slave may carry arms, such as any club, staff, gun, sword, or other weapon, nor go from his owner's plantation without a certificate and then only on necessary occasions." *Id.* at 39. *See also* WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812 (1995).

60 *See generally* JOHN HOPE FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA, 1790-1860 (1995). Franklin finds evidence of a free black population in North Carolina as early as 1701. *Id.* at 9. According to Franklin, the presence of free blacks prompted a "growing realization that free Negroes in a slave society must be carefully regulated lest their very presence serve to overturn the system." *Id.* at 10.

61 For example, North Carolina's 1840 law provided, "That if any free negro, mulatto, or free person of color, shall wear or carry about his or her person, or keep in his or her house, any shot gun, musket, rifle, pistol, sword, dagger or bowie-knife, unless he or she shall have obtained a license therefor from the Court of Pleas and Quarter Sessions of his or her county, within one year preceding the wearing, keeping or carrying thereof, he or she shall be guilty of a misdemeanor, and may be indicted therefor." An Act to Prevent Free Persons of Color from Carrying Firearms, 1840 N.C. Sess. Laws ch. 30 (codified at N.C. REV. CODE ch. 107, § 66 (1855)), *repealed* by N.C. CONST. of 1868, art. IV, § 24. In 1844, Elijah Newsom, a free person of color, challenged this law on grounds that it violated his rights under the Second Amendment to the Federal Constitution and under North Carolina's Constitution. State v. Newsom, 27 N.C. (5 Ired.) 250, 251 (1844). North Carolina's Supreme Court rejected both arguments. *Id.* Newsom's Second Amendment claim was rejected on the ground that the Federal Constitution constrained the U.S. Congress, not the legislatures of the several States. *Id.* In a harbinger of *Dred Scott*, the Court rejected Newsom's North Carolina Constitutional claim on grounds that "free people of color cannot be considered citizens, in the largest sense of the term." *Id.* at 254. *State v. Newsom* partly reversed the Court's 1838 decision in *State v. Manuel*, 20 N.C. (3&4 Dev. & Blat.) 114 (1838), where it held that free persons were indeed citizens of North Carolina, and so could invoke some of its Constitutional protections. *Id.* at 253-54. However, like women and children, free persons of color were not full, equal citizens. *Id.* at 254.

62 Cooper v. Mayor and Alderman of Savannah, 4 Ga. 68, 72 (1848).

ments have not been considered to extend equally to both classes of our population. We will only instance the restriction upon the migration of free blacks into this State, and upon their right to bear arms."[63]

This "free-but-not-equal" regime reached its apogee in *Dred Scott*, when the U.S. Supreme Court ruled 7-2 that blacks were not citizens of the United States and lacked "standing" to bring claims into federal court. Chief Justice Taney reasoned that the set of initial entitlements ("the privileges and immunities") secured to "the people" by the Constitution excluded non-white persons. Therefore, (absent a Constitutional Amendment) blacks could never lay claim to the privileges and immunities of national citizenship. To think otherwise would entail (in Taney's mind) an absurdity, namely, that manumitted blacks would be entitled to travel freely from State to State and "*to keep and carry arms wherever they went.*"[64]

While gun laws have been shorn of their *de jure* racist formulation, current federal law continues to stigmatize persons widely regarded as political unequals by disabling from possession and making it a crime to sell or dispose of any firearm or ammunition to: (1) anyone charged or convicted of a felony or of a crime carrying more than a one-year sentence (except for state misdemeanors); (2) fugitives from justice; (3) users of or persons addicted to illegal drugs; (4) anyone adjudicated mentally incompetent; (5) anyone admitted to any mental institution; (6) anyone dishonorably discharged from the military; (7) anyone who has renounced U.S. citizenship; (8) illegal aliens; (9) anyone under a court restraining order for stalking or presenting a credible threat to an intimate partner or partner's child.[65] Violators face up to ten years in federal prison.

In theory, our legal system recognizes that law-abiding adults not under specific legal disability retain the liberty-right to possess and carry

---

63 Aldridge v. Commonwealth, 4 Va. (2 Va. Cas.) 447, 449 (1824).

64 Dred Scott v. Sanford, 60 U.S. 393 (1856). It bears emphasizing that *Dred Scott* was a "privileges and immunities" case, not a Second Amendment, militia-related case. Thus, the Court focused on the Constitutional comity provision in Article IV, Section 2, and held that blacks were excluded *ab initio* from the "privileges and immunities of Citizens in the several States." *Id.* at 427. That Justice Taney saw a distinction between a "privileges and immunities" foundation for a citizen's right to arms and the Second Amendment's "militia purpose" is further underlined by Taney's choice of words, namely, that the right from which blacks were excluded, in perpetuity, was an entitlement "to keep and *carry* arms wherever they went," not a right to keep and *bear* arms. *Id.* at 417 (emphasis added).

65 Major Federal gun control legislation includes: The National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (codified as amended at 26 U.S.C. §§ 5801-72 (2000)); The Gun Control Act of 1968, 18 U.S.C. §§ 921-28 (2000); The Firearms Owners' Protection Act, 18 U.S.C. §§ 921-26A, 929, 26 U.S.C. § 5845 (2000); The Brady Handgun Violence Prevention Act, 18 U.S.C. §§ 921-25A, 42 U.S.C. § 3759 (2000); and, The Public Safety and Recreational Firearms Use Protection Act (Assault Weapons Ban), Pub.L. 103-322, §§ 110101-06, 108 Stat. 1996 (1994) (repealed 2004). The Bureau of Alcohol, Tobacco, Firearms and Explosives maintains a compendium of all gun laws and gun ordinances in the several States and U.S. Territories. *See* Bureau OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, U.S. DEPT. OF JUSTICE, , STATE LAWS AND PUBLISHED ORDINANCES—FIREARMS, ATF P 5300.5 (26th ed. 2005), *available at* http://www.atf.treas.gov/firearms/statelaws/26thedition/index.htm.

handguns. For example, when the Gun Control Act of 1968 was enacted into the federal criminal code, Congress declared, *"it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law abiding citizens for lawful purposes."*[66]

PART IV

OBJECTIONS

America Suffers From Too Many Guns and Too Much Gun Carrying

America's crime rate and its assault rate are roughly comparable to that of the G7 countries. However, America's homicide rate is much higher. How to explain the difference? Professor Franklin Zimring has claimed that a single FBI statistic tells the tale.[67] In America, guns are used in approximately 70% of all criminal killings. He claims, *"[T]his tells us immediately what the special problem of gun use is in violent crime—an increase in the death rate."*

Zimring subscribes to (and can fairly claim to be have originated) the "instrumentality hypothesis," according to which the (supposed) greater inherent lethality of guns makes assaults committed with them 5-7 times more deadly, *independent of perpetrator-factors.* Therefore, not only should we anticipate that *supply-side restrictions* on handguns hold promise for a large reduction in the homicide rate, we should not expect such any significant reduction without it.[68] In 1989, Zimring and his co-author

---

[66] The "main" Federal gun control laws of the United States are found in the 920s, in Chapter 44 of Title 18: Crimes and Criminal Procedure, the United States Code. The quotation is from a Statute at Large, cited in ALAN KORWIN, GUN LAWS OF AMERICA 128 (4th ed. 1995).

[67] In FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA (1997), Zimring additionally supports it by noting that the homicide rates in the G7 countries are markedly lower than those in the United States despite having assault rates similar to the United States. *Id.* at 106-10.

[68] The medical literature on wound etiology is not extensive. The only article I could find with the relevant focus was published in the ANNALS OF SURGERY in 1961. The study reported mortality statistics from 266 penetrating wounds to the abdomen. Etiology of injury and associated mortality percentages were as follows: shotgun (20.4% mortality), handgun (16.8%), ice picks (14.3%), butcher knives (13.3%), rifle (7.7%), switch-blade knives (5.9%), and pocket knives (0%). These data do not support the claim that handguns are "inherently 5 times more lethal" than other weapons commonly used to inflict injury. Harwell Wilson & Roger Sherman, *Civilian Penetrating Wounds to the Abdomen*, 5 ANNALS OF SURGERY 639 (1961).

Gordon Hawkins claimed that "The circumstantial indications that implicate gun use as a contributing cause to American lethal violence are overwhelming."[69] And they made a very dark prediction. "The most marked reduction in firearms violence cannot be expected until well past the introduction of legislation designed to achieve handgun scarcity."[70]

The Seventy Percent Solution?

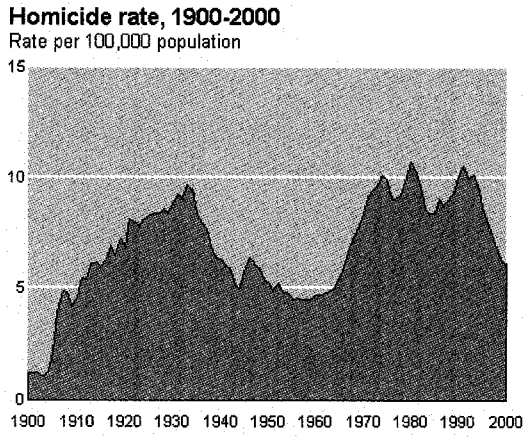
The statistic that Zimring finds so telling in favor of his instrumentality thesis does not tell the tale he thinks it does. As a century's worth of data graphed below shows, America's estimated homicide rate fluctuated by *an order of magnitude*—from a reported low of 1.1 per 100,000 in 1903 to a high of 10.7 in 1980.[71]

---

69 ZIMRING & HAWKINS, *supra* note 67, at 199.

70 FRANKLIN E. ZIMRING & GORDON HAWKINS, THE CITIZEN'S GUIDE TO GUN CONTROL 205 (1992).

71 *See* http://www.ojp.usdoj.gov/bjs/glance/hmrt.htm. It should be noted that at the beginning of the 20th Century, several states known or suspected of having comparatively high homicide rates did not report their homicide data to the federal government. This suggests that the nation's homicide rate must have been higher than the reported national estimate during those years. Professor Kleck has pointed out to me in a personal communication that "the data for 1903 to 1932 are not actually national data, but rather merely cover the changing subsets of the U.S. that were included in the 'Death Registration Area' (DRA), which consisted of those states that had achieved relatively complete coverage of deaths in their vital statistics systems. Most of the apparently enormous increase in homicide rates from 1903 to 1920, and part of the 1921 to 1933 increase, is a statistical mirage, attributable to new, mostly high homicide, states being added to the DRA. Only a minority of the U.S. was covered by the 1903 DRA, predominantly low-homicide Northeast states, while all of it was covered by 1933. Unfortunately, there was a systematic pattern to which states got added to the DRA latest; generally, the states that were the last to get their statistical systems up to speed and join the DRA also tended to be the highest homicide states, mostly from the South and Southwest (e.g., the very last state to join was Texas, a huge contributor to the national homicide rate both because of its high rate and its large population). In reality, the increase in the U.S. homicide rate was much milder than your chart indicates, up until Prohibition went into effect in 1920, at which point homicide really did jump up, though not as much as the DRA-based data seem to indicate."



In summary:

► At the beginning of the century, the fragmentary data gathered at that time indicated that there were 1.2 homicides per 100,000 population.

► Rates rose significantly after 1904 reaching a peak of 9.7 in 1933.

► From 1934 to 1944, (encompassing the years of the Great Depression, a time a serious economic distress) rates actually fell to 5.0 in 1944.

► After a slight increase from 1945 and 1946 when rates reached 6.1, rates declined, falling to 4.5 in 1955.

► After 1955 rates increased slightly each year until the mid 1960s when there was a steep increase reaching a peak of 10.1 in 1974.

► Rates fell slightly in 1975 and 1976 but began rising thereafter, reaching an all time high of 10.7 in 1980.

► From 1981 to 1984, rates declined, falling to 8.4 in 1984.

► After 1985, rates increased again peaking in 1991 at 10.5.

► After 1991 rates declined slightly but remained at around 10 through 1993.

► Starting in 1994, rates declined each year, reaching 6.1 in 2000, the lowest rate since 1967.

However, unlike the nation's homicide rate which fluctuated up and down, *the percentage of homicides committed with firearms remained comparatively constant.* For example, in the period 1920-26, 71% of homicides

were by gun.[72] According to the FBI, the percentage of homicides committed with guns dropped to 62% in 1989[73] but was back up to 70% in 1993, as Professor Zimring has noted. Most recently, the FBI estimated that, of the 16,503 homicides committed in 2003, 67% were committed with firearms.[74]

Since the homicide *rate* varied remarkably over the last 100 years but the *percentage* of homicides committed with guns did not, the latter figure cannot explain the former. Instead of "70%" giving us quick insight, a more measured review of the past century's homicide data says that *America's homicide rate is virtually independent of the percentage of homicides committed with guns.*

This is not a subtle point, so I'll hammer it home. The data do not support that America's homicide rate is *strongly and independently determined* by the percentage of homicides committed with guns. Therefore, we should not infer "immediately" that reducing guns' 70% "market share" of criminal killings must be *sine qua non* in a comprehensive strategy to reduce the nation's homicide rate.[75] Zimring's hypothesis that the percentage of homicides committed with guns is causally linked to the homicide rate is refuted.

The Instrumentality Thesis and Suicide

Suicide is not a crime and so, by definition, does not qualify as a criminal assault. Nevertheless, it is common to count a suicide and especially gun-suicide as a violent death. If so, Zimring's "instrumentality hypothesis" should also illuminate the suicide rate—the higher the percentage of suicides committed with guns, the higher the suicide rate. Contrariwise, the lower the percentage of suicides committed with guns, the lower the suicide rate.

America's suicide rate is approximately twice as high as its homicide rate (roughly 11 versus roughly 6). More than 30,000 Americans commit suicide each year, putting suicide in the top ten causes of death. Guns' "market share" of American suicide is 50%—not as large as their market share in homicide, percentage-wise, but the body count is nearly twice as high.

Assuming that guns are 5-7 times *inherently more lethal* than other mechanisms of injury, and with guns' market share of suicide at 50%, the instrumentality thesis says that America's suicide rate should fall if the percentage of suicides committed with guns falls, assuming that the overall number of suicide attempts were to remain the same. And the instrumental-

---

72 *See* KLECK, *supra* note 44, at 20.

73 *Id.*

74 *See* Firearms and Crime Statistics, http://www.ojp.usdoj.gov/bjs/guns.htm.

75 *See* ZIMRING & HAWKINS, *supra* note 67, at 199-202.

ity hypothesis predicts finding lower suicide rates in countries where comparative gun scarcity results in a smaller percentage of suicides committed with guns.

But again, the hypothesis generated by the suicide-corollary of the instrumentality thesis is false. Countries known for having very restrictive gun policies and for having much lower gun prevalence than the United States (for examples, Hungary, Denmark, Austria, Norway, and France) nevertheless have persistently higher suicide rates, notwithstanding that a comparatively low percentage are committed with guns.[76]

10,000 Guns

Professor Zimring claims that introducing 10,000 guns into an environment where violent assault is rare will not necessarily produce a large number of *additional deaths* unless doing so increased the assault rate. On the other hand, he claims that were 10,000 guns added to an environment where rates of criminal attack are already high, the contribution made to the expectable increase in the death toll from violence must be high.

This thought experiment (taken from *Crime Is Not the Problem*) captures Zimring's sociological theory of lethal violence in a nutshell.[77] It is noteworthy that Zimring limits speculation to whether a bolus of 10,000 guns added to an imaginary society would result in a small or large number of *additional deaths*. He neglects to consider whether adding 10,000 guns to the social environment might have *no net-effect* or might actually be associated with an overall decline in the violent death total or rate.

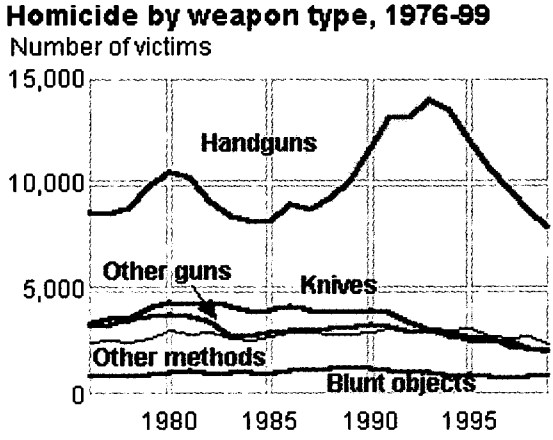
Fortunately, we can forego data-less speculation. Instead we can look to real-world data and consider the results of a social experiment that began in Florida in 1987 and has since spread across the country. Bureau of Alcohol, Tobacco, Firearms and Explosives (BATF) firearms production/import/export data enables an objective estimate of how large a bolus of guns America has actually received over the past 20 years. We also have a century's worth of year-by-year homicide data. And we have a huge, county-by-county data-set from the entire United States that enables a judgment whether the nation's 38 states that have put approximately 3+ million non-police carriers of concealed handguns on the streets has transformed them into America's bloodiest jurisdictions.

---

[76] *See* Don B. Kates et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513, 563 (1995). The problem of *differential suicide-attempt rates* remains. Since many developed countries have suicide rates higher than the United States, it would seem that their attempt-rates must be higher too because every suicide presupposes a (successful) attempt. The number of failed attempts is largely unknowable, for a host of obvious reasons.

[77] ZIMRING & HAWKINS, *supra* note 67, at 123.

BATF's data[78] from 1982-2001 indicate that American gun manufacturers produced 77,361,013 firearms including 34,484,476 handguns. All were sold in the American retail market except for 64,813 handguns and 96,861 long guns (rifles and shotguns) that were exported. What was happening in the homicide market over that period?



The graph shows that the number of homicides committed with "other guns" (which would include shotguns that the trauma data say are inherently more lethal than handguns), knives, blunt objects and "other methods"

---

[78] By federal law, every firearm produced by American gun manufacturers must bear a serial number. Each firearm imported must also bear a serial number. Domestic production totals, imports, and exports must be reported annually to the BATF. The trade publication SHOOTING INDUSTRY also publishes annually, based on BATF-provided data, the number of firearms produced over a running 20-year period. These data include BATF totals by handgun type (revolvers and pistols) and by caliber. They enable an objective basis for evaluating market trends and for estimating and updating the number of civilian-owned guns.

Using BATF figures to establish a 1945 baseline, Gary Kleck has developed a production-based model that cumulates annual domestic production, adds imports, and subtracts exports. From 1945 to 1994, the American civilian gun total rose from an estimated 46,909,183 guns to an estimated 235,604,001 guns, an increase of 502.25%. Over that period, the number of privately-owned handguns increased from an estimated 12,657,618 to an estimated 84,665,690, a gain of 668.9%. From 1945 to 1994, Americans bought handguns at a higher rate than they bought long guns. The whole-period handgun growth rate was 151% of the whole-period long gun growth rate (a total handgun increase of 668.9% versus a total long gun increase of 440.7%).

Between 1993 and 1999, the industry produced approximately 28.6 million firearms, including 12.5 million handguns. Allowing for imports and subtracting for exports, we may reasonably estimate that the current gun total approximates the size of the U.S. population, including approximately 95 to 100 million handguns. Figured on a per capita basis, American civilians probably own guns at a rate between 969 and 1,016 per 1,000 adults, including a rate between 365 and 388 handguns per 1,000 adults.

held remarkably constant. By contrast, the number of homicides committed with handguns is much higher and more labile.

In 1980, when America's homicide *rate* hit its all time high (10.7), there were 23,040 homicides, with slightly fewer than 50% committed with handguns. By 1992, the homicide rate was 9.3 but the homicide *total* hit an all-time high, 24,700. In 1993, while the number of homicides committed with handguns soared to more than 14,000 (with homicide from all mechanisms totaling 24,530), the homicide *rate* actually had declined (albeit not much) from its 1980 all-time high to 9.5.

Beginning in 1993, the homicide rate began a steep decline to its current level of 6/100,000, the lowest since the mid-1960s. Handgun homicides also declined sharply. However, the handgun infusion continued albeit also declining from a peak of 2.6 million in 1993 to 943,213 in 2001. Handgun killings declined, handgun production declined and the homicide rate declined. But I reiterate, *the percentage of killings committed with firearms*, to which Professor Zimring's lethality hypothesis attaches such great importance, did not change remarkably (namely, 67% in 2002) from what it had been in 1993 (namely, 70%).

Beginning in Florida in 1987 and now including 38 CCW-issuing states, more than 3 million so-called "shall issue" licenses to carry a concealed handgun have been obtained by qualified persons. Typically, these laws prohibit the carrying of concealed handguns to anyone who has not satisfied statutory requirements but mandate issuing a permit to every person who satisfies them. Requirements include age restrictions; a personal history free of felony convictions or arrests for violence and a medical history free from documented mental illness as verified by an applicant-authorized investigation of his/her medical records; enrollment in a state-approved course on gun safety, legally permissible gun use in personal protection, and demonstrated minimum proficiency in actual gun use, fingerprinting and FBI background check. Associated application fees, course-tuition fees, etc. vary the costs associated with obtaining a (renewable) license from $150-$500.

The most important and rigorous work on the criminological consequences of CCW laws has been done by John Lott who claims to have found a substantial reduction in criminal violence in CCW-issuing jurisdictions, with the apparent deterrent effects being proportionally greater in counties that issue licenses in proportionally greater numbers.[79] Lott has freely shared his data set with anyone who requests it. Several scholars have replicated Lott's findings, others have been highly critical on methodological grounds and many harshly so, on political grounds.

Irrespective the details of the Lott-related controversy, it is unarguable that jurisdictions that have adopted CCW laws have not paid a heavy price

---

[79] LOTT, *supra* note 36, at 156.

in blood and gore, as was first predicted for Florida in 1987 and has been predicted again and again in every subsequent political battle over their adoption elsewhere. Criminological theories rarely enjoy such a direct verifying/falsifying reality check.

Why Zimring Ignores the Apparent Benefits of Armed Self-Defense

Professor Zimring has always opposed the use of force in self-defense. Initially, his arguments against resisting criminal attack were pragmatic. Early analyses of the data on victim-resistance showed that victims who were criminally attacked and resisted were also more likely to be injured or killed than victims who put up no resistance at all. However, the early analyses only found a statistically significant association between victims who did worse and victims who resisted. The data were not recorded in such a way as to permit inferring that resisters did worse *because* their resistance provoked an injury-causing attack that might not have occurred otherwise. And the early analysis did not distinguish between gun-armed resistance and non-gun resistance.

Farther analysis of the data distinguished between types of resistance. It found that victims who used a gun to resist criminal attack not only did better than victims who resisted by other means, they also did better than victims who offered no resistance whatsoever.

And, where once we had no data on the efficacy and frequency of defensive gun use (DGU), we now have at least 15 studies to consider. The most statistically sophisticated of these supports that DGU occurs more frequently than criminal gun-assaults, probably not significantly less than 2.5 million times per year and perhaps more frequently.[80]

These findings have apparently prompted Zimring to shift his ground. With apparent benefit and frequency of civilian defensive gun use now established by data, Zimring now denies that there is a valid difference between criminal violence and lawful use of force in self-defense. He lumps these together under the general rubric "lethal violence." Indeed, Zimring thinks that the American tradition that attaches ethical importance to the distinction between criminal violence and lawful use of force in self-defense contributes to perpetuating America's violence-problem. This explains why Professor Zimring thinks that America's "violence problem" is not merely criminological, but comprehensively societal and why he proposes more restrictions on armed self-defense.

Since Zimring regards all uses of deadly force as malignant, irrespective whether it is perpetrated by criminals or by (allegedly) "good citizens" in self-defense, his social calculus refuses to count as beneficial any use of deadly force by private citizens. Theoretically, this makes the now-

80 KLECK, *supra* note 2, Ch.5 (for a comprehensive review).

substantial literature on defensive gun use irrelevant to an ethical inquiry whether the *net-effect* of firearms violence is beneficial, or malignant. It's all malignant *per se*.

It is also noteworthy that Zimring ignores lethal violence perpetrated by government officials, irrespective whether clearly lawful, e.g., when an LEO justifiably shoots a violent felon in the line of duty or outrageously violates individual rights under the color of law, or when the attorney general of the United States authorized use of tanks, incendiaries and automatic weapons to kill indiscriminately men, women and 19 children, as she did in Waco, Texas in 1994.

How Many Guns?

By federal law, every firearm produced by American gun manufacturers must bear a serial number. Each firearm imported must also bear a serial number. Domestic production totals, imports and exports must be reported annually to the Bureau of Alcohol, Firearms and Tobacco. The trade publication *Shooting Industry* also publishes annually the number of firearms produced, together with a running 20 year cumulation. These data include totals by handgun type (revolvers and pistols) and by caliber. They enable an objective basis for evaluating market trends and for estimating and updating the number of civilian-owned guns.

Using BATF figures to establish a 1945 baseline, criminologist Gary Kleck has developed a production-based model that cumulates annual domestic production, adds imports and subtracts exports. From 1945-1994, the American civilian gun total rose from an estimated 46,909,183 guns to an estimated 235,604,001 guns, an increase of 502.25%. Over that period, the number of civilian-owned handguns increased from an estimated 12,657,618 to an estimated 84,665,690, a gain of 668.9%. From 1945-1994, Americans bought handguns at a higher rate than they bought long guns. The whole-period handgun growth rate was 151% of the whole- period long gun growth rate (a total handgun increase of 668.9% vs. a total long gun increase of 440.7%). Between 1993-1999 the industry produced approximately 28.6 million firearms, including 12.5 million handguns. Allowing for imports and subtracting for exports, we get a gun total that approximates the size of the U.S. population, including approximately 95-100 million handguns. Figured on a per capita basis, American civilians probably own guns at a rate between 969 and 1016 per 1,000 adults, including a rate between 365 and 388 handguns per 1000 adults.[81]

---

[81] I am indebted to and here rely on the analytical work done by Tyler O'Connell, Davidson Class of 2000. Tyler worked as my research assistant during the Summer of 1999.

America's Homicide Rate

According the Bureau of Justice Statistics, 15,533 homicides were committed in 1999, a rate of 5.7/100,000. Assuming that 70% of these homicides were by gunshot, approximately 10,873 persons were killed by gunshot in 1999. If so, almost 5,000 homicides resulted from other mechanisms. The number of non-gun homicides exceeds the homicide total for all the G7 countries combined. The highest homicide total ever recorded in the United States occurred in 1991, when 24,700 were killed, all mechanisms of death combined. Since 1950, the homicide rate has varied from a low of 4/100,000 (in 1957) to a high of 10.2/100,000 (in 1980).

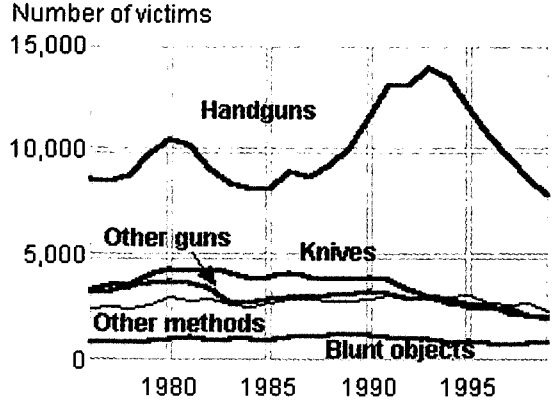
In January 2000, the Centers for Disease Control (CDC), reported that, for the period 1993-1997, "declines in nonfatal and fatal firearm-related injury rates generally were consistent across all population sub-groups. The declines in non-fatal and fatal injury rates were similar for males (40.7% for nonfatal, 20.9% for fatal) and for females (42.1% for nonfatal, 23.2% for fatal). Declines in death rates for blacks and Hispanics were similar, and were both greater than the decline observed for non-Hispanic whites."[82]

The National Center for Health Statistics' graph of the nation's homicide rate for the last century, shown above, indicates the rate has fluctuated up and down. By contrast, the nation's civilian gun supply has edged ever upward. The Bureau of Justice Statistics has graphed victimization data and data regarding weapons used in homicides. The following pictures do not show what one might expect, if one were a subscriber to the "more guns, more homicide" hypothesis.

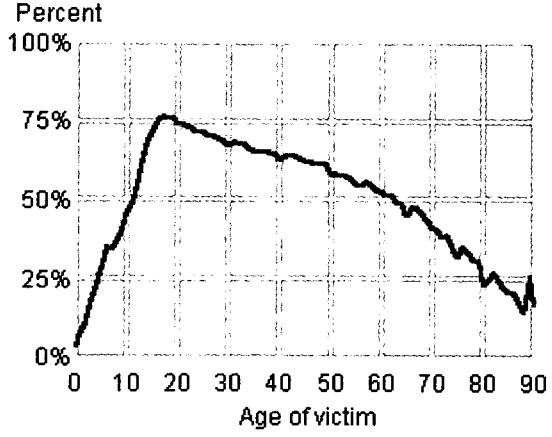
---

82 Center for Disease Control, *Morbidity & Mortality WeeklyReport: Nonfatal and Fatal Firearm-Related Injuries in the United States, 1993-1997,* 283 JAMA 47, 47-48 (2000). It must have been painful for the CDC to report this decade-long trend. The CDC itself has become trenchantly hostile to civilian gun ownership for more than a decade. The evidence that the information was "painful" for the agency to report is its delay in doing so. The Department of Justice had been issuing reports documenting declining homicide rates for several years.

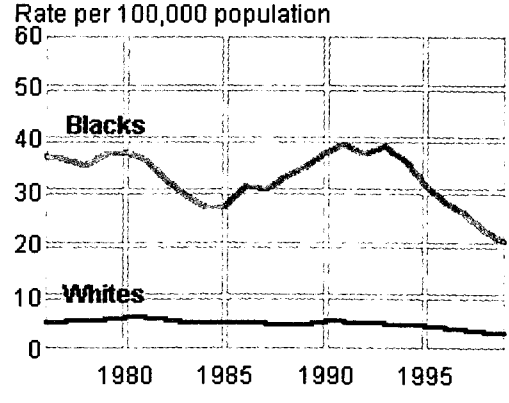
Homicide by weapon type, 1976-99



Percent of homicides involving guns by age of victim, 1976-99



Homicide victimization by race, 1976-99



An American's absolute risk of death by gunshot is very low. The incidence is approximately 3/100,000. However, when we consider comparative risk, there are noteworthy exceptions. Males, especially young males, commit homicides at disproportionate rates compared with females. Males are also disproportionately at risk for homicide victimization. However, young males who own guns legally are less likely than their non-gun owning peers to commit crimes of any kind. Young black males commit homicide at a rate 6 times higher than their white counterparts and are 6 times more likely to be homicide victims, despite that the overall African-American rate of handgun possession is lower than for whites.

Risk of victimization by gunshot declines with age, unless suicide counts as self-victimization. If it does, male gender and advancing age are associated with an increased risk for suicide by gunshot. However, first-gun acquisition is rare among elderly males. It is implausible to suppose that younger males tend to acquire guns in order to kill themselves when they become elderly.

How can the drop in the homicide rate over the past decade be explained? Handguns have not become scarce among American civilians. On the contrary, gun industry production data reported to BATF says that Americans own more handguns, more high-capacity pistols and more assault-style rifles than ever. But even more interesting, *we have no evidence that handguns have become scarce among criminals.* Nevertheless, the homicide rate decline of the past decade owes almost entirely to a decline in handgun homicides. Obviously, the addition of millions of handguns and assault-style weapons to the civilian gun supply is compatible with a substantial decline in the homicide aggregate and the rate.

Perhaps the sharp decline in the homicide rate results from a sharp increase in the number of civilians licensed to carry handguns concealed, a legal development that has expanded to include 38 states.[83]

Perhaps the decline results, in part, from the legalization of abortion. Since 1973, legal abortions have ranged from 1 million to 1.6 million per year. Assume that half of aborted pregnancies are male. If those aborted males would have been socialized under circumstances highly productive of violence-prone males, preventing their births would tend to reduce the homicide rate 18+ years later.[84]

Guns as Vectors of Violence

In vector theory, mental causation plays no role in the production of harm. Paradigm illustrations of vector theory include: the Anopheles mos-

---

[83] LOTT, *supra* note 36, at 83, 86.

[84] John J. Donohue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q. J. ECON. 379, 379-420 (2001).

quito's transmission of Yellow Fever to human beings secondary to its feeding on their blood; Typhoid Mary, who spread disease unintentionally secondary to otherwise-innocent casual social contact; and HIV/hepatitis/STD transmission that occurs secondary to injection drug-use or to intimate sexual contact.

It's not clear how vector theory might apply to the transmission of violence. If a human being is the vector, her gun presumably will be the lethality-injection device, analogous to the proboscis and mouth-parts of the mosquito. The gun's cartridges would be the pathogen. The person's pulling the trigger would presumably activate the pathogen and transmission (of violent injury) would occur if the bullet discharged from the gun's barrel entered the body of a live person. However, reference to vector-intent is not part of the etiology of harm. According to vector-theory, violence-transmission should be as surprising (since unintentional) to the vector as to his victims.

Or, perhaps the gun is the vector. Gun purchasers acquire the analogue of a slow-virus. Gun possession insidiously erodes the purchaser's self-control, transforming her into an agent of death. Leave aside that the physiological/psychological nexus remains unclear; it seems that most gun owners are highly resistant to violence seeding their motivational structures. Indeed, those exposed to the vector most frequently, seem most resistant to the onset of violent symptomology. At shooting matches, for example, armed civilians load and discharge their firearms multiple times in a competitive, stressful environment. Yet, gun fights are unknown at these events. Camaraderie and good manners are the rule.

Deviant Mental Causation?

Phallic narcissism is a psychoanalytic theory rooted in Freud's account of male deviance. Freud thought that during early development, every male struggles with castration anxiety. But in the deviant male, the struggle transforms into obsessive fearfulness of sexual inadequacy. Fears run amok, lead to generalized feelings of powerlessness. The deviant's unconscious responds to the resulting distress by activating phallic narcissism, a subconscious compensatory mechanism that redirects the suffering male's obsession towards power symbols, e.g. weapons.

In *Dreams in Folklore*, Freud and Oppenheim speculated that spears, daggers and other sharp weapons, reportedly appearing in the dreams of folklore characters, were phallic symbols. They hypothesized that the male character's unconscious employed phallic symbols to compensate for felt helplessness and fear of ineffectuality.[85] In his *Introductory Lectures on Psychoanalysis*, Freud further elaborated the list to include (1) daggers, (2)

[85] *See* SIGMUND FREUD & D.E. OPPENHEIM, DREAMS IN FOLKLORE (1911).

hammers, (3) knives, (4) pistols, (5) revolvers, (6) rifles, and (7) sabres. Indeed, anything longer than wide could have phallic significance. Thus he theorized that "things that are long and upstanding" could represent the erect penis.[86]

Freud said little about guns. He focused instead on daggers and swords, close-combat weapons used for thrusting, stabbing and penetrating. For example, in his *On Hamlet and Oedipus*, Freud speculated that Hamlet's repressed oedipal urging and his castration anxiety were ultimately surmounted through the power of the sword.[87]

Extending the theory to guns was left to later-day Freudians. For example, Feldman and Johnson argue that weapons, and especially firearms, "provide a sense of power, omnipotence, and mastery for the damaged self . . . [allowing] the self to feel in control."[88] They claim that "the weapon not only allows the self to feel in control of situations and its own cohesion, by their very nature they allow the self to feel control over the selfobject (analogous to merger transference); because the merger transference is a more primitive type of selfobject transference, this may imply that the use of weapons as selfobjects is also a more primitive and pathological process." Feldman and Johnson use their theory to diagnose "collective pathology" in the American psyche on the ground that that "one in every three Americans owns a handgun or a rifle."

A self-doubting, anxiety-riddled male is highly susceptible to the phallic narcissistic mechanism. He would naturally be drawn to possessing a gun—always hard, potent and intimidating. The stronger a male's generalized feelings of ineffectuality, the more he will tend to compensate by obsessing about guns—dreaming about guns, reading gun magazines, anticipating and attending guns shows, shopping for and buying guns, more powerful guns, more lethal guns. Phallic narcissistic (PN) theory implies that the firepower of a man's gun collection plus his store of ammunition indexes to the severity of his deviance.

Feldman and Johnson use their theory to diagnose Ernest Hemingway, General George Patton, President Reagan's would-be assassin John Hinkley and the Clint Eastwood character Dirty Harry Callahan who famously toted "the most powerful handgun in the world." Their analysis of John Lennon's killer, Mark David Chapman, links his schizophrenia with his gun obsession—a compensatory mechanism predictably responsive to Chapman's perception that he was losing the battle with the "bad spirits" who were gaining control of him. His Charter Arms .38 revolver "became a negative selfobject influencing him to murder John Lennon, someone Chapman viewed as a rejecting and unempathetic selfobject." Lennon had

---

86 SIGMUND FREUD, INTRODUCTORY LECTURES ON PSYCHOANALYSIS (1916).

87 SIGMUND FREUD, THE INTERPRETATION OF DREAMS (1911).

88 Theodore B. Feldman & Phillip W. Johnson, *The Selfobject Function of Weapons: A Self Psychology Examination*, 20 J. AM. ACAD. PSYCHOANALYSIS 561, 561-76 (Winter 1992).

once written a song entitled, "Happiness is a Warm Gun." Chapman carried its lyrics in his wallet.

Feldman and Johnson claim several explanatory benefits for their theory: better insight into the role weapons play in individual and in social psycho-pathology, better understanding of violent offenders and an enhanced ability to predict the danger gun-owning individuals present to society. "An individual prone to fits of narcissistic rage followed by fragmentation would clearly present a great potential for violence. These individuals would likewise be expected to have more excessive preoccupations with weapons than persons with a more cohesive sense of self."[89]

Practical Implications of Phallic Narcissism

Despite their confidence that PN names a genuine pathology and their claims for the theory's predictive power, Feldman and Johnson draw no practical implications from it. For example, they do not suggest that insurance companies might reimburse a therapist for treating chronic, relapsing PN. Nor do they propose that hospital credential committees privilege PN therapists to admit patients for treatment of acute exacerbations of PN.

Dangerousness to self or others is a well-recognized basis for seeking court-ordered involuntary commitment. Yet, Feldman and Johnson do not recommend that licensed therapists seek an involuntary commitment order for gun-owning patients diagnosed with PN. Given the confidence they have in their theory, shouldn't they argue that diagnosing an acute exacerbation of PN would place a therapist under a "Tarasoff duty" to protect innocent third parties from harm by taking reasonable steps to warn them of the danger? Wouldn't a clinician's failure to do so be professional negligence? Mightn't psycho-analyst's testimony persuade the jury that, at the time of the shooting, the defendant perceived the deceased as mocking his ineffectuality? The provocation acutely exacerbated the defendant's phallic narcissism, over-matched his too-meager resources of self-control with the result that . . . the trigger pulled his finger!

Perhaps they hold back because "narcissism of the phallic type" is not listed among the bona fide mental disorders in DSM-IV. This may explain why they do not mention the "billing opportunity" that diagnosing and treating recognized conditions typically offer clinicians. If a therapist currently would not be reimbursed by an insurance company for treating PN, it's hard to argue that a diagnosis justifies involuntary commitment. Nevertheless, in light of their confidence that PN names a genuine pathology, it's puzzling why Feldman and Johnson have not proposed PN for inclusion in an addendum to DSM-IV.

---

89 *Id.* at 573.

PN theory may be incoherent. "Deviance" is threatened by "prevalence without harm." The more prevalent a condition (namely, gun possession) without a specific further association with an increased tendency to cause harm, the less credible the case for "deviance." Twenty-five years ago, the American Psychological Association declassified homosexuality as deviance on grounds it was very prevalent and homosexuals were not remarkably likely to cause harm to themselves or others. If a prevalence of 10+% and non-harm undercut the warrant for classifying homosexuality as deviance, what does a prevalence of one in three suggest for classifying gun owners as deviant, especially since the rate at which this sub-population causes harm is very low? Perhaps PN can yet be defended as a valid account of unconscious mental causation of intentional behavior. I'm doubtful, however.

Non-Deviant Mental Causation

A more commonly encountered theory of mental causation avoids abnormal psychology and makes lethal violence the straightforward upshot of desire strength. On this account, handgun possession may (1) seed the agent's motivational structure with a new desire to inflict lethal injury by gunshot, (2) strengthen an already-present desire to inflict injury sufficiently to overcome the agent's formerly-effective inhibitory desires or it may weaken his otherwise effective inhibitory desires or both or some further combination.[90]

Many of life's provocations stimulate an impulsive, transitory desire to inflict bodily harm. Because these desires are short-lived albeit intense, most-often they abate before causing an agent to inflict injury. However, when common provocation and gun access coincide, the results will tend to be dramatically deadly.

Causation might proceed as follows. For some reason, Joe acquires a handgun. Merely holding the gun (intentionally) may render a provoked Joe unable to weaken his already-existing (or new-onset) lethal desire sufficiently to prevent his acting on it. The resulting motivational state may be such that Joe is unable to divert his attention from violence, say, by intentionally thinking of something else, e.g. by vividly representing to himself the revolting physiological effects of gunshot on flesh, or the irreversible loss of his current way of life that reasonably would result from his pulling the trigger, etc. Instead, he focuses exclusively on the favorable aspects of

---

[90] *See, e.g.*, ALFRED R. MELE, IRRATIONALITY: AN ESSAY ON AKRASIA, SELF-DECEPTION AND SELF-CONTROL Ch. 2-4 (1987). Mele provides the best general account of mental causation. His theory enables serious analysis of the supposed mechanisms whereby gun possession might result in the production of lethal violence.

destroying what angers him. His will is overwhelmed. Without deliberation, he fires the gun.

On this account, Joe's agency is destroyed because his abilities to access and to effectively employ his otherwise effective self-control techniques are undermined. Joe becomes an impulsive automaton—as much a victim of gun possession as the one he shoots at.

However, the preceding causal account isn't yet plausible, nor is it easy to make it so. The irresistible desire to inflict crippling injury or death resulting in the loss of self-control seemingly cuts off any further reference to Joe's intentions in explaining what happened subsequent to the lethal desire's ascendancy to total dominance. It remains unexplained why Joe holds the gun by it's grip rather than by its barrel or in some other way, why he places his finger inside its trigger guard rather than somewhere else, and finally, how it comes to pass that, of all the possible directions the gun might have been pointed, it was pointed at the victim precisely coincident with the gun's discharge.

In short, the "irresistible-desire-resulting-in-loss-of-control" account makes sense only when offered as a retrospective, (self-serving?) psychological sketch. It makes less sense when offered as a plausible account of mental causation involving loss of intentional control. If the offender lost control at some point, we are deprived of making reference to the guiding force of his intentions after that, in which case it's hard to explain how things actually worked out as they did.

A refined version of the account might propose that the formation of the irresistible desire to inflict crippling injury or death by means of gunshot need not deprive his intentions of a central role in producing what happens. On the amended account, Joe's loss of self-control is "focal," namely, loss of ability to access and to strengthen inhibitory desires sufficiently to counter the degree of strength that his lethal desire has acquired. The resulting lethal desire thus guides all the things he does subsequently. But he does them all intentionally.

Such an account makes perfect sense. It's consistent with what the law calls a "hot blooded act." When an accused can present a convincing case that he killed in the heat of passion, pre-meditated murder is ruled out, manslaughter is the most that can be proved against him (waiving complications of felony-murder). However, neither law nor common sense thinks there is anything special about gun-access in the etiology of irresistible desires that result in offensive lethal violence. No good research supports thinking so either.

The Paradox of Gun Control and Public Reasonableness

During the decade of the 1990s, domestic gun production totals varied from a low of 3 million (1992) to highs of 4.9, 5.1, and 4.3 millions in 1993, 1994, 1995 respectively. In 1996, production fell by 500,000. The

Brady Law was proposed in 1992 and enacted on Nov. 30, 1993. The so-called Assault Weapons Law was proposed in 1993 and enacted on September 13, 1994. In 1999, the Department of Justice published a study of the latter's criminological effects. It could not detect any because "the weapons banned by this legislation were used only rarely in gun crimes." However, the Law had other effects that were clearly detectable. "Fueled by the preban speculative price boom, production of assault weapons surged in the months leading up to the ban. [Production] rose by more than 120 percent, from an estimated average of 91,000 guns annually between 1989 and 1993 to about 204,000 in 1994." [91]

The Paradox of Gun Control says that gun control laws whose announced goal is to restrict civilian access to specific types of guns and accessories ("assault-style" rifles and high-capacity magazines) will stimulate production and increase dissemination of the targeted items among civilians, at least in the short run. A corollary says, in a mature gun market, where almost everyone who wants a gun probably has several already, exogenous factors (e.g., "reasonable" gun control) will stimulate demand more strongly than endogenous factors (e.g. product improvement or novelty).

The political institutions of the United States were shaped by a republican theory of citizenship based on popular sovereignty first outlined by Aristotle. European countries have monarchical or aristocratic traditions which have shaped their social and political lives differently, not necessarily for the worse, but not necessarily for the better either. Their institutions do not allow that a claim brought by an individual may require striking down laws duly enacted. Nor does their history and traditions support an understanding of citizenship that vests the initial entitlement over gun rights in "the people." Their civilian populations have never owned guns at rates anywhere near those of the United States. Pragmatically, there is no historical precedent for disarming so large a population, possessed of so many guns and that has affirmed for so long (explicitly or tacitly) the law-abiding citizens' liberty to decide on possession for him or herself.

CONCLUSION

The fundamental ethical problem posed by imposing gun scarcity on the general population has nothing to do with the comparatively trivial "sporting interests" of the public. Nor does gun control implicate merely idiosyncratic, outmoded notions of personal liberty. On the contrary. The fundamental ethical problem posed for proponents of scarcity gun control

---

[91] JEFFREY A ROTH & CHRISTOPHER S. KOPER, U.S. DEPARTMENT OF JUSTICE, IMPACTS OF THE 1994 ASSAULT WEAPONS BAN: 1994-96 (1999).

(SGC) arises in case they subscribe simultaneously to the following propositions:

- (1) An ethically legitimate state must *recognize and respect equally* the fundamental, individual right to bodily integrity, which includes a fundamental, serious right to self-defense, and;
- (2) the state has no general duty to provide minimally adequate protection from criminal violence to any individual, nor does it incur a special obligation to anyone by expressly promising an individual that it will provide her a reasonable, minimum of protection from criminal violence, and;
- (3) the State's *inherent police powers* include the authority to threaten competent, non-felon adults with criminal penalties for having arms for self-preservation and defense.[92]
- (4) A state whose laws seriously impair the right of a competent, trustworthy citizen to defend herself from violence, owes her compensating protection from bodily injury.

Affirming 1-3 is incoherent. 2 & 3 rule out 1.[93] Prohibitory gun laws directly implicate the state's duty to respect equally each person's interest in bodily integrity. If the state bans civilian possession of "equalizers" by invoking a monopoly power under 3, it forbids those who are resultingly made vulnerable to offset the criminological effects of natural inequalities (of being frailer, smaller and weaker). Machiavelli put it crisply. "There simply is no equality between a man who is armed and one who is not."[94]

---

92 *See* Hugh LaFollette, *Gun Control,* 110 ETHICS 266 (2000). This otherwise sophisticated discussion ignores the ethical implications of the "public service" doctrine of State immunity.

93 *See* Samuel Wheeler, *Self-Defense and Coerced Risk-Acceptance*, 11 PUB. AFF. Q. 431 (1997).

94 NICCOLO MACHIAVELLI, THE PRINCE 88 (George Bull trans., 2d ed. 1981) (1515).

GENOCIDE, MURDER AND THE FUNDAMENTAL HUMAN RIGHT TO DEFEND ONE'S LIFE

*Don B. Kates**

[Explanatory note: In Geneva, in 2003 and 2004, I argued to the United Nations Sub-Commission on the Promotion and Protection of Human Rights that the rights to self-defense, and of civilians to arms, are among the most important deterrents to genocide. (My remarks appear in the Appendix hereto.) Subsequently, the Swiss Small Arms Survey, a project of the Graduate Institute on International Studies at Geneva, informed me of inquiries my remarks inspired them to make of several European international law professors. All denied there is any human right to self-defense, claiming that is a right only nations have. As to individuals, self-defense is a mere *privilege* which nations may allow or abolish at will. It would seem that many troubling conclusions follow from this supposedly sovereign right of nations, including, for example: (1) that Iran is free to forbid Jews to defend their lives, but allow Muslims to do so; and, concomitantly, (2) that Saudi Arabia is free to make it a crime for women to resist rape or beatings by their husbands. (An American expert whom I consulted denies (1) and (2), but agrees that nations may forbid women or Jews having firearms, the only means of self-defense that allows most victims substantial parity with aggressors.)

I wrote a short comment on this subject for the Swiss periodical of which the following is a much expanded version. I also solicited comment from the American international law expert mentioned above, whose article follows mine.]

A CONDIGN EXAMPLE

Consider a situation of which I learned in my capacity as an attorney: By sheer luck, "Irene," a 28-year-old divorcee living with her eight-year-old daughter, discovered barely in time that an ex-convict neighbor was tunneling into her basement from a concealed position between their houses. Irene immediately notified the police, whereupon an officer arrived, examined the uncompleted tunnel, and took the tools that had been left in it.

---

* LL.B. Yale, 1966; criminologist and civil liberties lawyer. The advice of C.B. Kates and Prof. John McGinnis is gratefully acknowledged, and I would also like to thank Prof. John P. Cerone and Prof. Robert F. Turner for their valuable insight. For errors the author is alone responsible, of course.

Having had no further contact from the police after three weeks, Irene called—only to be told that they had no record of the tools or of any officer responding to her original call. Irene is a very attractive woman with a wealthy and influential boyfriend. He complained to a friend in the prosecutor's office who promptly had an inquiry launched by a ranking police official. Though the cause could not be ascertained, it became clear that there had been no on-going investigation of Irene's situation, and there was no record of any tools or of any response to Irene's original report.

The police official suspected the unidentifiable officer who had responded to Irene's call was one of several in the department who had been suborned by a drug gang. The ex-convict enjoys the gang's protection because most of the murders of which he is suspected had been committed for the gang. But he had other predilections as well. One incident, for which he had served an extensive prison sentence, was tunneling into the basement of a 29-year-old woman and her nine-year-old daughter, whom he spent the weekend raping and torturing to death.

Upon hearing this, Irene got her boyfriend to covertly move her and her daughter to a secret new home with an unlisted phone number. But, just two days later, the ex-convict (perhaps through information from police sources) stood grinning across the street from her new home. Irene received training and began carrying a handgun. Perhaps aware the police had licensed her, the convict has never attacked. Yet, for years he has terrorized her, appearing every few months near her home, in stores when she is shopping, and elsewhere she goes.

Given Irene's extraordinarily influential friends and connections, the police have done what they can for her. They cannot prosecute the ex-convict because the necessary evidence, the tools, is gone. (Even if they could prosecute it would only be for some misdemeanor, such as trespass or malicious mischief.) Police officers visited the ex-convict to try to warn him off. But, knowing he has nothing to fear from them, his answer was to slam the door in their faces with a suggestion that they "go ---- yourselves."

Even so, Irene is extraordinarily lucky. Extraordinarily lucky to be so pretty. Extraordinarily lucky to have an influential boyfriend. Extraordinarily lucky to be licensed to carry a gun, something no one without special influence can get in urban or suburban California. Extraordinarily lucky not to be one of the hundreds of American women who are raped and murdered each year.

The lesson is clear. Irene and her daughter are safe because she has a gun and the ability to defend herself. What would have happened to a less fortunate woman and her daughter?

ILLOGICAL FICTION

To claim nations have a right to self-defense but individuals have not is to perpetrate an absurd and illogical fiction. Except as embodiments of

their populations, nations are mere concepts without substance. The concepts Australia or France have no more right to self-defense than do the concepts "Atlantis" or "Carthage" or the "Duchy of Westphalia." Nations can only have a right to defense by derivation—because the human beings who compose them have that right.

Yes, the United Nations Charter enunciates a right of nations to defend themselves. But it also enunciates a right to human life. That right has no substance unless it includes the right to preserve life when it is threatened. If it were valid to deny that the right to life gives individuals the right to defend their life, it would be equally valid to deny that the right to life includes a right to eat—from which it would follow that, while nations are precluded from direct murder, they may instead arrest and confine individuals without food and water until they die.

To put it bluntly, the notion that the right to life does not encompass the right to preserve life is a great nonsense. There is no intellectually serious way of denying that, implicit in her right to life, Irene has a basic human right to use her gun to preserve her own life and her daughter's life from violence.

That self-defense is a basic human right is further attested by various international laws, protocols, and conventions. Perhaps most important is that the law of the International Criminal Court explicitly recognizes the right of individuals to use deadly force in self-defense.[1] The right is also recognized in the European Convention on Human Rights (art. 2). Likewise, the 2005 UN Protocol Against the Illicit Manufacture of and Trafficking in Firearms speaks of: "the inherent right to individual or collective self-defense."[2] Do these recognitions not shift the burden to those who deny that there is a basic human right of self-defense to produce some evidence that international law contradicts that right and declares that nations are free to abolish it or limit it in any way they like?

THE UNIVERSAL RULE AMONG NATIONS

Erudite professors may claim nations are free to forbid self-defense, but, significantly, no nation appears to have done so. So far as I can determine, every legal system in the world recognizes the right of a victim to use force, including deadly force, to preserve her life and her child's against murderous aggression.[3] Indeed, the trend, both in Europe and the United

---

[1] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, art. 31 (July 17, 1999), *cited in* David B. Kopel, Paul Gallant & Joanne D. Eisen, *Is Resisting Genocide a Human Right?*, 81 NOTRE DAME L. REV. 1275 (2006).

[2] *Id.*

[3] Schlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 VA. L. REV. 999, 999 (2005) ("the right to self-defense is recognized in all jurisdictions"); Herbert

States, is to expand the right in response to the post-World War II trend of increasing violent crime.[4] In this context, let me repeat that the law of the International Criminal Court explicitly recognizes the right of individuals to use deadly force in self-defense. Moreover, the view that self-defense is a fundamental human right gains support from the innumerable judicial decisions on self-defense in various nations,[5] and the writings of eminent scholars in those nations—judicial decisions and legal treatises being recognized sources of international law.[6] In this respect, modern law, including international law, follows from ancient Roman law which held it justifiable to kill a thief in the night and which accepted in all circumstances the right to kill in defense of life[7] pursuant to the maxim "whatever one does in defense of his own person, that he is considered to have done legally."[8]

Which is worth more: the denial by some international law professors that there is a fundamental human right to protect one's life from unlawful attack—or the apparently unanimous judgment of the world's nations "that there is no social interest in preserving the lives of the aggressors at the cost of those of their victims?"[9]

THE UNIVERSAL VIEW OF MORAL PHILOSOPHY

Though the right to self-defense gets little attention from modern philosophers, I am informed by one that his discipline universally accepts that right, excepting only pacifist philosophers who deny that *either* nations or people may use force. Far from being unknown to international law, the right of individuals to use force in self-defense is the basis on which the right of nations to use force has always rested. The first international law

---

Wechsler & Jerome Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 736 (1937) (justifying the right of deadly force self-defense in light of the "universal judgment that there is no social interest in preserving the lives of the aggressors at the cost of those of their victims"); *see also* GEORGE P. FLETCHER, With Justice for Some (Perseus Books 1995) (discussing self-defense as a justification in American, European and Israeli law).

[4] For discussion of the success of the Italian movement to expand the right to use deadly force and of similar movements in England and Belgium see Renée Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L., ECON. & POL'Y. 331 (2006); Melissa Kite, *MPs to get fresh vote on right to fight off burglars*, TELEGRAPH (UK), June 12, 2005, at 1. As to the U.S., *see* Don B. Kates & Nancy J. Engberg, *Deadly Force Self-Defense Against Rape*, 15 U.C. DAVIS L. REV. 873 (1982) (retreat rule shrinking in extent and application even in the minority of states that follow it); *compare* People v. Riddle, 467 Mich. 116, 119-20, 649 N.W.2d 30, 34-5 (2002) (retreat rule held not to apply to any situation in which one is attacked by surprise or by an assailant with a deadly weapon).

[5] *See, e.g.*, Brown v. United States, 256 U.S. 335 (1921).

[6] Rome Statute of the International Criminal Court U.N. Doc. A/CONF. 183/9, art. 38(d).

[7] STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 17 (Independent Institute 1984).

[8] David B. Kopel, *The Torah and Self-Defense*, 109 PENN ST. L. REV. 17, 36 n.85 (2004).

[9] Wechsler & Michael, *supra* note 3, at 736.

treatises (von Pufendorf, J.J. Burlamqui, Vattel, etc.) deduced the law of nations by analogy from the self-defense rights of individuals.[10] Likewise, a later figure who is recognized as a founder of modern international law, Francisco Suárez, declared the natural human right of self-defense to be "the greatest of rights," which belonged to individuals and to communities alike.[11]

Compare Blackstone (the right of self-defense is "the primary law of nature which [cannot be] taken away by the law of society"[12]), Locke (morally, each person "is bound to preserve himself"[13]), and Hobbes (as preservation of life is the very reason for man submitting to government, "a covenant not to defend myself with force from force is always void"[14]).

THE VERDICT OF RELIGIOUS PHILOSOPHY

The Torah commands: that one who sees a victim pursued by a rapist or killer must intervene to protect her, even killing the criminal if necessary; and that "If someone comes to kill you, arise and kill him first!"[15] The Koran agrees—in 5:32, 22:39, 42:39-43; and 49:7-9. The Old Testament exonerates a householder who kills a burglar (Exodus 22:2) and relates that Moses killed an Egyptian slave master in defending an Israelite (Exodus 2:11-14). In the New Testament, Christ speaks favorably of a "good man" guarding his home against burglary (Matthew 24:43), and Moses' killing of the slave master in defense of the Israelite is praised (Acts 7:24). Throughout history, religious teachers have recognized the right to kill in self-defense—some even declaring it a duty.[16]

---

[10] Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87 (1992); *see also, e.g.*, EMMERICH DE VATTEL, LAW OF NATIONS: PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 22 (Joseph Chitty ed., T. & J.W. Johnson, 1854 1883); J.J. BURLAMQUI, THE PRINCIPLES OF NATURAL AND POLITICAL LAW 121 (Nugent trans., Cambridge U. Press 1807)(1748); SAMUEL VON PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 32 (Frank Gardner Moore trans., Oceana Publications Inc. 1964)(1682).

[11] Quoted in Kopel, Gallant & Eisen, *supra* note 1.

[12] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 121, 143-44 (Clarendon Press 1765-1769).

[13] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 6 (C.B. MacPherson ed., Hackett Pub. 1st ed. 1980) (1690).

[14] THOMAS HOBBES, LEVIATHAN 88, 95 (Collier 1962) (1651).

[15] *Talmud Sanhedrin* 72a; *see* HYMAN E. GOLDIN, HEBREW CRIMINAL LAW AND PROCEDURE 174-78 (Twayne Publishers, Inc. 1952); *see also* Kopel, *supra* note 8, at 36. Kopel cites Samuel Mendelsohn, a late 19th Century rabbi and commentator on Jewish law asserting as a maxim of Hebrew ancient jurisprudence, "kill him who unlawfully attempts to kill thee."

[16] *See* GOLDIN *supra* note 15; *see also* Kates *supra* note 10; BRENDAN FURNISH & DWIGHT SMALL, THE MOUNTING THREAT OF HOME INTRUDERS: WEIGHING THE MORAL OPTION OF ARMED SELF-DEFENSE, pt. II (Springfield, Il., Charles C. Thomas 1993).

DISCOMFITING IMPLICATIONS

Philosophers conclude that the right to self-defense entitles potential victims to have guns, the only effective means of defense.[17] It is in order to evade this appalling (to them) implication that European international law professors deny that Irene has any right to defend her life and her daughter's life. But the grotesque consequences of that denial are not limited to gun use. To deny that self-defense is a fundamental right means not just that government may forbid Irene a gun, but may forbid her to struggle at all, even with her bare hands, when a man is raping and torturing her and her daughter to death. Ordinary people, lacking the intellectual sophistication of academics, would deem a denial that entails such grotesque consequences to be a great nonsense.

FICTIONAL SUBSTITUTION

A superficially more plausible position would be to admit that Irene has at least a theoretical right to self-defense, but claim she may be denied the right to have a gun if government is substituting its own protection for her and her daughter. But law professors eschew arguing that, knowing it is fictional as a matter of law. Police have no legal duty to protect endangered individuals. Police exist to deter crime *in general* by patrol activities and by apprehension *after* crime occurs. Though police may succor an individual being attacked, the law does not require that, nor need police officers respond to distress calls, no matter how urgent—they certainly need not protect individuals who are under mere general threat of death.[18]

The U.S. case, *Warren v. District of Columbia*, epitomizes this. Two of the victims were upstairs when they heard men break in and rape their downstairs roommate. Ample time having passed and her screams having ceased, they assumed police had arrived. But their repeated phone calls had gone unheeded. So when they went downstairs to see to their roommate, they too were captured: "For the next fourteen hours the women were held

---

[17] *Compare* Kates *supra* note 10 (discussing 17th and 18th Century philosophers) to Michael Huemer, *Is There a Right to Own a Gun?* 29 SOC. THEORY & PRAC. 297 (2003); Lance Stell, *Gun Control*, *in* A COMPANION TO APPLIED ETHICS 192 (R.G. Frey & Christopher Heath Wellman, eds., Blackwell 2003); Lester Hunt and Todd C. Hughes, *The Liberal Basis of the Right to Bear Arms*, 14 PUB. AFF. Q. 1 (2000); Samuel C. Wheeler, *Self-Defense and Coerced Risk-Acceptance*, 11 PUB. AFF. Q. 431, (1997); Samuel C. Wheeler, *Arms as Insurance*, 13 PUB. AFF. Q. 111, (1999).

[18] See discussion and citations in Don B. Kates Jr., *The Value of Civilian Handgun Possession as Deterrent to Crime or a Defense Against Crime*, 18 AM. J. CRIM. L. 113, 123-25 (1991); Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) ("there is no constitutional right to be protected by the state against being murdered by criminals or madmen"). For more recent caselaw, *see, e.g.*, Zelig v. County of Los Angeles, 45 P.3d 1171 (Cal. 2002); Ashburn v. Anne Arundel County, 510 A.2d 1078 (Md. 1986); Everton v. Willard, 468 So. 2d 936 (Fla. 1985).

captive, raped, robbed, beaten, forced to commit sexual acts upon each other, and made to submit to the sexual demands" of their attackers. Having described these facts, the court dismissed the victims' suit because it is a "fundamental principle that a government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen."[19]

THERE IS NO GOVERNMENT SUBSTITUTE FOR SELF-PROTECTION

The *Warren* case's principle is "fundamental" because it reflects police resource limitations that are equally applicable in other nations, e.g., Australia, Canada, and England whose violent crime rates now far exceed those in the U.S. (As of 2000, those nations suffer twice the U.S. violent crime rate, despite having severely restricted guns for decades, and banning and confiscating hundreds of thousands of guns from those who were law abiding enough to comply in the 1990s.[20]) Their resources swamped, English police no longer even investigate burglary and "minor" violence like assault.[21]

Even with U.S. violence now far lower than the rates in those nations, U.S. police resources do not remotely suffice for protecting endangered individuals. For instance, if it sent officers to guard the persons of women who credibly report death threats by ex-husbands or stalkers, the New York City Police Department, America's largest, would have no officers available for street patrol, traffic control, crime detection or responding to emergency calls. Given what New York courts call "the crushing nature of the burden,"[22] police cannot be expected to protect individuals. This case, and the *Warren* case mentioned above, epitomize the decisional law of American state jurisdictions.[23] The federal courts have similarly proclaimed that

---

19 Warren v. D.C. Metro. Police Dep't, 444 A.2d 1, 6 (D.C. 1981).

20 Don B. Kates, *The Limited Importance of Gun Control from a Criminological Perspective, in* SUING THE FIREARMS INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 62, 66-67 (Timothy Lytton ed., 2005). *Compare* Katrina Tweedie, *Scotland tops list of world's most violent countries*, TIMES (U.K.), Sept. 19, 2005, at 31.

21 Daniel Foggo, *Gun-free UK: Don't bother about burglary, police told*, TELEGRAPH (U.K.) Jan. 12, 2003, at 1.

22 Weiner v. Metro. Transp. Auth., 448 N.Y.S.2d 141, 144 (N.Y. App. Div. 1982).

23 *See* cases cited *supra* note 18. State statutes to the same effect abound; *see, e.g.*, MASS. GEN. LAWS ANN. ch. 258, §10 (West through the 2005 1st ANN. SESS. and through Ch. 10 of the 2006 2nd ANN. SESS.) (There is no liability for failures of police or fire protection unless the victim relied on "explicit and specific assurances of safety or assistance," or for failure to diminish the harmful consequences of conditions or situations not originally caused by the government or its employees); CAL. GOV'T. CODE §§ 821, 845, and 846 (Deering 2005), construed in Stone v. State, 106 Cal. App. 3d 924 (1980); and 745 ILL. COMP. STAT. ANN. 10/4-102 (West through P.A. 94-722 of the 2005 REG. SESS.) (corresponds to ILL. REV. STAT. 1971, ch. 85, para. 4-102), construed in Jamison v. City of Chicago, 48 Ill. App. 3d 567 (1977).

"there is no constitutional right to be protected by the state against being murdered by criminals or madmen."[24]

These decisions reflect simple reality. Year after year, surveys of thousands of U.S. police officials find them saying that "because of limited police man-power citizens should retain the right to own firearms for self-defense at home or business."[25] A 2005 review of all available data on police response to citizen 911 calls for help reveals that some departments are so inundated with emergency calls that callers often get busy signals or answering machines instead of reaching emergency dispatchers. For instance, the *New York Times* reported that 11 percent of emergency callers in one large New York county get answering machines instead of police dispatchers.[26]

Even when a caller gets through, police response time in major cities varies between eight minutes (Washington, D.C.) and 15 minutes (Atlanta). Nevertheless, according to a Kansas City, Missouri police study, "the factor which most hampered the effectiveness of the 911 system was not police response time, but citizen delay in alerting the system."[27]

The phrase "citizen delay" is misleading. The reason for the delay usually lies not with the helpless unarmed victim herself, but with the criminal who is in control of the situation until he departs. A study by Professor William Spelman and Dale Brown collected data from Jacksonville, Florida; Peoria, Illinois; San Diego, California; and Rochester, New York, all of which "confirmed the Kansas City results: the most important reason criminals escape, despite a call being made to 911, is that the call is made too late . . . The police were not, in general, failing to respond quickly to 911 calls; *the calls simply came too late to do any good.*"[28] Spelman and Brown found, "arrests that could be attributed to fast police response were made in only 2.9 percent of reported serious crimes."

---

[24] *Bowers*, 686 F.2d at 618; DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) (state's failure to protect an individual against private violence is not a constitutional violation); Town of Castle Rock v. Gonzales, 125 S. Ct. 2796 (2005).

[25] Quoting the view expressed by 92.2 percent of police officials in a national survey appearing in the July/August 1991 issue of *Law Enforcement Technology*. The National Association of Chiefs of Police's latest survey of the opinions of American police executives yielded results consistent with its 16 previous annual surveys: "With regard to private citizens owning firearms for sport or self-defense, 93.6 percent of the respondents supported civilian gun-ownership rights. Ninety-six percent of the police chiefs and sheriffs believe criminals obtain firearms from illegal sources . . . When asked if [giving] citizens concealed-weapons permits would reduce violent crime, 63.1 percent said yes." Jim Kouri, *Police Execs Speakout About Terrorism, Gun Control, Drugs*, MICHNEWS.COM, Jan. 19, 2005, http://www.michnews.com/cgi-bin/artman/exec/view.cgi/193/6497.

[26] David Kopel, Paul Gallant & Joanne Eisen, *911 Is a Joke . . . or Is It? Let's Find Out*, TCS DAILY, January 5, 2005, http://www.tcsdaily.com/article.aspx?id=010505H.

[27] Id.

[28] *Id.* (emphasis added).

On June 5, 2002, for example, 89-year-old Lois Joyner Cannady called the Durham County, North Carolina, 911 for immediate police aid. She was murdered before the police arrived on the scene. Though law enforcement officers came within minutes, the killer was long gone.[29] Contrast the incident after which this "Bessie Jones" symposium is named: a wheelchair-bound 92-year-old Chicago woman shot to death a teenage predator who broke into her home and advanced on her despite her repeated warnings.[30] Or consider the two 80-year-old women homeowners who used guns to repel intruders in Elbert County, Georgia, leading the local sheriff to remark, "having the guns kept those women alive . . . In these two cases I'm actually glad they did because it could have been a different story if they didn't."[31]

CONCLUSION

To deny the right to preserve life from homicidal attackers is to deprive the right to life of meaning. Such denial equally refutes a right of nations to self-defense, for how can nations have a right to forcibly defend people who have no right to defend themselves? Finally, such denial contradicts what has been deemed self-evident throughout human history. Perhaps international law professors are offering themselves an answer to Montesquieu's rhetorical question, "Who does not see that self-protection is a duty superior to every precept?"[32] If so, they deny a right that has been fundamental to international law from the 17th Century to today, and which religion and philosophy affirm.

Self-defense was deemed not just a right, but "commendable," by such great 18th, 19th, and 20th Century legal analysts as Blackstone, Stephens, Pollock, Bishop, and Brandeis.[33] Sixty-five years ago, another legal giant, Herbert Wechsler, could still describe the basis for the human right of self-defense as the "*universal* judgment that there is no social interest in preserving the lives of the aggressors at the cost of those of their victims."[34] The position taken by the international law professors proves that judgment is no longer universal—but not that it is no longer the law.

---

29 *Id.*

30 Mark P. Tilford & Steve Rhodes, *Elderly Woman Shoots Intruder; After Asking Him to Leave, 92 Year Old Kills Teenager*, CHI. TRIB., Nov. 9, 1993, at N3.

31 Kopel et al., *supra* note 26.

32 CHARLES DE SECONDAT MONTESQUIEU, 2 SPIRIT OF THE LAWS 64 (Thomas Nugent trans., The Colonial Press 1900) (1758).

33 WILLIAM BLACKSTONE, 4 COMMENTARIES 182; FREDERICK POLLOCK, A TREATISE ON THE LAW OF TORTS 201 (New Amer. ed. 1894); JOEL PRENTISS BISHOP, 1 BISHOP ON CRIMINAL LAW §851 (John M. Zane & Carl Zollmann eds., T.H. Flood & Co. 9th ed. 1923); LOUIS D. BRANDEIS, THE BRANDEIS GUIDE TO THE MODERN WORLD 212 (Alfred Lief ed., Little Brown & Co. 1941).

34 Wechsler & Michael, *supra* note 3, *emphasis added.*

IS THERE A HUMAN RIGHT OF SELF-DEFENSE?

*John Cerone**

I. SCOPE OF THE QUESTION

This paper is limited to the question of whether there exists in international law a human right of self-defense such that states are required to secure[1] this right to individual human beings.

Whether there is a moral right of self-defense or whether there should be a legal right of self-defense are not questions that I will be addressing; these are questions for moral philosophers and policy-makers. As an international lawyer, I am providing my answer to the question of whether or not there is a legal human right to self-defense in international law.

My position is not that international law prohibits states from recognizing this right, or that international law requires it, or that international law permits it. My proposition is simply that there is no norm of international law providing a human right to self-defense.

As such, the burden is on the party attempting to establish the existence of a norm of international law.[2]

II. AN INTERNATIONAL HUMAN RIGHT OF SELF-DEFENSE?

A. *The Right of Self-Defense in International Law*

While there is a clearly established right of self-defense in international law, this right applies only to states.[3] According to article 51 of the Charter of the United Nations:

---

* Professor John Cerone is Director of the Center for International Law & Policy at the New England School of Law. These remarks were prepared for the Bessie Jones Day Symposium at George Mason University School of Law on November 5, 2005.

[1] Use of the term 'secure' is intended to encompass both negative and positive obligations. *See infra* notes 13-21 and accompanying text.

[2] S.S. Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10. While the breadth of the Court's exposition on the freedom of states has been subject to criticism, the rule placing the burden on the party asserting the existence of a norm of international law is well established.

[3] It is this right of self-defense that the UN General Assembly refers to in its Resolution 55/255, cited by my opponent. Through this Resolution, the General Assembly adopted the text of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Article 51 is formulated in terms implying a pre-existing right of self-defense. The International Court of Justice (ICJ) has affirmed that this right exists in customary international law, and has held that the scope of the customary right is co-extensive with the parameters expressed in Article 51 of the Charter.[4]

This right of self-defense is an exception to the general prohibition on threat or use of force in international law, as expressed in article 2(4) of the Charter, which states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

As an exception to this general prohibition, the ICJ has construed the right of self-defense narrowly. The right of self-defense authorizes states, and only states, to use armed force in response to an armed attack by another state. It does not apply to armed attacks by non-state entities, and this right may only be invoked by states. Article 51 expressly contemplates "[m]easures taken by Members in the exercise of this right of self-defense," the word Members of course referring to Member States of the United Nations.

Thus, when attacks were being carried out against ethnic Albanians in Kosovo, NATO was unable to invoke collective self-defense as a justification for bombing the Federal Republic of Yugoslavia. Kosovo is a not a state. Thus, it had no right of self-defense. As such, other states could not legally come to its aid in exercise of the right of collective self-defense. Clearly, the Charter understanding of the right of self-defense cannot be invoked by entities other than states. A fortiori, such a right authorizing the use of armed force against a state could not be invoked by a natural person in his or her capacity as an individual human being.

While this right of self-defense is clearly established in international law, no human right of self-defense can be implied from this right. One cannot simply transpose international norms applying to states to application to individual human beings, as the context is quite different. In order to understand why, it is essential to appreciate the nature of the international legal system.

---

[4] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

B. *The Nature of the International Legal System*

The primary function of international law is to regulate relations between and among states. From the inception of the Westphalian system, the sovereign equality of states and the related principle of non-intervention were paramount. Only states were true subjects of international law, with individuals generally relegated to the status of mere objects, and its substantive norms consisted of a network of reciprocal obligations that focused almost exclusively on inter-state relations. Notwithstanding the substantial evolution in international law over the course of the past century, in particular in its relationship to individual human beings, the classical inter-state structure of the international legal system persists. Thus, norms generated within this context cannot necessarily be applied to individual human beings. The existence of rights and duties of individuals in international law is still exceptional, constituting a tiny minority of the tens of thousands of treaties currently in force.

This applies a fortiori in the context of matters falling within a state's domestic jurisdiction. In the classical system, the principle of non-intervention constituted an almost impenetrable barrier to scrutiny of the way states treated those within their domain. As such, the quest for the establishment of human rights in international law has been an uphill battle. Thus, the process of creating human rights law has largely been treaty-driven, a process requiring the express consent of states. In this context, the existence of new human rights norms cannot be presumed.

Another significant difference between the international legal system and municipal systems is that on the international level, there is virtually no law enforcement machinery. It remains a very primitive system, with few central institutions. The role of self-defense in such an environment is far different from its place in a domestic system with highly developed institutions and extensive law enforcement capacity.[5]

A related contextual difference relates to the purpose of the international right of self-defense. My opponent claims that a human right of self-defense is directed to the preservation of the human life of the victim. The right of self-defense in international law is not about the preservation of lives of individuals in the targeted country; it is about preservation of the state.[6]

---

[5] To underscore this contextual difference, consider that the International Court of Justice in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons could not rule out the possibility that an extreme case of self-defense might justify recourse to nuclear weapons.

[6] Indeed, one can easily think of situations where many more lives would be saved within an attacked country if that country refrained from responding to an armed attack with the use of armed force. For example, if the Baghdad regime immediately surrendered, rather than militarily resisting the March 2003 invasion, it is likely that far fewer Iraqis would have been killed; nonetheless, most jurists agree that Iraq had a right to defend itself against the US invasion.

Another hurdle to the establishment of a human right of self-defense is the process by which international law is formed. In a system where all states are sovereign equals, international law emanates predominantly, if not exclusively,[7] through the express or implied consent of states. This is reflected in the authoritative listing of the sources of international law in article 38(1) of the Statute of the International Court of Justice, which states:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Thus, the primary sources of international law are treaties, customary law, and general principles. If there is an international human right of self-defense, it would have to be found in one of these sources. Jurisprudence (i.e., decisions of courts) and scholarship (i.e., the teachings of publicists) are not themselves primary sources, but provide evidence of either customary law or general principles.

C. *Human Rights Law*

Human Rights law obliges states to respect and ensure certain rights to all those within their jurisdiction. If it were established that self-defense was a human right in international law, states would be required to recognize self-defense as grounds for excluding criminal responsibility in prosecutions under domestic law. Further, states would be obliged to refrain from interfering with an individual's act of self-defense, and would also be required to take steps to prevent non-state actors from interfering with this right. In light of the principle of substantive equality, the international law

---

[7] While natural law dominated early international legal discourse, it has largely receded from the international legal system as an independent source of international law. To the extent that norms and principles of natural law continue to have legal force, it is through the sources of positive law identified in article 38 of the ICJ Statute.

of non-discrimination may even require the state to take steps to ensure equal access to means for effectively exercising such a right of self-defense.[8]

1. Treaty law

The primary human rights treaties are the International Covenant on Civil and Political Rights (ICCPR)[9] and the International Covenant on Economic, Social, and Cultural Rights.[10] Neither makes any reference to a right of self-defense.

While the regional European Convention on Human Rights[11] refers to self-defense in the context of article 2, which enshrines the right to life, self-defense is not itself identified as a right. Instead, article 2(2) states:

> Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> a) in defence of any person from unlawful violence;
>
> b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> c) in action lawfully taken for the purpose of quelling a riot or insurrection.

---

[8] In general, however, such a right of self-defense would not necessarily imply a right of access to means for exercising that right (e.g. weapons). Self-defense is a right that arises under certain circumstances, and this right may be construed to permit use of the means available to the individual in those circumstances. It would not necessarily provide a right to broader access to means of defense (e.g. extending materially and temporally beyond the circumstances giving rise to the right). It could be argued, however, that the right of self-defense is not circumstance-dependent and indeed that it exists at all points in time. As such, it could then be argued that individuals have a continuous right to access means to enable them to effectively protect their right to life. My opponent cites examples of women held captive having a continuous right of self-defense during the period of captivity. To extend this reasoning beyond a situation of physical captivity essentially contemplates that human beings live not in any kind of society, but are captive in a world of aggressive strangers. However, as will be discussed infra, human rights law imposes upon states a duty to take steps to protect the rights of individuals. This would seem to undermine the latter conception of the world. In particular, it would show that individuals are not captive in the world, perpetually at the mercy of potential aggressors. A further difficulty would be determining the scope of permissible means. If the test is access to means sufficient to enable the defender to effectively repel an attack, then the scope of those means would vary with the relative strengths of the attacker and defender. For example, if an individual is being attacked by an angry mob, would the right of self-defense entitle him or her to access to means sufficient to repel the attack, which in such a case might reasonably require heavy weaponry or explosives?

[9] International Covenant on Civil and Political Rights, Oct. 5, 1977, 999 U.N.T.S. 171, 1057 U.N.T.S. 407.

[10] International Covenant on Economic, Social, and Cultural Rights, Oct. 5, 1977, 993 U.N.T.S. 3.

[11] [European] Convention on Human Rights and Fundamental Freedoms.

The reference to defense is quite broad. It refers to defense of any person, not just oneself, and it may be in response to "unlawful" violence, not necessarily limited to violence threatening death. The function of this provision is simply to remove from the scope of application of article 2(1) killings necessary to defend against unlawful violence. It does not provide a right that must be secured by the state.[12]

It could be argued that a right to self-defense may be implied from the right to life (as opposed to being expressly granted), which is clearly provided for in the ICCPR as well as the main regional human rights treaties. While the subject of obligations under human rights treaties is clearly the state party, and not individual human beings, it is clearly established in human rights law that the state is obliged to protect rights from violation by non-state actors.

Article 2(1) of the ICCPR states that "[e]ach State Party to the present Covenant undertakes *to respect and to ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant. . . ."[13] In its General Comments, the Human Rights Committee has construed this provision to oblige States to protect the rights contained in the Covenant against non-State interference.[14] The regional human rights

---

[12] For example, this provision of itself would not require that states parties provide for exclusion of criminal responsibility in cases of defense from unlawful violence. The Convention sets minimum standards that states parties are required to meet. Article 2(2) simply operates to reduce the scope of what is required of states parties under the Convention.

[13] International Convention on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171, (emphasis added) (*entered into force* Mar. 23, 1976).

[14] U.N. Human Rights Comm., General Comment No. 31 (2004) at para. 8 (*available at* http://www.ohchr.org/ english/bodies/hrc/comments.htm); U.N. Human Rights Comm., General Comment No. 6 (1982) (*available at* http://www.ohchr.org/ english/bodies/hrc/comments.htm); U.N. Human Rights Comm., General Comment No. 10 (1983) (*available at* http://www.ohchr.org/english/bodies/hrc/comments.htm); U.N. Human Rights Comm., General Comment No. 16 (1988) (*available at* http://www.ohchr.org/english/bodies/hrc/comments.htm); U.N. Human Rights Comm., General Comment No. 17 (1989) (*available at* http://www.ohchr.org/ english/bodies/hrc/comments.htm); U.N. Human Rights Comm., General Comment No. 18 (1989) (*available at* http://www.ohchr.org/english/bodies/hrc/comments.htm); U.N. Human Rights Comm., General Comment No. 20 (1992) (*available at* http://www.ohchr.org/english/bodies/hrc/comments.htm); U.N. Human Rights Comm., General Comment No. 21 (1992) (*available at* http://www.ohchr.org/english/bodies/hrc/comments.htm); U.N. Human Rights Comm., General Comment No. 27, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999); U.N. Human Rights Comm., General Comment No. 28, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000). In General Comment 27, for example, the Human Rights Committee stated, "The State party must ensure that the rights guaranteed in article 12 are protected not only from public, but also from private interference." U.N. Human Rights Comm., General Comment No. 27, *supra*, ¶ 6.

institutions have similarly interpreted comparable provisions[15] in their respective treaties.[16]

In the *Velásquez-Rodriguez* case,[17] for example, the Inter-American Court of Human Rights found that agents who acted under cover of public authority carried out the disappearance of Manfredo Velásquez. The Court stated, however, that "even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the Convention, which obligated it to ensure Manfredo Velásquez the free and full exercise of his human rights."[18]

Earlier in its opinion, the Court had surmised, "what is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible."[19] In either case the Government would be held responsible. In the former case, where the violation has occurred with the support or the acquiescence of the Government, the State would be directly responsible for the violative act itself. In the latter case, the State would be responsible for failing to ensure the right through the exercise of due diligence.[20]

It may thus be argued that the obligation to ensure the right to life requires states to recognize self-defense as a human right. This is unlikely the case. As with most international legal obligations, it is up to the state to

---

15 *See, e.g.*, American Convention on Human Rights art. 1(1), Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 143 (*entered into force* July 18, 1978); European Convention on Human Rights and Fundamental Freedoms, *supra* note 11, at art. 1.

16 *See* A v. United Kingdom, App. No. 25599/94, Report of the Commission para. 45 (Sept. 18, 1997) (*available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item_=2&portal-hbkm&action=html&highlight=&sessionid=5800558&skin=hudoc-en) ("even in the absence of any direct responsibility for the acts of a private individual under Article 3 of the Convention, State responsibility may nevertheless be engaged through the obligation imposed by Article 1 of the Convention 'to secure . . . the rights and freedoms defined in Section 1 of this Convention'").

17 Velásquez-Rodriguez case, Inter-Am. Court H.R., Judgment of July 29, 1988 (*available at* http://www.corteidh.or.cr/seriec_ing/seriec_04_ing.doc).

18 *Id.* at ¶ 182.

19 *Id.* at ¶ 173.

20 As stated in the Report of the Representative of the Secretary-General on Mass Exoduses And Displaced Persons, "Abuses committed by non-State actors generally do not entail the responsibility of the States under human rights treaties, unless they are instigated, encouraged or at least acquiesced to by the Government concerned; otherwise they are typically labeled as infractions of a country's domestic laws. In such cases, the State is expected to take measures, to the best of its ability, to prevent further displacement, to alleviate the plight of the displaced and to bring those responsible to justice." U.N. Econ. & Soc. Council [ESCOR], Commission on Human Rights, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms Including the Question of the Programme and Methods of Work of the Commission: Questions of Human Rights, Mass Exoduses and Displaced Persons*, E/CN.4/1998/53/Add.1 (Feb. 11, 1998).

determine how to fulfill its obligation to ensure the right to life. The ICCPR does not provide detailed regulation as to how this right must be ensured. As recognized by the Inter-American Court of Human Rights, "[i]t is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party."[21] While there is a clear obligation to protect individuals against arbitrary deprivation of their lives by non-state actors, it is up to the state to determine how best to go about achieving this. Recognition of self-defense is one way that states may choose to achieve this, but this does not mean that it is required by international law.

In searching for a human right of self-defense, reference might also be made to international criminal law, and in particular to the treaty establishing the International Criminal Court (ICC).[22] Article 31(1)(c) of the ICC Statute refers to situations in which a person:

> acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected.[23]

As the chapeau language makes clear, this situation is identified as one of the "grounds for excluding criminal responsibility."[24] It does not create a right. Further, this provision is specific to the ICC regime, meaning that it does not require states to recognize self-defense as a defense in their municipal law. It merely identifies it as grounds for excluding criminal responsibility in proceedings before the ICC.

2. Customary law

Customary international law consists of two elements: state practice and *opinio juris* (i.e. that the practice is engaged in because it is perceived as being legally required).

Is there practice and *opinio juris* recognizing an international human right of self-defense? Supporters of an affirmative answer might point to domestic criminal codes around the world providing for the exclusion of criminal responsibility in situations of self-defense. This could constitute a widespread and representative practice over time as required by the ICJ in the *North Sea Continental Shelf Cases*.[25]

---

21 Velásquez-Rodriguez, *supra* note 17, at para. 175.

22 Rome Statute of the International Criminal Court, July 1, 2002, 2187 UNTS 90; 37 ILM 1002.

23 *Id.* at Art. 31(1)(c).

24 *Id.* at Art. 31.

25 North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 1 (Feb. 20).

However, the *opinio juris* remains to be demonstrated. There is nothing to indicate that states believe they are legally compelled by international law to recognize a right of self-defense within the municipal sphere. The simple fact that most states do provide this right in their domestic law would not be enough.

Further, it has not been demonstrated that most states do enshrine self-defense as a *right* under their domestic law. The simple fact that states recognize it as a basis for excluding criminal responsibility in certain narrow circumstances does not of itself give rise to a right to engage in such conduct.

3. General Principles

Finally, it may be argued that self-defense constitutes a "general principle of law recognized by civilized nations" within the meaning of article 38(1)(c) of the ICJ Statute.[26] However, this claim would be subject to many of the infirmities noted above with respect to the possibility of a customary norm—first and foremost, that it is not universally recognized as a right.

In addition, although general principles are technically a primary source of international law, they tend to be formulated in extremely general terms and as such operate in a residual fashion.[27] General principles recognized by international courts are such principles as equity, estoppel, lex posterior derogat legi priori, lex specialis derogat lex generalis, pacta sunt servanda, and so on.

Even if self-defense constitutes a principle sufficiently general to fall within the terms of article 38(1)(c), it would still have to be determined whether such a principle was appropriate for application in the context of the international legal system. Of course, it may be argued that the right of self-defense that is clearly established in international law was itself derived from a general principle of law recognized in the municipal sphere; however, as is readily apparent from the text of the Charter, that principle has been tailored to conform to the structure of that system, and as such, applies only to states.

Nonetheless, it could still be argued that self-defense is a general principle of law that would be appropriate for application by an international criminal court. International criminal courts are charged with prosecution of individual human beings, and, as such, operate in a capacity more similar to domestic courts than, e.g., the International Court of Justice, which is competent to resolve inter-state disputes only. Thus, in the absence of express guidance in their respective charters, international criminal courts routinely look to principles of domestic criminal law for guidance. It could

---

[26] ICJ Statute, art. 38(1)(c).

[27] That is, general principles tend to be employed as gap-fillers and interpretational aids.

thus be argued that the general principle of self-defense has entered the evolving corpus of international criminal law. However, this principle would be confined to a very narrow context—it would operate only as a basis for excluding criminal responsibility in the course of prosecutions before an international criminal court in the absence of express guidance in the instrument outlining the court's competence.[28]

III. CONCLUSION

The present debate was entitled: "Is There an International Law Human Right of Self-Defense or is the Right to Self-Defense a Mere Privilege Which Any State is Free to Dispense With?" However, these are not the only two possibilities. To say that self-defense is not a human right in international law is not to say that states are not required to recognize it as grounds for excluding criminal responsibility. There are several possibilities.

The first is simply that there is no international legal norm specially regulating the exercise of self-defense by individual human beings or regulating state conduct vis-à-vis such an exercise of self-defense. As noted above, this is the default position, which carries unless refuted by evidence of the existence of such norms.

The second possibility is that self-defense is a human right that states are obliged to respect and ensure. No evidence supporting the existence of such a norm has been adduced.

The third possibility is that there is a norm of international law requiring states to recognize self-defense as grounds for excluding criminal responsibility within the municipal sphere. Similarly, there is insufficient evidence, in particular a lack of *opinio juris*, to establish the existence of such a norm.[29]

The fourth possibility is that the principle of self-defense is an international legal principle that an international criminal court would be bound to recognize in the absence of express statutory language (e.g. in its constitutive instrument) regulating the issue. This is the most likely candidate for an international legal norm of self-defense applicable to individuals. But again, this norm would be narrowly confined to a basis for excluding criminal responsibility in the context of a criminal prosecution.

---

[28] An interesting question would be whether an international criminal court's competence could be defined so as to expressly exclude self-defense as grounds for excluding criminal responsibility (i.e. to provide that self-defense would not be a defense). Even though this would never happen, it is likely within the competence of states to negotiate a treaty to this effect. The only hindrance would be if the principle of self-defense in this context could be deemed a *jus cogens* norm, in which case the treaty would be void. *See* Vienna Convention on the Law of Treaties, art. 53, Jan. 27, 1980, 8 ILM 679.

[29] Even if such a norm were established, it would not create an entitlement to means of physical defense or even to access to means of physical defense.

In sum, no recognized source of international law provides a human right to self-defense. The most that may be reasonably argued is that there is a norm of international law requiring states or international criminal courts to recognize self-defense as a basis for excluding criminal responsibility. Such a norm could not reasonably be construed to imply a right of access to means of physically defending oneself.

THE WORLDWIDE POPULAR REVOLT AGAINST PROPORTIONALITY IN SELF-DEFENSE LAW

Renée Lettow Lerner[*]

ABSTRACT

This article examines popular dissatisfaction with the proportionality standard in self-defense law, which holds that the prevention of harm cannot be achieved by causing harm that is disproportionate. Legal elites, such as prosecutors, judges, and legal scholars, have long championed versions of this standard. But there is an increasingly widespread movement in the United States and Europe to modify elite notions of proportionality.

Common to these movements is the desire to replace complicated balancing tests with clearer rules, which would limit the discretion of prosecutors and judges, and to permit use of deadly force against attackers in more situations. Fueling the movements is the belief that government is not able or willing to adequately protect its citizens. While these reform movements are occurring in many countries, the article focuses on three places in particular: Florida, Britain, and Belgium. For each place, the author discusses events that led to dissatisfaction with existing rules, political debates surrounding reform, and detailed legislative action. Efforts in Florida and Britain show an approach to reform that centers on presumptions that deadly force may be used in certain situations, such as a forcible entry into a home. Efforts in Belgium show another approach, which is in effect an expansion of provocation doctrine: anyone who exceeds the bounds of proportionality because of emotion (fear, anxiety, or panic) caused by attack or threat of attack is not criminally liable. The paper then analyzes the two types of efforts. The author concludes that emotions caused by attack are proper grounds for mitigation, but not for complete exoneration. Reforms that emphasize presumptions may well be justified, particularly presumptions about the use of force against those who forcibly intrude into the home.

---

* Associate Professor of Law, George Washington University Law School. I thank Rachel Barkow, Stephanos Bibas, Donald Braman, Paul Butler, David Fontana, James Jacobs, Don Kates, Frederick Lawrence, Cynthia Lee, Craig Lerner, Joyce Malcolm, Paul Robinson, and Robert Weisberg for their helpful comments, and Merel Berling for assistance finding and translating Dutch sources. All translations are the author's own except as noted.

I. INTRODUCTION

Many legal scholars love to draw fine analytic distinctions and invent complicated balancing tests, carefully weighing various interests in different circumstances in an effort to achieve theoretical perfection. They contemplate issues in the safety of their offices, at leisure. True, they try on occasion to take account of the gritty world of quick action, limited information and resources, violent emotion, and basic intuition. But that world is largely foreign to their lives and temperaments. There are times when scholarly theories, embodied in law, come into conflict with popular views of morality. This is happening around the world with respect to the law of self-defense.

While proportionality in some form has long been a feature of the English law on self-defense,[1] scholarly opinion has particularly championed the idea since at least the middle of the eighteenth century.[2] Blackstone,[3] Beccaria, Bentham and the utilitarians all played their role in encouraging the idea: the prevention of harm cannot be achieved by causing harm that is disproportionate. Proportionality asks a defender to balance his own interests against those of an aggressor, discounted to some extent by the aggres-

---

[1] Thomas A. Green, *The Jury and the English law of Homicide*, 1200-1600, 74 MICH. L. REV. 414, 420, 428-30 (1976) (by the early thirteenth century, self-defense "had come to be defined as slaying out of literally vital necessity," but noting that juries manipulated verdicts to fit other situations within that category). Blackstone stated that English law, "like that of every other well-regulated community," would not "suffer with impunity any crime to be *prevented* by death unless the same, if committed, would also be *punishable* by death." WILLIAM BLACKSTONE, 4 COMMENTARIES *182. See also MICHAEL FOSTER, DISCOURSES OF HOMICIDE (1762) 289; Bernard Brown, *Self-Defence in Homicide from Strict Liability to Complete Exculpation*, 1958 CRIM. L. REV. 583, 598-90.

[2] I do not mean to imply that elite legal opinion is currently monolithic, or that it is incapable of changing.

[3] It should be noted that Blackstone, unlike the others mentioned, rested his ideas of proportionality on traditional legal norms (the English common law). BLACKSTONE, *supra* note 1, at *181-82.

sor's blameworthiness,[4] and also to take into account the means to be used and the necessity of defensive action. This is not an easy task. Ordinary people may find it hard to do in the heat of the moment. The idea, however, has spread widely: virtually every industrialized country has adopted some form of proportionality.[5]

A popular revolt against certain notions of proportionality has been underway for the past several decades in the United States, and for at least the past five years abroad. I do not mean necessarily that a majority of the population of various countries believe that proportionality standards should be changed, though that may be true in some, but that there is a widespread and increasingly vocal movement to do so. This worldwide revolt has several common themes. People in many countries are angered by particular instances of what they see as injustice in the treatment of those who defend themselves with force. The cause célèbre is so powerful in this area because many people can easily identify with the defender and imagine themselves in his shoes; even if the incidents are rare, they have a great hold on the imagination. People blame police forces and especially prosecutors for being more concerned to punish victims of crime than criminals; there is a deep distrust of governmental authority.[6] This distrust of criminal justice insiders is linked with distrust of legal and other elites generally. (By "elites," I mean primarily prosecutors, judges, and legal scholars, though popular distrust extends to other social and economic elites as well.) People are outraged by defenders having to pay court costs and civil damages to would-be burglars. This movement is thus part of a global distrust of litigation. They complain that criminals have easy access to guns while they are legally prohibited from owning or carrying any. They are concerned that the law pays insufficient attention to retribution.

Underlying all of this discontent is the idea that the state is unable to defend law-abiding citizens against crime, and that therefore citizens must be allowed to defend themselves. The English tend to state the situation explicitly in terms of social contract theory (and to declare that the contract

---

[4] Or, in Paul Robinson's view, instead of discounting the interests of the aggressor, one may consider, in addition to physical harm to the innocent, various intangible harms arising from the aggression. PAUL H. ROBINSON, 2 CRIMINAL LAW DEFENSES 70 (1984).

[5] As George Fletcher pointed out, Germany and the Soviet Union largely rejected the idea of proportionality, Germany in favor of a Kantian idea of autonomy and the Soviet Union in favor of maximum deterrence of crime. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 855-56, 861 (1978); George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 951-52 (1985). Since Fletcher wrote on the topic, however, Germany has adopted a proportionality rule in its penal code.

[6] Popular distrust of the criminal justice system is the theme of a recent essay by Stephanos Bibas, who argues that the gulf between insiders (judges, police, and prosecutors) and outsiders (crime victims, bystanders, and most of the general public) undercuts the effectiveness of criminal law and procedure. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006).

has been broken), whereas continental Europeans tend to characterize private self-defense as a delegation from the state's monopoly of the use of force. In both cases, there is an undercurrent of thought that too much restraint cannot be asked of people subject to constant predations.

It is possible that certain popular views of self-defense discussed here stem from deep-rooted moral intuitions, and are not mere passing reactions to current conditions or perceptions. Recent empirical studies have shown striking agreement in intuitions about moral blameworthiness among people throughout the world and from every demographic group.[7] These shared intuitions are highly nuanced.[8] They are so arrestingly similar that several scholars have suggested the most likely explanation is that they have some biological component, similar to language.[9] It would be helpful to see empirical work done on moral intuitions about self-defense, in particular. If similar agreement is found on intuitions about certain aspects of self-defense, such as use of force against an intruder in the home, for example, it may be very hard for governments to persuade citizens to accept a different view. (Not only might it be difficult to persuade citizens otherwise, it may be unwise to try to do so for other reasons. Such shared norms, whether biological or social or some combination of the two, may have developed because they further the smooth working and flourishing of individuals and societies, though the way they do so may not be immediately apparent.[10]) Scholarly theories about self-defense that run counter to such deep-seated intuitions will tend to generate intense resentment toward government.[11]

In keeping with the idea of moral intuition, the popular revolt against proportionality makes appeals to common sense rather than philosophical theory. Although rejection of proportionality certainly could be justified on philosophical grounds, relying on philosophical theory alone would produce results that many would view as morally unacceptable, just as untempered philosophical theories of proportionality may be unacceptable. The

---

[7] Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice* 15-27 (July 13, 2006) (reviewing studies) (work in progress, on file with author).

[8] *Id.* at 15-27, 30-37 (providing results for new study).

[9] Paul H. Robinson et al., *The Origins of Shared Intuitions of Justice* (July 7, 2006) (work in progress, on file with author).

[10] *See, e.g.*, 1 FRIEDRICH H. HAYEK, LAW, LEGISLATION, AND LIBERTY, chap. 1 & 4 (1973).

[11] Not surprisingly, ideas about the use of force in self-defense seem to align with certain ideas about the role of individuals in society. In a series of papers, Dan Kahan and Donald Braman offer empirical evidence that people tend to have a more favorable view of private gun ownership if they are individualistic and what the authors call "hierarchical," meaning that they believe, for example, that men and women tend to have different strengths and to play different roles. The authors posit that people are skeptical of risk if activities are challenged as harmful that are integral to their status. Kahan and Braman call this "status anxiety." Dan M. Kahan, et al., *Gender, Race, and Risk Perception: The Influence of Cultural Status Anxiety*, *available at* http://ssrn.com/abstract=723762; Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291 (2003); Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 147 (forthcoming 2006), *available at* http://ssrn.com/abstract=746508.

idea of autonomy as a basis for self-defense, as found in the thought of liberals Locke and Kant, provides a theory for the rejection of proportionality. Several decades ago, George Fletcher emphasized the idea of autonomy in his work on self-defense: if an intruder violates one's personal autonomy, one has the right (and possibly even the duty) to use any force necessary to prevent it.[12] According to the purest version of this theory, for example, the owner of an orchard would be justified in shooting a boy who was running away after stealing fruit.

There is some evidence for a revival of autonomy notions, particularly in the United States. But one should not exaggerate the strength of this; the popular revolt against proportionality usually does not entail a complete rejection of the concept in all areas.[13] Reformers often talk of an effort to "rebalance" the interests of the defender and the aggressor; according to this way of thinking, the concept of proportionality is acceptable, but the way the balance has been struck (often under the influence of legal elites) is wrong. It is sometimes hard to tell if reformers are criticizing the idea of proportionality because it is wrong in theory or simply unworkable in practice (because of issues of proof, allowing too much discretion to prosecutors, etc.). The area in which ideas of autonomy seem most pronounced around the world is in defense of the home.[14]

The popular revolt against elite notions of proportionality has led to several different types of proposed legislation. Characteristic of many of them is the blunting of finer legal distinctions, which may cause confusion, in favor of clear rules that ordinary people can understand and apply. The efforts frequently concern protection of the home, and seek to introduce a presumption that a forcible intrusion into a home may be met with force, including deadly force. Other proposed legislation seeks to limit proportionality rules by excusing excessive defensive force in cases of fear or panic.

This paper examines three particular efforts to limit proportionality rules in self-defense law: enacted legislation in Florida, and proposed legislation in England and Belgium. These examples by no means exhaust the scope of the revolt: Italy has recently enacted reform, and serious efforts are underway in New Zealand, among other countries, as well as several other

---

[12] *See* FLETCHER, RETHINKING, *supra* note 5, at 860. Fletcher notes the embrace of this idea by the liberal theorists Locke and Kant. *Id.* at 855-65. Blackstone explicitly rejected Locke's theory of autonomy, and accompanying lack of proportionality, in the area of self-defense. BLACKSTONE, *supra* note 1, at *182.

[13] Some notion of proportionality does seem to fit with most people's ideas of morality. Mordecai Kremnitzer & Khalid Ghanayim, *Proportionality and the Aggressor's Culpability in Self-Defense*, 39 TULANE L. REV. 875, 896 (2004).

[14] But see Stuart Green's article arguing that defense of home statutes in the U.S. might in fact be consistent with a proportionality rationale because of an aggregation of different interests. Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 7.

states in the U.S. The paper will first look at the sources of popular discontent with the proportionality standard in each of the three jurisdictions and then compare the specific proposals made. The comparison of proposals focuses on excuse and provocation and then takes up presumptions about the use of force.

II. THE SEEDS OF DISCONTENT

A. *Florida*

While the Florida law that went into effect October 1, 2005 has attracted considerable media attention, including a skit on The Daily Show, it is by no means unique. It should rather be seen as one of the latest in a series of state statutes around the country allowing defense of dwelling or vehicle.

The revolt against proportionality (or, at least, a major overhaul of proportionality) has been underway in the United States for the past several decades. Many states have adopted defense of premises statutes. It should be kept in mind that the castle doctrine is distinct from defense of premises. The castle doctrine simply does away with the duty to retreat inside one's home; it still permits use of force only to counter a threat to one's person. Defense of premises statutes allow use of force in response to an entry.[15] Defense of premises statutes use different standards for allowing deadly force against intruders. Certain statutes allow lethal force if necessary to prevent or terminate an unlawful entry (trespasser)[16]; some that use this

---

[15] *See id.* at 8-9. The trend in the United States to do away with the duty to retreat is more a revolt against the necessity requirement than against the proportionality requirement. In the nineteenth and early twentieth centuries, many states rejected the common law duty to retreat in favor of allowing a person to "stand his ground" in a place where he had a right to be. RICHARD MAXWELL BROWN, NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY 5-37 (1991). The Model Penal Code, adopted in 1962, provided for a general duty to retreat, and several states followed its recommendations and changed their laws. Lately there has been something of a trend to do away with the duty of retreat once again. The duty to retreat, while related to autonomy theory and the balancing of interests under proportionality theory, does not do away with the proportionality requirement. In theory, even if one has no duty to retreat, one could still be required to respond to an attack with proportionate force.

[16] *See* IND. CODE § 35-41-3-2(b) (West 2004), *amended by* 2006 Ind. Legis. Serv. P.L. 189-2006 (West) (deadly force is permissible if occupant believes it is necessary to "prevent or terminate the other person's unlawful entry of or attack on the person's dwelling, curtilage . . ."); LA. REV. STAT. ANN. § 14:20(A)(4)(a) (1997 & Supp. 2005), *amended by* 2006 La. Sess. Law Serv. Act No. 141 (West) (deadly force is justifiable when committed by a person inside a dwelling against a person attempting to make unlawful entry into the dwelling, and occupant reasonably believes deadly force is necessary to prevent entry or to compel intruder to leave the premises).

standard require that the defender first warn the trespasser if reasonable.[17] Other statutes allow use of deadly force against an intrusion where the entry is forcible or violent.[18] Some statutes allow for deadly force when entry is violent and an occupant believes force may be used against any occupant.[19] More commonly, statutes will permit deadly force whenever the occupant reasonably believes the intruder intends to commit a felony[20] or a specific

---

[17] *See* DEL. CODE ANN. tit. 11, § 469 (2001) (deadly force is permissible where intruder is in occupant's dwelling, occupant demands intruder to surrender if reasonable, and intruder refuses to do so); 18 PA. CONS. STAT. ANN. § 507(c)(1), (c)(4)(i) (West 1998) (deadly force justified if occupant first warns trespasser to desist if reasonable, trespasser remains unlawfully in dwelling, and actor believes no less than deadly force would be sufficient to terminate entry).

[18] *See* CONN. GEN. STAT. ANN. § 53a-20 (West 2001) (deadly force permissible to the extent that defender "reasonably believes such to be necessary to prevent or terminate an unlawful entry by force into his dwelling"); GA. CODE ANN. § 16-3-23(2) (2003) (deadly force is permissible against a person who "unlawfully and forcibly enters or has unlawfully and forcibly entered the residence" and the defender knew or had reason to know that such an entry occurred).

[19] *See* COLO. REV. STAT. ANN. § 18-1-704.5(2) (2004) (deadly force permissible when there is unlawful entry into dwelling, there is reasonable belief that the intruder has committed a crime against person or property or intends to, and there is a reasonable belief that the trespasser may use "any physical force, no matter how slight, against any occupant"); GA. CODE ANN. § 16-3-23(1) (2003) (a person is justified in using deadly force when "entry is made or attempted in a violent and tumultuous manner and he or she reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person dwelling therein and that such force is necessary to prevent the assault or offer of personal violence"); IDAHO CODE ANN. § 18-4009(2) (2004) (deadly force justified in defense of habitation against "one who manifestly intends or endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein"); 720 ILL. COMP. STAT. ANN. 5/7-2(a)(1) (West Supp. 2006) (one is justified in using deadly force if entry is "made or attempted in a violent, riotous, or tumultuous manner, and he reasonably believes that such force is necessary to prevent an assault upon, or offer of personal violence to, him or another then in the dwelling"); MO. ANN. STAT. § 563.036(2)(3) (West 1999) (deadly force permissible when entry into premises is made or attempted in a violent or surreptitious manner, person in possession or control of premises reasonably believes that the "entry is attempted or made for the purpose of assaulting or offering physical violence to any person or being in the premises" and defender also reasonably believes that the "force is necessary to prevent the commission of a felony"); MONT. CODE ANN § 45-3-103(1) (2005) (deadly force justified if "entry is made or attempted in a violent, riotous, or tumultuous manner" and an occupant "reasonably believes that such force is necessary to prevent an assault upon or offer of personal violence to him or another then in the occupied structure"); UTAH CODE ANN. § 76-2-405(1)(a) (2003) (one is justified in using deadly force when "entry is made or attempted in a violent and tumultuous manner, surreptitiously, or by stealth, and he reasonably believes that the entry is attempted or made for the purpose of assaulting or offering personal violence to any person, dwelling, or being in the habitation and he reasonably believes that the force is necessary to prevent the assault or offer of personal violence").

[20] *See* FLA. STAT. ANN. § 782.02 (West 2005) (deadly force justifiable by a person resisting any felony "upon or in any dwelling house in which such person shall be"); GA. CODE ANN. § 16-3-23(3) (2003) (deadly force is permissible when defender "reasonably believes that the entry is made or attempted for the purpose of committing a felony therein and such force is necessary to prevent the commission of the felony"); IDAHO CODE ANN. § 18-4009(2) (2004) (deadly force justifiable in defense of habitation against "one who manifestly intends or endeavors, by violence or surprise, to commit a felony"); 720 ILL. COMP. STAT. ANN. 5/7-2(a)(2) (West Supp. 2006) (deadly force is justified if defender

type of felony or crime[21] and that lethal force is necessary to prevent it. Sometimes threat of physical harm to an occupant is an additional require-

"reasonably believes that such force is necessary to prevent the commission of a felony in the dwelling"); 18 PA. CONS. STAT. ANN. § 507(c)(1), (c)(4)(ii) (West 1998) (deadly force justified if occupant first warns trespasser to desist if reasonable, trespasser remains unlawfully in dwelling, and "such force is necessary to prevent the commission of a felony in the dwelling"); Minn. Stat. Ann. § 609.065 (2003) (deadly force justifiable when necessary in preventing "the commission of a felony in the actor's place of abode"); MISS. CODE ANN. § 97-3-15(1)(e) (West 2005), *amended by* 2006 Miss. Legis. Serv. Ch. 492 (West) (effective July 1, 2006) (deadly force justifiable when occupant resists an attempt to commit a felony "upon or in any dwelling . . . in which such person shall be"); OKLA. STAT. ANN. tit. 21, § 733(1) (West 2002) (homicide is justified when resisting an attempt "to commit a felony upon him, or upon or in any dwelling house in which such person is"); S.D. CODIFIED LAWS § 22-16-34 (1998), *amended by* 2005 S.D. Adv. Code Serv. ch. 120 § 165 (LexisNexis) (effective July 1, 2006) ("deadly force justifiable when committed by any person while resisting any attempt to commit a felony "upon or in any dwelling house in which such person is"); UTAH CODE ANN. § 76-2-405(1)(b) (2003) (deadly force is justified when occupant "reasonably believes that the entry is made or attempted for the purpose of committing a felony in the habitation and that force is necessary to prevent the commission of a felony"); *cf.* ME. REV. STAT. ANN. tit. 17-A, § 104(3)-(4) (2006) (deadly force permissible to prevent a criminal trespass when the occupant reasonably believes the trespasser is attempting to enter the dwelling place or has surreptitiously remained therein, is likely to commit some other crime within the dwelling place, and the occupant has warned the trespasser to terminate the trespass).

[21] *See* ALASKA STAT. § 11.81.350 (2004) (deadly force is justifiable by any person in possession or control of any premises in order to terminate what the person reasonably believes to be "a burglary in *any* degree occurring in an occupied dwelling or building", and by any person in order to terminate the "commission or attempted commission of arson upon a dwelling or occupied building") (emphasis added); ARK. CODE ANN. § 5-2-608(b)(2) (2006) (deadly force permissible by a person in lawful possession or control of premises if he "reasonably believes the use of such force is necessary to prevent the commission of arson or burglary by a trespasser"); COLO. REV. STAT. ANN. § 18-1-705 (West 2004) (deadly force permissible by a person in possession or control of any building when he "reasonably believes it necessary to prevent what he reasonably believes to be an attempt by the trespasser to commit first degree arson"); CONN. GEN. STAT. ANN. § 53a-20 (West 2001) (deadly force permissible to the extent that defender "reasonably believes such to be necessary to prevent an attempt by the trespasser to commit arson or any crime of violence"); KY. REV. STAT. ANN. § 503.080(2) (West 2005), *amended by* 2006 Ky. Rev. Stat. & R. Serv. ch. 192 (West) (deadly force permissible when the defendant believes the person on whom the force is used is "committing or attempting to commit a burglary, robbery, or other felony involving the use of force" of such dwelling in his possession"); MO. ANN. STAT. § 563.036(2)(2) (West 1999) (deadly force permissible when person in possession or control of premises "reasonably believes it necessary to prevent what he reasonably believes to be an attempt by the trespasser to commit arson or burglary upon his dwelling"); MONT. CODE ANN. § 45-3-103(2) (2005) (deadly force justified if occupant "reasonably believes that such force is necessary to prevent the commission of a forcible felony in the occupied structure"); N.H. REV. STAT. ANN. § 627:7 (1996) (deadly force permissible when a person in possession or control of premises "reasonably believes it necessary to prevent an attempt by the trespasser to commit arson"); N.Y. PENAL LAW § 35.20(1)-(2) (McKinney 2004) (deadly force is justifiable by any person in possession or control of any premises in order to prevent or terminate the commission or attempted commission of burglary, and by *any* person in order to prevent or terminate the commission or attempted commission of arson) (emphasis added); OR. REV. STAT. §§ 161.219(2), .225(2)(b) (2005) (deadly force is permissible when a person "reasonably believes that the other person is committing or attempting to commit a burglary in a dwelling" or a person in lawful possession or control of a premises "reasonably believes it necessary to prevent the commission of arson or a felony by force and violence by the trespasser"); TEX. PENAL CODE ANN. § 9.42 (Vernon

ment imposed when using deadly force to prevent the felonious act.[22] Several states have also adopted defense of vehicle statutes, most famously Louisiana with its so-called "Shoot the Carjacker" law.[23]

Some of the most prominent of these statutes explicitly embody a presumption that those using deadly force against intruders had a "reasonable fear of imminent peril of death or great bodily injury," as in California's 1984 statute (known as the Homeowner's Bill of Rights).[24] Colorado borrowed this presumption for its 1985 statute, dubbed the "Make My Day" statute. The origins of the Colorado law show the depth of popular feeling on the subject and contain echoes of what would later happen in England.

2003) (deadly force justified to "prevent the other's imminent commission of arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime" and use of force other than deadly force would expose the actor to "a substantial risk of death or serious bodily injury").

22 *See* DEL. CODE ANN. tit. 11, § 469 (2001) (deadly force justifiable if the actor reasonably believes that the person against whom force is used is attempting to commit "arson, burglary, robbery or felonious theft or property destruction," and has either "employed or threatened deadly force" or any less force would expose the actor to "reasonable likelihood of serious physical injury"); HAW. REV. STAT. ANN. § 703-306(3) (LexisNexis 2003) (deadly force permissible if the actor reasonably believes that the person against whom force is used is attempting to commit "felonious property damage, burglary, robbery, or felonious theft," and has "employed or threatened deadly force" or any less force would expose the actor to "substantial danger of serious bodily injury"); NEB. REV. STAT. ANN. § 28-1411(6) (LexisNexis 2003) (deadly force permissible if the actor believes that the person against whom force is used is attempting to commit "arson, burglary, robbery or other felonious theft or property destruction," and has "employed or threatened deadly force" or any less force would expose the actor to "substantial danger of serious bodily harm"); N.J. STAT. ANN. § 2C:3-6(b)(3) (2005) (deadly force permissible if the actor reasonably believes that the person against whom force is used is attempting to commit "arson, burglary, robbery or other criminal theft or property destruction," and has "employed or threatened deadly force" or any less force would expose the actor to "substantial danger of bodily harm").

23 *See* ARK. CODE ANN. § 5-2-608 (2006) (deadly force justifiable by a person in lawful possession or control of a vehicle if he "reasonably believes the use of such force is necessary to prevent the commission of arson or burglary by a trespasser"); GA. CODE ANN. §§ 16-3-23, -24.1 (2003) (deadly force is permissible when defender "reasonably believes that the entry is made or attempted for the purpose of committing a felony therein and such force is necessary to prevent the commission of the felony," where a habitation encompasses dwellings, motor vehicles, and places of business); IND. CODE § 35-41-3-2(b) (West 2004), *amended by* 2006 Ind. Legis. Serv. P.L. 189-2006 (West) (effective July 1, 2006) (deadly force is permissible if occupant believes it is necessary to "prevent or terminate the other person's unlawful entry of or attack on the person's . . . occupied motor vehicle"); LA. REV. STAT. ANN. § 14:20(A)(4)(a) (1997 & Supp. 2005), *amended by* 2006 La. Sess. Law Serv. Act No. 141 (West) (deadly force is justifiable when committed by a person inside a motor vehicle against a person attempting to make unlawful entry into the motor vehicle, and occupant reasonably believes deadly force is necessary to prevent entry or to compel intruder to leave the motor vehicle); MISS. CODE ANN. § 97-3-15(1)(e) (West 2005), *amended by* 2006 Miss. Legis. Serv. Ch. 492 (West) (effective July 1, 2006) (deadly force justifiable when occupant resists an attempt to commit a felony "in any vehicle . . . in which such person shall be").

24 CAL. PENAL CODE § 198.5 (West 2006).

The Colorado statute was born of a grass-roots, popular concern about uncertainty in the law. Rep. Vicki Armstrong, a Republican from Grand Junction, held a series of town meetings with her constituents to see what problems her constituents had that might be addressed by legislation.[25] One of the problems they mentioned most often was the fear of being prosecuted or sued for defending their homes against intruders. Many said they were unsure of the law and how it might be applied by police and prosecutors. Some said that they would consider putting a gun in the hand of an unarmed intruder they had shot or that they would drag the dead body inside the house if an intruder were shot outside. Along with these specific concerns went the more general belief that "criminals (including home intruders) have more rights than law-abiding citizens" and that "the courts are more concerned with protecting the rights of defendants than victims and that victims are at a disadvantage in the criminal justice system."[26] Rep. Armstrong said that she did not contact any lobbyists (such as the National Rifle Association) when drafting the bill; she simply borrowed the language of the California statute.[27]

Although Florida's law was drafted with extensive involvement of the NRA, many of the concerns that prompted it were the same as the ones expressed in Colorado. According to Marion Hammer, the executive director of The Unified Sportsmen of Florida and a representative of the National Rifle Association[28] who worked closely with Florida legislators in drafting the bill, prosecutors (as well as police, judges, and juries) could not always be trusted to arrive at a fair result under a "reasonableness" standard. They too often tended to "favor the criminal over the victim,"[29] and their discretion needed to be limited by clear presumptions and procedural mechanisms. This distrust of prosecutors is part of a distrust of elites (or "insiders," as Stephanos Bibas puts it) generally in the criminal justice system. One might wonder what the incentive is for prosecutors in the United States, many of whom are elected, to bring cases against those who defend themselves against intruders. One answer might be that some prosecutors are willing to risk bringing, or at least consider bringing, an occasional politically unpopular case to enforce the law as they see it.[30] Even though

---

25 WILLIAM WILBANKS, THE MAKE MY DAY LAW: COLORADO'S EXPERIMENT IN HOME PROTECTION 29 (1990).

26 *Id.* at 30.

27 *Id.* at 31-32.

28 She was the president of the NRA from 1995-1998.

29 Telephone interview with Marion P. Hammer, Former President of the Nat'l Rifle Ass'n, (October 26, 2005).

30 There is anecdotal evidence to suggest this is true. In the Workman case, discussed below, the prosecutor allegedly hesitated about whether to bring the case, though ultimately did not. I am told that an assistant county attorney discussed with the county attorney in Tucson, Arizona why he continued to bring cases against homeowners who shot burglars in the back, even though in three consecutive such cases the jury acquitted. The country attorney is said to have responded, "Well, it's illegal."

such prosecutions may be rare, reform supporters want no risk of them at all. They do not want citizens to live in fear of a prosecutor's decision, and all the expense and disruption that a criminal case entails, and a civil suit which may to some extent piggyback on the prosecution's case. They therefore want a clear rule to cabin prosecutorial discretion. Similarly, even though juries in this country may rarely convict those with a legitimate claim to self-defense, reform supporters want to limit even that risk.

Both Hammer and the co-sponsors of the Florida bill pointed to certain instances of what they viewed as the failure of the criminal justice system before the reform legislation, particularly problems with prosecutors. One example involved James Workman, 77, and his wife, who had been living in a FEMA trailer beside their Escambia County house, which had been damaged by Hurricane Ivan. Workman is said to have fired a warning shot, then shot an intruder.[31] Prosecutors considered filing charges against Workman for three months but ultimately did not. According to Hammer, this may have been because State Senator Peaden told the prosecutor "enough is enough." In another instance, a man in Perry, Florida named Jared L. Fowler said that Don Bain came to his mobile home shortly after midnight, shouting and spoiling for a fight. According to the Tallahassee Democrat, when Fowler refused to go outside, Bain forced his way in, started beating Fowler, and threatened to kill him before Bain was shot as they struggled over a shotgun. The prosecutor charged Fowler with manslaughter, but a Taylor County grand jury refused to return the indictment.[32]

According to Hammer, she and state Senator Peaden were talking about another matter when Peaden brought up the Workman case and said, "We've got to do something about this."[33] Hammer says she had been concerned about the role of prosecutors for some time. She is quoted as saying, "Prosecutors are always looking for somebody to prosecute and too often it's the victim. They are part of the problem."[34] She told Peaden her office had draft legislation ready to go, Peaden introduced it, and the two worked closely together through various changes in the bill after that, along with Representative Dennis Baxley in the Florida House.

The bill as originally introduced would have provided for damages against prosecutors and police for wrongful prosecution. After consultation with prosecutors, that provision was dropped, but Hammer says that if prosecutors do not get the message, "we'll be back to the legislature asking for it."

---

31 James L. Rosica, *"No Retreat" Gives Right to Defend Self*, TALLAHASSEE DEMOCRAT, May 12, 2005.

32 Dan Christensen, *NRA Uses New Florida Gun Law as National Model*, DAILY BUSINESS REVIEW, May 17, 2005.

33 Hammer, *supra* note 29.

34 Christensen, *supra* note 32.

The Florida law makes two major substantive changes, one designed to clarify defense of dwelling and the other to strengthen the right of self-defense outside the home. Neither of these changes is revolutionary; they are part of well-established trends in U.S. law. As in the California and Colorado statutes, the Florida act creates a presumption that a person using defensive force had a "reasonable fear of imminent peril of death or great bodily harm" if someone unlawfully and forcibly entered a dwelling or occupied vehicle.[35] As many other states have done, the Florida act also does away with the duty to retreat, thus clarifying the law of self-defense outside the home.[36]

The Florida law contains certain procedural mechanisms designed to protect against civil suits as well as changes in the substantive criminal law. There is a provision that people who appear to be validly relying on the law are "immune" from arrest and criminal prosecution unless probable cause exists to believe that the use of force was not legal. This would appear to be simply another way of stating the substantive presumption. Also, as will be seen respecting England, there was concern in Florida about civil suits against a person acting in self-defense. The act awards attorney's fees, lost income, and all expenses of defending any civil action to any person sued because of their use of defensive force who is found to be "immune" in the civil case. This is a largely symbolic gesture, since it is likely that any such plaintiffs would have no money to pay the expenses. Still, it does indicate frustration with the machinery of justice being used on behalf of would-be criminals against ordinarily law-abiding citizens.[37]

As might be expected, prosecutors have generally not been enthusiastic about the act. Several have suggested the bill was unnecessary, and others say they are concerned about giving bad actors a defense. A few have supported the legislation. Opponents of the bill have said that the law "en-

---

[35] Fla. Stat. § 776.013(1) (2005). Florida law previously was that someone inside a home facing an intruder could "meet force with force." The new law may restrict the actual area that may be protected somewhat because it does not use the term "curtilage," but suggests that the area protected must be roofed. One interesting feature of the Florida law is that it does not do away with the duty to retreat in cases of attack by co-tenants. In 1999, the Florida Supreme Court held that there is no duty to retreat from one's residence before resorting to deadly force in self-defense against a co-occupant. Weiand v. State, 732 So.2d 1044, 1051, 1057 (Fla. 1999). An interesting question for the Florida courts will be if the new law overturns that decision.

[36] The act declares that a person who is not engaged in an unlawful activity and is "attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force," including deadly force if necessary to prevent "death, great bodily harm, or the commission of a forcible felony." Fla. Stat. § 776.013(3) (2005). Hammer says that the concern here again is for clarity; retreat will often not be possible with safety, especially for women, and in cases of doubt, she says, the presumption should be with the defender rather than against her.

[37] The effect is made worse in the U.S. adversarial system because of expensive and protracted litigation and lack of a general fee-shifting rule leading to possibilities for strike suits.

courages vigilante 'justice' and empowers street gangs,"[38] and repeatedly invoked the Wild West in various forms. The Brady Campaign threatened to attack the tourism industry in Florida if the bill were passed, and indeed has been passing out leaflets in Florida airports, issuing press releases, and posting ads warning that tourists now "face a greater risk of bodily harm in Florida" because of the "Shoot First Law."[39] Nevertheless, the bill overwhelmingly passed the legislature. There were no votes against it in the Florida Senate and the vote was 94-20 in the House. According to the Christian Science Monitor, "[m]any Democrats admitted they did not want to appear soft on crime by voting against it."[40]

Despite the hot rhetoric against the act, the Florida law is part of an established trend in the U.S., and the NRA is working to keep the trend rolling.[41] The Florida language has become a model for the NRA as it seeks passage of legislation in other states. Following a presentation by Hammer in August 2005, the American Legislative Exchange Council, a group of conservative state legislators, has adopted the Florida law as a model for other states.[42] Thus far in 2006, the following states (in order of enactment) have passed legislation similar to the Florida law: South Dakota, Indiana, Mississippi, Alabama, Idaho, Kentucky, Arizona, Georgia, and Oklahoma.[43] As of this writing, seven states have legislation pending.[44]

---

38 *See* Martin Dyckman, *Bringing the Wild West to Florida*, ST. PETERSBURG TIMES, Mar. 27, 2005, at 3P.

39 *See generally* http://www.bradycampaign.org (featuring an ad against Florida's "Shoot First Law") (last visited Apr. 20, 2006).

40 *See* Jacqui Goddard, *Florida Boosts Gun Rights, Igniting a Debate*, CHRISTIAN SCI. MONITOR, May 10, 2005, at 2.

41 Adam Liptak, *15 States Expand Right to Shoot in Self-Defense*, N.Y. TIMES, Aug. 7, 2006, at A1. The article's tone is generally unfavorable toward the trend. The article cites several examples where the shooter acted in a questionable fashion and was not charged because of the new law. However, in nearly all the examples given, the new law would likely have made no difference. For example, the article describes a 23-year-old prostitute who says she was confronted with a 72-year-old longtime client with a gun who threatened to kill her and then himself. A suicide note and other evidence supported her contention. She allegedly wrested the gun away from the man and then shot him, rather than retreating. Even if the retreat rule had been in effect, she would only have needed to retreat if she could have done so in complete safety, without risk that a desperate man could have jumped her and taken the gun.

42 The next issue that Ms. Hammer is tackling is the question of employees being prohibited from keeping guns in their vehicles in employer parking lots. Interest in the issue was triggered by Weyerhaeuser's decision to search employee vehicles for guns on the first day of hunting season at an Oklahoma plant. A dozen employees were fired as a result. The Oklahoma legislature moved quickly to permit employees to keep guns in their vehicles. Members of the Florida legislature introduced similar legislation, but the bills died in committee in May 2006. See Florida Senate Bill 206, House Bill 129. The issue raises interesting questions of dueling property rights.

43 Act of Feb. 17, 2006, ch. 116, sec. 2, § 22-18-4, 2006 S.D. Sess. Laws (abolishing the duty to retreat) (to be codified at S.D. CODIFIED LAWS § 22-18-4); Act of Mar. 21, 2006, P.L. 189-2006, 2006 Ind. Legis. Serv. (West) (abating the duty to retreat and immunizing third parties using reasonable force from legal jeopardy) (to be codified at IND. CODE § 35-41-3-2); Act of Mar. 27, 2006, ch. 492, 2006

B. *England*

England finds itself in the position of having one of the highest crime rates in the industrialized world—with especially astronomical burglary rates [45]—combined with the strictest gun control regime.[46] One influential commentator, in chronicling deep failings in the English criminal justice system, opened a recent article by declaring, "For the last 40 years, government policy in Britain, de facto if not always de jure, has been to render the British population virtually defenseless against criminals and criminality."[47] Under these circumstances, England was ripe for a *cause célèbre*,

---

Miss. Laws (abolishing the duty to retreat, presuming a reasonable fear of sufficient harm after forcible entry into certain premises or removal of someone from those premises, immunizing the actor from civil action after being found "not guilty" in a criminal proceeding arising from the same conduct, and awarding attorney's fees and other costs in any civil action if use of force is found reasonable) (to be codified at MISS. CODE ANN. § 97-3-15); Act of Apr. 4, 2006, Act 2006-303, sec. 1, § 13A-3-23, 2006 Ala. Legis. Serv. (West) (abating the duty to retreat, presuming the justified use of deadly force in limited circumstances, and immunizing the actor from criminal prosecution and civil action) (to be codified at ALA. CODE § 13A-3-23); Act of Apr. 14, 2006, ch. 453, 2006 Idaho Sess. Laws (immunizing the actor from civil liability and awarding attorney's fees and costs in any civil action if immunity is found) (to be codified at IDAHO CODE ANN. § 6-808); Act of Apr. 21, 2006, ch. 192, 2006 Ky. Acts (abolishing the duty to retreat, presuming a reasonable fear of sufficient harm after forcible entry into the home or removal of someone from the home, immunizing the actor from criminal prosecution and civil action, and awarding attorney's fees and other costs in any civil action if use of force is found reasonable) (to be codified in scattered sections of KY. REV. STAT. ANN. § 503); Act of Apr. 24, 2006, ch. 199, 2006 Ariz. Sess. Laws (abolishing the duty to retreat, presuming a person acts reasonably after forcible entry into his or her residential structure or vehicle in certain circumstances, and awarding attorney's fees in any civil action if use of force is found reasonable) (to be codified in scattered sections of ARIZ. REV. STAT. ANN. § 13); Act of Apr. 27, 2006, Act 599, 2006 Ga. Laws (abolishing the duty to retreat and immunizing the actor using proper defensive force from criminal prosecution) (to be codified at GA. CODE ANN. §§ 16-3-23.1, -24.2, 51-11-9); Stand Your Ground Law, ch. 145, 2006 Okla. Sess. Laws (abolishing the duty to retreat, presuming a reasonable fear of sufficient harm after forcible entry into the home or removal of someone from the home, immunizing the actor from criminal prosecution and civil action, and awarding attorney's fees and other costs in any civil action if use of force is found reasonable) (to be codified at OKLA. STAT. tit. 21, § 1289.25).

[44] The states are: Alaska, Michigan, Minnesota, Missouri, New Hampshire, Ohio, and South Carolina. Updates can be found at http://www.nraila.org.

[45] Global Report on Crime and Justice 286 (Graeme Newman ed., published for the United Nations, Office of Drug Control and Crime Prevention, 1999); Gordon Barclay et al., International Comparisons of Criminal Justice Statistics 2001, 12/03 Home Office Statistical Bulletins, Oct. 24, 2003, at 14, 17, available at http://www.homeoffice.gov.uk/rds/pdfs2/hosb1203.pdf.

[46] *See generally* JOYCE L. MALCOLM, Guns and Violence: The English Experience 164-216 (2002).

[47] Theodore Dalrymple, *Oh to be in England: Real Crime, Fake Justice*, CITY JOURNAL, summer 2006. Dalrymple, in a review of a book by David Fraser called *A Land Fit for Criminals*, notes that British police routinely fail to record crimes that come to their attention, and frequently refuse to investigate serious crime because prosecutors will either decline to prosecute, or sentences will be so light that their efforts would not be justified. Police are encouraged not to bring too many offenders to court, but to let them off with a "caution"—including those accused of robbery, burglary, and violence against

and it surely has one in the case of Tony Martin. Martin was a Norfolk farmer who fired his unlicensed shotgun at two would-be burglars during a nighttime break-in in the dark, killing one and wounding the other. He was originally sentenced to life imprisonment for murder, 10 years for attempted murder, and a year for having an unregistered shotgun. On appeal, after much public outrage, the sentence was reduced to five years for manslaughter. The surviving burglar has announced he is suing Martin for civil damages based on the incident.[48] Current English law allows a person to use "reasonable force" in defense of the home, according to a 1967 act.

The story of reform efforts in England is the most unusual anywhere. The English have turned to media outlets to make their voices heard. The story includes a strange approximation to direct democracy in a country famed for its representative government. In late 2003, BBC Radio 4's Today program ran an experiment in direct democracy: listeners were asked to suggest a piece of legislation to improve life in Britain, with the promise that an MP would then attempt to get it enacted. Out of over 10,000 suggestions, five were chosen as finalists, and listeners were encouraged to vote by email and phone for the one they favored. The results were tallied New Year's Day, 2004. Labour MP Stephen Pound was drafted to introduce the legislation and push it through Parliament. Pound got a shock when the results were announced. With 37% of the vote, the winner was a law (now called "Tony Martin's Law") allowing people to use "any means to defend their home from intruders." Pound appeared to have been expecting something more like the runner-up, which provided for automatic organ donation unless the deceased had opted out. A shaken Pound said on the January 1 program, "Well, I have to say that my enthusiasm for direct democracy is slightly tempered. . . . I can't remember who it was who said, 'The people have spoken—the bastards.'"[49] He later called the proposal a "ludicrous, brutal, unworkable blood-stained piece of legislation" and said he would go through the motions of presenting the bill but hoped it would fail. He said it was "the sort of idea somebody comes up with in a bar on a Saturday night between 'string 'em all up' and 'send 'em all home.'"[50]

---

the person. Those convicted of murder are sometimes confined in "open" prisons, from one of which prisoners abscond at the rate of two per week for three years. Offenders regularly serve less than half their sentences under an early release program. Dalrymple and Fraser are especially damning of the probation service, which they say routinely undercounts the number of crimes committed by those in their charge. For every 1,000 people on probation, about 600 are reconvicted at least once within the two years the Home Office tracks them for statistical purposes.

[48] *See* BBC News, *Timeline: The Tony Martin Case*, July 28, 2003, http://news.bbc.co.uk/1/hi/england/norfolk/3087003.stm (last visited Apr. 20, 2006).

[49] *See* Radio Broadcast: The People Have Spoken—the Bastards (Jan. 1, 2004) (available on BBC Radio 4 at http://www.bbc.co.uk/radio4/today/listenagain/zthursday_20040101.shtml) (last visited Apr. 21, 2006).

[50] Vincent Graff, *MP Calls Radio 4 Listeners "Bastards" Over Vigilante Vote*, THE INDEPENDENT, Jan. 2, 2004.

Saturday night bars or not, the campaign seems to have struck a chord with the English. The Mail on Sunday got responses from 21,500 people in support of a Tony Martin law, and also got a large response to its Police Watch campaign, which invited people to send in stories about police who made legal trouble for victims of crime. Two cases described by the Mail on Sunday: Police confiscated the gun of Baker White (71) after he fired a shot to scare off burglars. Criminals then bashed the unarmed White over the head when they returned to his home. Metropolitan Police warned Brian Conn for breaching data protection laws after he used shop records to identify the person who beat him unconscious at work.[51] The Sunday Telegraph also launched a "Right to Fight Back" campaign in 2004. That campaign is supported by Sir John Stevens, the immediate former Metropolitan Police Commissioner. Stevens has suggested a presumption that the force used by someone in their home against a violent intruder was lawful.[52] Even the establishment Law Commission has acknowledged that "[t]here is undoubtedly a very strongly held view among many members of the public that the law is wrongly balanced as between householders and burglars."[53]

The legal establishment in England has reacted cautiously to this popular movement. The Law Commission, an independent body established to review laws and recommend reform, responded in early January 2004. In an interview with Radio 4, Chairman Roger Toulson said that the Commission was looking at a particular aspect of self-defense: whether someone who kills using excessive force in self-defense should have a partial defense, reducing the charge from murder to manslaughter. (Some jurisdictions in the United States allow a similar defense, called imperfect self-defense. It operates as a partial defense.[54]) He also said the Commission was looking at the law of self-defense more generally.

In its final report, the Law Commission rejected a partial defense of excessive defensive force.[55] However, the Commission recommended a change to the law clarifying the partial defense of provocation, so that charges would be reduced to manslaughter from murder if a defendant acted in response to gross provocation, defined as words or conduct that cause a defendant to have a justifiable sense of being seriously wronged or

---

51 Bernard Ginns, *21,500 Reasons Why We Need a Tony Martin Law*, THE MAIL ON SUNDAY, Jan. 11, 2004, at 38.

52 John Steele, *Time to Let People Kill Burglars in Their Homes, Says Met Chief*, THE TELEGRAPH, Apr. 12, 2004.

53 Law Commission, Partial Defences to Murder: Final Report at 49, Aug. 6, 2004, *available at* http://www.lawcom.gov.uk/docs/lc290(1).pdf.

54 Imperfect self-defense is distinguished from ordinary provocation doctrine because with the former, violence is provoked by fear, while with the latter, violence is provoked by anger. The English Law Commission rejected such a distinction because it claimed it was difficult to distinguish between fear and anger psychiatrically, and also in everyday experience. *Id.* at 80.

55 *Id.* at 6.

to be in fear of serious violence.[56] The Law Commission noted that some burglars do "the most vile acts of desecration of a person's home and of belongings," and householders may therefore be provoked to use deadly force.[57]

The British Government has so far responded tepidly. The Government did successfully support a change in civil liability standards in 2003, so that householders would not be sued for damages by intruders unless they reacted with "grossly disproportionate" force.[58] After the Radio 4 referendum, Tony Blair said that he would ask the Attorney General to look into the question of changing the criminal law to give people in their homes and shops more rights to protect themselves.[59] The Lord Chancellor, Lord Falconer, and the Attorney General, Lord Goldsmith, expressed doubts about changing the law. Labour MPs were ordered to vote against any change. But, in the run-up to elections in fall 2004, the Home Secretary, David Blunkett, joined Conservative shadow Home Secretary David Davis in supporting householders against intruders, and suggested that government action to change the criminal law was likely. So far the Government has introduced no bill on the subject. Also in October 2004, Police Chief Superintendent Ian Johnson of the Chief Superintendents Association of England and Wales formally advised householders, if they discovered a burglary in progress, to barricade themselves in a room and "not to approach the intruder."[60]

Conservatives stepped in to try to push legislation. Conservative MP Roger Gale introduced a bill that was viewed as extreme and blocked by the Government in April 2004. Conservative MP Patrick Mercer then introduced a private member's bill called the Householder Protection Act of 2005:

> (1A) Where a person uses force in the prevention of crime or in the defence of persons or property on another who is in any building or part of a building having entered as a tres-

---

56 *Id.* at 4-5. The inclusion of "words" as legally adequate provocation contrasts with the "mere words rule" recognized by most jurisdictions in the United States.

57 *Id.* at 49, *quoted in* John Cooper, *Courts Already Respect the Right to Self-Defence*, THE TIMES, Nov. 30, 2004. The Law Commissioners decided not to recommend any changes implementing a battered woman defense. "It would be wrong to introduce special rules relating to domestic killings unless there is medical or other evidence that demonstrates a need and a proper basis on which to do so," adding that "the criminal law should be gender-neutral unless it is absolutely necessary to depart from that principle."

58 Criminal Law (Amendment) (Householder Protection) Act 2005, *available at* http://www.publications.parliament.uk/pa/cm200405/cmbills/020/05020.1-i.html.

59 More recently, in May 2006, Blair told a group of Labour supporters in London that reform of the criminal justice system was a top priority, and that that system was "the public service most distant from what reasonable people want." George Jones and Philip Johnston, We've Failed on Crime, Says Blair, London Telegraph, May 16, 2006.

60 John Steele and Philip Johnston, *Don't Tackle Burglars, urge Police,* DAILY TELEGRAPH, Oct. 27, 2004.

passer or is attempting so to enter, that person shall not be guilty of any offence in respect of the use of that force unless—

(a) the degree of force used was grossly disproportionate, and

(b) this was or ought to have been apparent to the person using such force.

(1B) No prosecution shall be brought against a person subject to subsection (1A) without the leave of the Attorney General.

Recall that the "grossly disproportionate" language is drawn from the Government's own change to the civil law in November 2003, which ensures that people in their homes cannot be sued by an intruder unless their retaliation is "grossly disproportionate."[61] The provision requiring the approval of the Attorney General for prosecutions under this section—which a commentator has called "crucial"[62]—suggests a distrust of the judgment of ordinary prosecutors on this issue found in many countries.[63]

The Mercer bill, which had the backing of the Conservative leadership and of several Labour MPs, passed its initial Commons vote with a majority of 130 (the initial vote moves a bill to a second reading and debate), but died from lack of support by Labour MPs in March 2005. In June, Anne McIntosh, a Conservative shadow foreign office minister, said that she planned to use her high rank in a ballot for private members' bills to resurrect householder protection legislation after a number of cases in her Vale of York constituency in which burglars had confronted homeowners. That same month, she introduced a bill identical to Mercer's,[64] which is currently scheduled to be read for the second time October 20, 2006.

The attitudes of many of those supporting reform are reflected in an opinion piece in the Daily Telegraph by Simon Heffer, alleging a broken social contract.[65] "Most of us, Heffer wrote, "had an implicit assumption there was a contract between law-abiding people and the state. In return for our restraint, the state would use the various means at its disposal to control crime. It would police our society properly. It would severely punish those who attacked us." Heffer then declared that "[I]t must, though, be clear to all that the state has broken that contract."[66] Since the contract is broken,

---

61 *See* Criminal Law Act 2005, *supra* note 58.

62 Melissa Kite, *Tories Launch Bill to Give Householders the Power to Tackle Intruders*, THE TELEGRAPH, Dec. 26, 2004.

63 *See supra* text accompanying note 6 (describing the distrust of prosecutors that helped motivate the Florida law).

64 *See* Criminal Law Act 2005, *supra* note 58.

65 Simon Heffer, *If the State Fails Us, We Must Defend Ourselves*, THE DAILY TELEGRAPH, Feb. 26, 2002, at 22.

66 Note the very similar language and arguments in C.S. Lewis's essay on crime in the late 50's, almost 50 years earlier. C.S. Lewis, *Delinquents in the Snow*, 38 TIME AND TIDE, Dec. 7, 1957, at 1521-

and the government lacks the political will to protect the fundamental liberty of the people to feel safe in their own homes, the solution is to revive the right to bear arms. Gun control laws are in any case "a joke," and there is far more gun crime now than there was before the Major government banned handguns after the Dunblane school massacre in 1996.[67] One commentator views the situation as even more drastic than Heffer, arguing that there is a "politically dangerous situation" in Britain for the state's failure protect the lives and property of its citizens "might bring the law itself into disrepute and give an opportunity to the brutal and the authoritarian."[68]

C. *Belgium*

The concept of legitimate defense (*légitime défense*) is at the heart of continental European laws of self-defense that stem from the French penal code of 1791, including those of Belgium and Italy. At the heart of this approach is proportionality.[69] Most of the various countries adopting this concept, however, have modified it over time, and there is now some variation in areas such as what may be protected by use of force (attacks against the person only or also against property), presumptions concerning breaking into a dwelling, and so on.[70] Several of those countries that have more narrow interpretations of legitimate defense, including Belgium and Italy, are now seeking to broaden them.

The debate over self-defense laws in Belgium is, as in other countries, closely tied to a debate over gun laws. Belgium in theory has strict controls on ownership and carrying of firearms, but in practice a large number of guns are not registered and a new law and regulations aim to change this.[71]

---

22 , *reprinted in* C.S. LEWIS, GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS 306-310 (Walter Hooper ed., 2001) (1970).

67 These laws are so strict that the British government is engaging in careful consideration of whether the British Olympic shooting team might be permitted to train with pistols in Britain prior to the 2012 Olympics in London. Top British shooters currently train in Switzerland. Britain Mulling Gun-Law Change for 2012 Olympics, http://www.chinaview.cn (Oct. 26, 2005).

68 Dalrymple, *supra* note 47 (agreeing with David Fraser).

69 *See, e.g.*, CODE PENAL FRANCIAS, art. 122-5 (Fr.) (requiring proportionality between the method of defense and the gravity of the harm sought to be avoided in cases of defense of the person and defense of property).

70 French law, for example, presumes that someone acted in legitimate self-defense if they were acting to prevent a nighttime entry by breaking, violence, or trickery into a dwelling. CODE PENAL FRANCAIS, art. 122-6 (Fr.).

71 A law of 1933 prohibited a private individual from owning firearms without the authorization of the chief of police of the municipality. LOI DU 3 JANVIER, art. 6 (1933). Under the same law, no one could carry a firearm without a legitimate reason and without a permit from the governor of the province with the advice of the prosecutor of the district. *Id.* at Art. 7. Licensing procedures were further governed by regulation (technically, royal decree); separate licenses are required for owning and for carrying firearms. L'Arrêté royal du 2 février 1996 modifiant l'arrêté royal du 20 septembre 1991 exécutant

In 2005, Belgium's justice minister, Laurette Onkelinx, told the parliament that she would propose new regulations to ensure no one owns a gun without a license. She said there were 641,781 guns privately owned in Belgium and 27,492 military guns.[72] There are, however, a large number of guns that have not been registered, especially hunting weapons, and the total number of guns in Belgium may be around 2 million.[73] Debate on a new law was accelerated following several murders, allegedly with racial overtones, committed by a mentally unstable man in Antwerp shortly after buying a gun on May 11, 2006.[74] In the wake of this incident, the new law passed overwhelmingly in the Belgian parliament in early June.[75] The main effect of the new law is to impose a three-month waiting period, accompanied by training and heightened police screening, before a permit may be granted. The law also subjects all hunting and sporting weapons to regulation.[76]

Since at least 2001, the right-leaning Flemish parties that had opposed tightened restrictions on gun ownership[77] and others have campaigned steadily for changes to self-defense laws in Belgium. A major motivation to the campaign has been a series of incidents involving shopkeepers, especially jewelers. In a famous incident in September 1999, a jeweler in Flanders fired on thieves who were running away and killed one. He was found guilty of murder.[78] Two other causes célèbres also involved Flemish jewelers, both of whom were victims of ram-raiding, the practice of using a truck or van to ram through a shop window to steal goods.[79] The jeweler Tyberghien, from Harelbeke, was found guilty of manslaughter. Although he was given no criminal sentence, he had to pay the costs of the proceedings and even civil damages and interest to the thief's next of kin. The jeweler Moortgat, from Alost, was acquitted in the court of first instance on the basis of self-defense. Public indignation in the case stemmed from the prosecutor's appeal of the judgment, causing Moortgat and his family to

---

la loi du 3 janvier 1933 relative à la fabrication, au commerce et au port des armes et au commerce des munitions (MB 15.02.1996). These regulations contain strict requirements that a permit applicant understand the regulations concerning firearms, know how to handle a firearm, and be familiar with safe storage procedures.

72 *Government Pledges Tough New Gun Law*, http://www.expatica.com. (Feb. 3, 2005).

73 *Id.*

74 *New Weapons Law Comes into Force*, http://www.expatica.com. (June 8, 2006).

75 Loi du 8 juin 2006, réglant des activités économiques et individuelles avec des armes.

76 *Id.* See also Circulaire relative à la mise en application de la loi réglant des activités économiques et individuelles avec des armes, 8 juin 2006.

77 These are the Flemish Christian Democrats (CD&V) and the Flemish Liberal VLD party. *Tough New Gun Law Promised*, http://www.expatica.com. (Feb. 3, 2005).

78 http://www.stopvol.be.

79 Document parlementaire 51K0651, Proposition de loi modifiant les règles légales relatives à la légitime défense et introduisant la cause absolutoire générale de l'excès de légitime défense, 6 janvier 2004, at 3. [hereinafter 51K0651].

live in "great uncertainty" for a year until the appellate court pronounced acquittal.[80]

Flemish politicians have noted the "great indignation among the population" at these situations.[81] They say that the general sentiment holds that someone in business may defend against forcible theft of his goods by firing a gun, and that such a person does not deserve criminal punishment and should not even be arrested.[82] (It should be noted that the Flemish seem to hold this view more strongly than French-speaking Belgians.[83]) As in Florida and England, Belgian concern about self-defense law focuses on prosecutors. Members of the parliament complain that prosecutors have adopted too narrow an interpretation of legitimate defense.

As reformers see it, there are two main problems with the Belgian approach to legitimate defense. The first is that the Belgian penal code prohibits the use of defensive force to protect against anything other than personal attack; property may not be protected by force.[84] The second is that reformers want to provide exoneration for anyone who violates the requirement of proportionality because of a "violent emotion" (*émotion violente* or *vive émotion*).[85]

The first reform falls into the category of tweaking the notion of proportionality, adjusting it to include an interest not previously able to be weighed in the balance. Reformers point out that many European countries allow use of force in defense of property, including France, the Netherlands, and Germany. They would permit use of force in defense of property, consistent with the proportionality requirement, that falls short of intentional killing.[86]

---

80 *Id.* As in most non-adversarial systems, Belgium has no equivalent of the Double Jeopardy Clause rule that a judgment of acquittal in the first instance is final. The prosecution may appeal such decisions. Appeals are generally examinations of the evidence de novo, with no presumption of correctness attaching to the first judgment.

81 *Id.* The authors of the bill and accompanying notes were four members of the Flemish party Vlaams Blok (VB): Bart Laeremans, Gerda Van Steenberge, Koen Bultinck, and Frieda Van Themsche.

82 *Id.*

83 *See, e.g.*, http://www.stopvol.be/ ("Cela se passait en Flandre, où la sensibilité est un peu autre.").

84 C. PÉN., Art. 416-17 (Be.).

85 Another concern is that the permissible use of force in legitimate defense situations is limited to "killing, wounds, and blows" (*l'homicide, les blessures et les coups*), whereas reformers would like to include other uses of force such as confining an attacker. Document parlementaire 51K0741, Proposition de loi 27 janvier 2004, at 7. [hereinafter 51K0741]. This bill was introduced by members of the CD&V party.

86 This is the current law of France. *See* C. PÉN., Art. 122-25 (Fr.). Note that EU human rights law puts constraints on members' self-defense laws, and would appear to prohibit intentional killing in defense of property. See European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221, available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf.

The second reform strikes deeper at the notion of proportionality. Reformers advocate following Dutch (and German) law in the area of "excess of legitimate defense," where a violent emotion causes a defender to pass the bounds of proportionality.[87] According to reformers, "every right-thinking person understands that it is not easy, for someone confronted with an immediate illegal attack, to do a rational evaluation of what is meant by 'necessity of defending oneself.'"[88] Under Dutch law, an emotional reaction to an immediate threat may create an absolute defense to criminal punishment.[89] Technically, such a defense should be an excuse, not a justification, though Belgian reformers seem confused about how to characterize it.[90] The reformers point out the constraints on this idea: that all the elements normally permitting legitimate defense must be present, only the reaction is excessive. In Italy, the Northern League (*Lega Nord*), an important part of the former ruling coalition there, proposed a similar change in Italian law that tracks German law.[91] (Note that there is no separate problem of civil liability in countries with non-adversarial systems, since the standards for civil and criminal liability are the same and the two issues are often combined into one case.)

The Belgian reformers are at pains to paint themselves as moderates. They make it clear that the primary responsibility for protection rests with the state: "Security remains, above all, the responsibility of the authorities."[92] They do, however, make a plea for better law enforcement. They argue for structural changes to policing and the criminal justice system which would require "a political will to attack criminality without mercy."[93] They object vigorously to attempts to shut down debate about changes to the law of self-defense by invoking "threadbare clichés" such as threats that any change "would uncork situations worthy of the Far West."[94] (The American Wild West once again makes a useful bugbear.) Conservatives counter such clichés by soberly pointing out that other European countries

---

87 51K0651, *supra* note 79; 51K0741, *supra* note 85, at 11.

88 51K0651, *supra* note 79, at 4.

89 Dutch Criminal Code, art. 41: "Anyone exceeding the limits of necessary defense, where such excess has been the direct result of a strong emotion brought about by the attack, is not criminally liable." *See* Peter J.P. Tak, The Dutch Criminal Justice System: Organization and Operation, 2003 WODC, at 42, available at www.wodc.nl. This provision is unchanged from the Dutch Criminal Code which went into effect in 1886, and was based on article 53 of the German Criminal Code (Deutschen Strafgezetzbuch). See C.P.M. Cleiren & J.F. Nijboer, Strafrecht, Tekst & Commentaar, Deventer: Kluwer 2004, at 257.

90 Compare 51K0741, *supra* note 86, at 7 (une cause d'excuse) with *id.* at 12 (cause de justification). See PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES 657-658 (2005) (exploring the differences between justification and excuse).

91 Stephen Skinner, *Populist Politics and Shooting Burglars: Comparative Comments on the Lega Nord's Proposal to Reform Italian Self-Defence Law*, 2005 CRIM. L. REV. 275, 281-82.

92 51K0741, *supra* note 85, at 7; see also 51K0651, *supra* note 80, at 5.

93 51K0651, *supra* note 79, at 5.

94 51K0651, *supra* note 79, at 6.

have such laws without provoking a bloodbath. Six proposals for change in the Belgian penal code have been launched in the last three years. So far, none of the bills has passed, but it seems certain members of parliament will continue to try.

III. ANALYSIS OF THE DEFENSE OF PROVOCATION AND OF PRESUMPTIONS IN REFORM EFFORTS

This section examines two of the main ways proposals seek to limit proportionality: justifications (or excuses) for use of excessive force, and presumptions that force was justified in certain circumstances.

A. *Provocation and Excuse*

In both England and Belgium, reformers have addressed the issue of defenders using excessive force out of passion. As in common law jurisdictions generally, English law does not distinguish precisely between justification (an objective measure) and excuse (which permits subjective elements). The issues are rolled together: the jury decides whether the defender's use of force was reasonable under the circumstances as he or she honestly believed them to be.[95] The proposed English reform in this area does not stem directly from popular pressure; rather, the elite Law Commission has proposed it. The Law Commission rejected the idea of a specific partial defense of excessive defensive force, but did propose a partial defense of provocation due to fear of violence.[96] (This is an interesting melding of provocation and self-defense.) Successfully raising this defense would reduce charges from murder to manslaughter, but would not exonerate the defender altogether.

In contrast, the popularly-driven reform proposals in Belgium and Italy would allow a defender using excessive force to escape criminal liability altogether. One of the Belgian proposals states, "One who exceeds the limits of legitimate defense is not punishable if the excess was the immediate consequence of a violent emotion caused by the attack."[97] The *Lega Nord* Italian proposal closely resembles German law. "No one shall be punishable for exceeding the limits of legitimate defense because of anxi-

---

[95] This resembles the subjective standard of reasonableness in the MPC's extreme emotional disturbance defense and not the modern test for provocation which looks at whether a reasonable person in the defendant's situation would have been provoked.

[96] *Partial Defenses to Murder*, FINAL REPORT (Law Comm'n, London, UK), Aug. 6, 2004, at 77-80 [hereinafter FINAL REPORT].

[97] Document parlementaire 51S0243, Proposition de loi, Oct. 15, 2003 [hereinafter 51S0243] (unclear whether the defense is regarded as an excuse or justification). Other proposals are similar. *See* 51K0741, *supra* note 85, at 7, 12 (also unclear).

ety, fear, or panic."[98] While the defender's emotion would exclude liability totally, there are, as the Belgian reformers point out, limits on the use of this defense. The defender has to have found himself initially in a situation allowing legitimate defense (that is, the under the necessity of defending himself against an actual unlawful attack). "At a certain moment," the defender exceeded the limits of legitimate defense, but that excess had to be the result of a violent emotion that was the immediate consequence of the attack.[99]

But making an absolute defense hinge on the defendant's emotion is troubling. The idea that one defendant may be exonerated totally and another found guilty for performing exactly the same act, the sole difference being their alleged emotions at the time, offends certain notions of equity. An excuse of excessive force in self-defense because of emotion is related to provocation, is indeed a subset of it, and the provocation doctrine has been under scholarly assault for the past few decades. Many of the concerns raised about provocation are relevant when considering excessive force in self-defense.[100]

In the analysis of the proper role of emotion in provocation and self-defense doctrine that follows, I will draw on the different ways of looking at emotion in criminal law developed by Dan Kahan and Martha Nussbaum.[101] Despite what their title may suggest, Kahan and Nussbaum argue there are three main ways of looking at emotion in criminal law: consequentialist, voluntarist, and evaluative.[102] Under the voluntarist approach, strong emotions reduce a person's culpability because the person's will is said to be overwhelmed by the emotion, at least to some extent. In contrast, consequentialists (or utilitarians) do not regard strong emotions as reducing a person's culpability, since a person may be punished whenever the person's behavior damages the common good sufficiently. An evaluative approach looks to whether the person's emotions are objectively appropriate in the circumstances (whether the person shows by his emotions that he values the right things), and reduces culpability or not accordingly.

If one looks at the criminal law from a consequentialist (utilitarian) point of view, the case for the provocation doctrine is weak.[103] It is not clear, for instance, that one who kills in rage is less dangerous in the future than other types of killers. Also, even if a provoked person cannot be de-

---

98 Skinner, *supra* note 91, at 281.

99 51S0243, *supra* note 97.

100 The concerns about provocation doctrine may be more intense in the context of excessive self-defense if the latter is considered a total defense and not just a partial.

101 Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996).

102 The authors call the first two approaches both "mechanistic," which is how they get the "two conceptions" of their title. *See id.* at 302-04.

103 Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 963-66 (2002).

terred at the moment of killing, the law (without the provocation defense) might encourage that person to learn to control his anger more effectively before the provocation occurs. There may be some gain in general deterrence if the law sent the message that people must control their rage to prevent violence or they will be treated the same as those who kill calmly.[104] The first consideration may be somewhat weaker in cases of excessive self-defense than in provocation cases, since one who kills in fear of being attacked might well be less dangerous than other killers. (This would depend in part on the test for the triggering event, especially whether the test was subjective or objective.) But on the second point, an excuse of excessive force in self-defense might well undermine deterrence and encourage those under attack not to think about proportionality.

Most modern scholars who support the provocation defense, therefore, do not seek to justify it on utilitarian grounds, but rather argue that it is appropriate based on theories of retribution and just deserts, either voluntaristic or evaluative. In this view, the partial excuse of provocation is a concession to ordinary human frailty.[105] The same might be said for the excuse of excessive self-defense, and indeed Belgian and Italian reformers, and Dutch scholars, make this point.[106] The doctrine allows for human weakness, acknowledging that it is not always possible to perform cool calculations of proportionality under stress. This idea seems to strike a chord with popular morality.

The issue is how much to concede to human weakness. By and large, elite legal opinion in England and the U.S. has been at pains to limit the defense. Many modern scholars writing about provocation put emphasis on the term "ordinary person" in order to prevent the excuse from gobbling too many instances of homicide.[107] There has lately been considerable schol-

---

104 Some have objected that the provocation defense operates mainly to condone (or partly condone) male violence against women (the feminist critique). *See, e.g.*, Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997); Emily L. Miller, Comment, *(Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665 (2001). Others are concerned about partially condoning violence against men who have made non-violent sexual advances against other men. *See, e.g.*, Robert B. Minson, Comment: *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133 (1992). The feminist critique of the provocation doctrine does not apply with the same force to excessive self-defense, since the latter is more rarely invoked to excuse violence against women. For a response to the feminist critique of the provocation doctrine, see Dressler, *supra* note 103, at 975-79.

105 *See, e.g.*, Cynthia Lee, MURDER AND THE REASONABLE MAN 262 (2003) ("We do not want others to emulate the behavior. We mitigate the charges only because we feel sympathy for the provoked killer.").

106 *See, e.g.*, Peter J.P. Tak, THE DUTCH CRIMINAL JUSTICE SYSTEM: ORGANIZATION AND OPERATION 45 (2d. ed. 2003) "Due to the strong emotions, the offender's will is impaired so that he cannot be blamed for his act."

107 Joshua Dressler, for example, has criticized the Model Penal Code's "extreme mental or emotional disturbance" provision for improperly conflating provocation and diminished capacity. Dressler, *supra* note 103, at 984-85.

arly attention paid to the idea of adequate provocation. As Kahan and Nussbaum point out, the idea of adequate provocation has a deep common-law history and indicates an evaluative approach to emotion.[108] A person must show emotion about the right thing to get mitigation. Several scholars therefore advocate an objective, not a subjective, approach to defining adequate provocation. Dressler, for example, argues: "The provocation must be so serious that we are prepared to say that an ordinary person in the actor's circumstances, even an ordinarily law-abiding person of reasonable temperament, might become sufficiently upset by the provocation to experience substantial impairment of his capacity for self-control and, as a consequence, to act violently."[109] Victoria Nourse recommends that, in order for there to be adequate provocation, the provocation must be something the law proscribes and in fact punishes by imprisonment.[110]

With the defense of excessive self-defense, an objective test for adequate provocation seems built-in. The person acting with emotion shows that he values the right thing: his life or safety. The defense only applies if the defendant were under unlawful attack or threatened with it, and in fact legally allowed to react with force. Thus even Professor Nourse's standard is met. But the defense is total, not partial. Countries adopting this approach in theory reject a proportionality requirement altogether. (In practice, however, judges in these countries may still do a rough calculation of proportionality.[111]) Under a voluntaristic approach, one would say this assumes that the defendant has completely lost the ability to control his conduct. Therefore although the triggering event is viewed objectively, the

---

[108] Kahan, *supra* note 101, at 306-08. For example, the infidelity of a man's wife was typically considered adequate provocation, but the infidelity of a man's fiancée or girlfriend was not. A man was considered to have a much greater interest in the chastity of his wife, even though the emotions provoked by the infidelity of a fiancée or girlfriend might be as strong. *Id.* at 308-09.

[109] *Id.* at 974. *See also* Lee, *supra* note 105, at 264 (arguing that "act reasonableness can be satisfied if the provoking incident would have provoked an ordinary person to violence"). This standard incorporates what Cynthia Lee calls emotion-reasonableness and act-reasonableness. Emotion-reasonableness means a finding that the defendant's passion was reasonable; act-reasonableness means that an ordinary person in the defendant's circumstances would have acted as violently as the defendant did. *Id.* at 262-63.

[110] Nourse, *supra* note 104, at 1396-97. For a critique of Nourse's proposal, see Dressler, *supra* note 103, at 979-84.

[111] In fact, some notion of proportionality may still remain, albeit in weakened form. Dutch courts have implied this in certain decisions. *See, e.g.*, Bijlmer Noodweer, HR 23 oktober 1984, NJ 1986, 56 m. nt. N. Keijzer. In that case, a woman walking home late at night in a dangerous neighborhood was attacked by two men, one with a knife. She fired a warning shot with an illegal gun, but they continued toward her. She shot the man with the knife in the chest, and both men fled. Suddenly the unwounded man came back and tried to grab her purse; she shot him in the shoulder. He fled with the purse and died shortly after. The court of appeals decided that the woman breached the limits of necessary self-defense by shooting the men in vital areas, but that this was the immediate consequence of the robbery attempt which caused a strong emotion. The court appeared to consider arguments about proportionality, even though it accepted that the defendant was under a strong emotion caused by the attack.

amount of force used in the defendant's subsequent reaction is not viewed objectively at all, but purely subjectively. Under an evaluative approach, one would say the defendant appropriately so values his own safety that the aggressor's life is forfeit if any sort of attack is made.

Under a voluntaristic approach, the provocation defense in the U.S. is partial, and a proportionality requirement observed, because, as Cynthia Lee puts it, the law "assumes that there are degrees of loss of self-control."[112] Under an evaluative approach, the defense is partial because the actor's emotion "embodies appraisals of mixed quality."[113] Reacting in anger or fear reflects a valuation of one's own life or safety which is in itself proper, but may be carried too far if it completely outweighs other considerations such as the aggressor's life.

The proposed English approach of elaborating a defense of provocation due to fear of violence, which is a partial defense, reflects these concerns to limit mitigation based on emotion. The elite Law Commission was particularly concerned with two types of cases: the householder who responds to an intruder and the abused child or woman.[114] While the Law Commission expressed sympathy with both types of defendants, its report repeatedly stressed the need to keep the defense in bounds with a "robust, objective test."[115] The test the commission proposed takes an objective view not only of the necessary provocation, but also of the defendant's reaction:[116] "a person of ordinary tolerance and self-restraint might have acted in the same way as the defendant."[117] In favor of this rather strict limitation on the defense, the Commission said that without the limitation the defense might be open to a professional criminal who decided it was necessary to respond to threats of violence from a rival gang with a private execution. (Perhaps a better way to deal with this concern would be to impose an immediacy requirement, in which case the defense would still benefit the householder although not always the abused child or woman.) This limitation does seem unduly strict, considering the Law Commission has proposed only a partial defense, and the defendant would still be liable for manslaughter. It seems to go beyond the test Dressler proposes, which is simply that an ordinary person would be provoked to violence. The Commission's insistence that the defense be "kept strictly in bounds"[118] exemplifies elite concern with sanctioning private violence.

---

112 Lee, *supra* note 105, at 267-68.

113 Kahan, *supra* note 101, at 313.

114 FINAL REPORT, *supra* note 96, at 77.

115 *Id.* at 80.

116 Lee calls this "emotion reasonableness" and "act reasonableness." Lee, *supra* note 96, at 262-63.

117 FINAL REPORT, *supra* note 96, at 80.

118 *Id.*

Countries that provide a total defense to murder based on emotion seem to have swung too far in the other direction. Even if one were willing to assume, under a voluntaristic approach, that the defendant had completely lost control, and therefore to reject a proportionality requirement in the defendant's actions, problems would remain. How would one prove one's emotion? Through psychiatric experts? Would simply claiming to have felt a "strong emotion" or "anxiety, fear, or panic" be enough?[119] One suspects that, in effect, the defense is mainly based on relatively objective appraisals of appropriate circumstances and therefore embodies an evaluative view of emotion in criminal law. If so, the defense of excessive self-defense would often be treated as a presumption to use deadly force in response to attack or threats. If this defense is to be a presumption, however, the circumstances in which it applies need to be spelled out more clearly.

B. *Presumptions That the Use of Force Is Justified*

Several of the reform efforts discussed above involve presumptions that the use of force is justified in certain circumstances. The Florida law introduced a presumption that a person using defensive force had a "reasonable fear of imminent peril of death or great bodily harm" if someone unlawfully and forcibly entered a dwelling or occupied vehicle.[120] The English Mercer/McIntosh private member's bill in effect introduces a presumption that a person in a building using force against a trespasser to prevent a crime is justified. The notion of proportionality is preserved to some extent by prohibiting a "grossly disproportionate" response, if the gross disproportion was or ought to have been apparent to the defender, but the bill is clearly intended to greatly weaken the notion of proportionality in English law. A recently enacted Italian reform states that the requirement of proportionality is satisfied if a legally registered firearm is used against an intruder in the home or commercial premises to protect either people or property.[121]

The function of a presumption is to begin to move from a standard to a rule. Proportionality, at least in its pure form, is very much a standard, in which multiple factors must be weighed in the balance. Applying standards

---

[119] These difficulties of proof are like those under the Model Penal Code's highly subjective approach to provocation, which is based on a voluntaristic conception. The MPC's approach is problematic and has been criticized by Kahan and Nussbaum and others. *See, e.g.*, Kahan, *supra* note 101, at 321-23.

[120] As we have seen, California and Colorado self-defense laws are also explicitly framed in terms of a presumption. Most U.S. states, however, do not explicitly invoke a presumption. In this, they more clearly resemble the proposed English law.

[121] Legge 13 febbraio 2006, n. 59. The law provides that a firearm may only be used to protect property if the intruder does not desist and there is a danger of aggression ("quando non vi è desistenza e vi è pericolo d'aggressione").

is often a complex task, and as we have seen, there is considerable popular confusion about how they apply in the context of self-defense. Popular feeling, at least in some quarters, seems to be running in favor of clearer rules for self-defense. (As noted above, this desire for greater clarity in self-defense law is linked to distrust of how prosecutors and others might apply the law.[122]) In the case of a presumption, how clear the rule is depends on whether and how the presumption is rebuttable. The text of the Florida law gives no guidance about rebutting the presumption. Courts will have to determine how it may be rebutted. In the English proposal, the phrase "grossly disproportionate," combined with the requirement that this was or ought to have been apparent to the defender, indicates the strength of the presumption. The Italian law seems closest to a bright-line rule.

Depending on the strength of these presumptions, it might be said that they have the effect of transforming the possibility of using force into a license to use it. Some commentators are concerned that such laws provide "an open invitation" to violate the proportionality requirement.[123] But there are several possible classes of justification for these presumptions. One group of reasons focuses on necessity and the practical difficulties of applying the proportionality standard in the circumstances; another group of reasons focuses on the blameworthiness of the attacker and permits use of force for retribution or deterrence (the latter tends more strongly to elevate the protection of property over the life of the attacker).

Legal scholars often tend to overlook or downplay the practical difficulties of a defender trying to apply the proportionality standard (assuming the proportionality standard requires that deadly force not be used when only property is in danger). These difficulties are, however, salient in the popular mind.[124] Under certain circumstances, such as an intruder in the home at night when the occupants have been asleep,[125] it is difficult for an occupant to tell if an intruder is armed, for example, or how big he might be, or whether he intends burglary or murder or rape.[126] It can be difficult to tell these things even during the day when everyone is awake. Because of these difficulties, it is hard for a defender to assess proportionality, and so a bright-line rule may be appropriate. One could argue that women are at a special disadvantage in such encounters, as being more likely to be

---

122 *See supra* text accompanying notes 6, 47, and 63.

123 ROBINSON, *supra* note 4, at 84.

124 Note the concerns of Rep. Armstrong's Colorado constituents, and also the large volume of calls the NRA receives asking under what circumstances an intruder may be shot.

125 One may be more vulnerable in a home than elsewhere, because of sleeping, showering, relaxing, and generally letting one's guard down. This vulnerability may help to justify a presumption about use of force to defend against an intruder in the home.

126 Consider Marion Hammer's question, "Should I have to say, 'Excuse me, Mr. Intruder, are you here to rape and kill me or are you here to take the television set?'" Hammer, *supra* note 29. See also comments by former Italian Justice Minister Castelli and other *Lega Nord* members. Skinner, *supra* note 91, at 280.

overpowered by non-lethal force or to be raped, and so deserve an even stronger presumption in favor of the use of deadly force (though, because of currently prevailing notions of equality, it is unlikely such a sex-based presumption would be made explicit in the law).[127] Some scholars have downplayed these concerns, arguing for example that burglars are statistically not likely to want an encounter with occupants,[128] and therefore a threat of death or serious bodily injury should not be presumed whenever there is a felonious entry. The point is made that the cost of error by an occupant using deadly force is high. The obvious response is that the cost of an error by an occupant not using deadly force may also be high; because of the blameworthiness of the intruder, it may not be unreasonable to make him bear the burden of mistake.

These presumptions may be viewed as privileging property over the life of the intruder. Stated that way, the presumed blameworthiness of the intruder becomes more important, and possible justifications of the rule include deterrence and retribution. Since in continental thought especially, but also in Anglo-American legal thought, these two functions are seen as solely the prerogative of the state, it might be argued that these presumptions allow citizens to usurp the state's proper functions and to become vigilantes.

A possible response is that this (limited) appropriation of the state's functions is justified in the case of intrusions into the home because such intrusions are uniquely terrifying and one's property interest in the home is different from other property interests.[129] The home has long been regarded as the embodiment of one's dignity and privacy, a special sphere under one's own control, free from interference by the government or other citizens who do not also live there. If anything, this feeling may have intensified recently; there is a growing sense of being under siege. The home is increasingly referred to in popular culture as a "sanctuary," a "retreat," an

---

127 There is a powerful argument to be made, along similar lines, that women should be permitted to carry concealed firearms. Among those noting the special need of women for firearms in scholarly literature are PAXTON QUIGLEY, ARMED AND FEMALE (1989); Sayoko Blodgett-Ford, *Do Battered Women Have a Right to Bear Arms?*, 11 YALE L. & POL'Y REV. 509 (1993); Inga A. Larish, *Why Annie Can't Get Her Gun: A Feminist Perspective on the Second Amendment*, 1996 U. ILL. L. REV. 467; *cf.* Don B. Kates & Nancy J. Engberg, *Deadly Force Self-Defense Against Rape*, 15 U.C. DAVIS L. REV. 873 (1982). A gun for a woman is a powerful equalizer. (Apparently this term was first used for the Colt revolver, since it was relatively cheap and poorer people could buy it.) The concern for women's lack of ability to safely retreat is part of what led Marion Hammer, who says she is 66 years old and 4 feet 11 inches tall, to urge doing away with the duty to retreat in public in Florida. In theory, prosecutors, judges, and juries are supposed to take into account particular factors affecting the ability to retreat with safety, but Ms. Hammer preferred a clearer rule that would not leave women (and others) dependent on their discretion. Hammer, *supra* note 29.

128 Green, *supra* note 14, at 28-29.

129 JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 238-39 (2d ed. 1995); Green, *supra* note 14, at 32, 36.

"oasis." The line between the home (or vehicle) and the outside world is becoming sharper, the area within one's control versus the area that is not.[130] This change is evident in everything from the language used in popular home decorating magazine articles and car advertisements to parents' reluctance to allow children to freely play in the neighborhood.

But it is clear that popular sentiment in favor of self-defense goes beyond simply protecting the home. It has come to seem to many Europeans intolerable, for example, to require a shopkeeper to simply stand by (or run away and hide) while a thief takes goods. Perhaps the surest sign of more willingness to allow citizens to take retribution and deterrence into their own hands is the sympathy many have shown for householders and shopkeepers who shoot a fleeing felon in the back.[131] Such seems to have been the case with Tony Martin, and with jewelers in Belgium and Italy. It is in these cases that the gulf between popular opinion and elite opinion seems greatest. In such cases, there can be no fig leaf, no pretending that there was an immediate continuing danger. The only possible justifications are retribution and deterrence.[132]

There is a powerful reason why citizens may be more inclined to take deterrence and retribution into their own hands: the sense that the state is failing to do it. Throughout the United States and Europe, as we have seen, many believe that the justice system is not capable of punishing and deterring criminals, but focuses on harassing law-abiding people instead.[133]

---

130 While this may be true in popular culture, it is not necessarily true in law. Cases on search and seizure do emphasize the sanctity of the home, at least rhetorically and sometimes in fact, *see e.g.*, Kyllo v. United States, 533 U.S. 27 (2001), but courts provide little protection for those in automobiles.

131 In the United States, since the U.S. Supreme Court's decision in *Tennessee v. Garner*, 471 U.S. 1 (1985), not even a policeman may shoot a fleeing felon unless the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. This is one example of elite imposition of a proportionality standard that may not accord with popular morality.

132 There is, of course, the possibility of excuse because of passion, but that is not a justification.

133 This belief may be more justified in Europe than in the United States, where criminal sentences are longer and crime rates have been falling for several decades. According to the National Crime Victimization Survey, an ongoing survey of households that interviews about 75,000 persons in 42,000 households twice annually, between the genesis of the survey in 1973 until 1980, there was an average 49.3 victimizations per 1,000 population age twelve and over. Bureau of Justice Statistics, U.S. Dep't of Justice, National Crime Victimization Survey, Violent Crime Rates, 1973-2004, http://www.ojp.usdoj.gov/bjs/glance/viort.htm (last visited Aug. 12, 2006). Crime rates peaked in 1981, with an average of 52.3 victimizations occurring. *Id.* Violent crime rates dropped throughout the mid 80's, reaching their lowest point in 1986 with an average of 42.2 victimizations before climbing again. *Id.* Rates climbed to an average of 52.1 victimizations in 1994, but since then have steadily declined. *Id.* In 2004, an average of 21.1 victimizations occurred. *Id.* Between 1995 and 2004, violent crime rates declined about fifty-four percent in the United States. *See id.* The violent crimes included in the Survey are rape, robbery, aggravated and simple assault. *Id.* The homicide data are collected from the FBI's Uniform Crime Reports which are comprised of reports from law enforcement agencies. *Id.* The Survey was redesigned in 1993 and data before that year have been adjusted to make it comparable to data collected since the redesign. *Id.* For a discussion of the effects of the redesign, *see* Charles Kin-

dermann et al., *Effects of the Redesign of Victimization Statistics*, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/erve.pdf (last visited Aug. 11, 2006).

Similar to the trend in the National Crime Victimization Survey, household perception of crime as a problem rose during the late 1980s and early 1990s and then leveled off. Carol J. DeFrances & Steven K. Smith, *Perceptions of Neighborhood Crime, 1995*, http://www.ojp.usdoj.gov/bjs/pub/pdf/pnc95.pdf (last visited Aug. 12, 2006) (in 1985, 4.7% of households identified crime as a problem; 1987, 4.8%; 1989, 6.4%; 1991, 7.4%; 1993, 7.4%; 1995, 7.3%). As crime dropped sharply from 1994 to 1995 though, perceptions of crime remained relatively stable. *Id.*; *see also* Mark Warr, *The Polls—Poll Trends: Public Opinion on Crime and Punishment*, 59 PUB. OPINION Q. 296, 298-99 (Summer 1995) (stating that public perceptions about crime have not changed substantially while noting that the public is usually pessimistic about crime); Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 106 n.20 (1998) (discussing the widespread perception that crime is a pressing national issue but not a significant local concern).

In contrast to the falling rates of crime in the United States, English crime rates (including Wales) as measured in both victim surveys and police statistics have risen since 1981. Bureau of Justice Statistics, U.S. Dep't of Justice, Crime and Justice in the United States and in England and Wales, 1981-96 http://www.ojp.usdoj.gov/bjs/pub/pdf/cjusew96.pdf (last visited Aug. 16, 2006). The following crime rates are per 1,000 population. From 1981 to 1996, the rate of robbery in England rose from an average of 4.2 to 7.6 (81% increase), but in the United States, fell from 7.4 to 5.3 (28% decrease). *Id.* at 3. In that time period burglary doubled in England, from an average of 40.9 to 82.9, but was cut in half in the United States (105.9 to 47.5). *Id.* In addition, the murder rate in the United States was measured as 8.7 times as great as England's in 1981, but only 5.7 times as great in 1996. *Id.* at iii. Another significant change was the rape rate in the United States shrinking from seventeen times that of England's in 1981 to three times as large in 1996. *Id.* A person committing a serious crime in the United States (rape, robbery, assault, burglary, and motor vehicle theft, but not murder) is generally more likely than one in England to be caught and convicted. *Id.* at iv. For all offenses (murder, rape, robbery, assault, burglary, motor vehicle theft), courts in the United States sentenced convicted offenders to longer periods of incarceration than courts in England. *Id.* According to figures for the United States in 1994 and for England in 1995, sentences in the United States were three years longer for murder, nearly four years longer for rape, nearly three years longer for assault, more than two years longer for burglary, and over one year longer for motor vehicle theft. *Id.* at 31.

In the United States, an examination of the rise of imprisonment from 1992 to 2001 concluded that the fifty percent increase in the incarceration rate was entirely a result of changes in sentencing policy and practice. *See* The Sentencing Project, *New Incarceration Figures: Growth in Population Continues*, at 1, http://www.sentencingproject.org/pdfs/1044.pdf (last visited Aug. 16, 2006) (emphasis in original) (citing Jennifer C. Karberg & Allen J. Beck, "Trends in U.S. Correctional Populations: Findings from the Bureau of Justice Statistics," presented at the National Committee on Community Corrections, Washington, D.C., Apr. 16, 2004). Changes included the "three strikes" rules, mandatory sentencing, and "truth in sentencing." *See id.*; *see also* Beres & Griffith, *supra*, at 107-08 (arguing that the rise in the prison population since 1980 is a result of, *inter alia*, legislatures reclassifying misdemeanors as felonies, increased mandatory minimum sentences, sentence enhancements for the use of guns in the commission of a crime, "truth-in-sentencing" laws diminishing the ability of inmates to reduce their time served through work or good behavior, and sharply enhanced sentences for repeat offenders, most noticeably through three strikes statutes). California's crime rate, for example, remained reasonably flat from 1972-95 while the incarceration rate increased over 300%. Beres & Griffith, *supra*, at 108 n.33 (citing Legislative Analyst's Office, Handbook for the Joint Hearing of the Senate Comm. on Criminal Procedure and the Assembly Comm. on Public Safety, The State of Public Safety in California, at 13 (June 6, 1997)). Some researches have argued that increased sentencing prevented a large spike in California's crime rate. *Id.* at 109 n.35.

It is certainly easier (and personally safer) for police to deal with basically law-abiding people than to attempt seriously to go after violent criminals. There is growing concern about the threat posed by the failed socialization of many boys and young men—especially those from the welfare underclass but others as well. In the face of such a threat, and given the incentives of police, strict limits on use of force in self-defense and on the private ownership of guns are coming to seem to many untenable.

IV. CONCLUSION

Unless governments are willing and able to seriously reduce criminality, they can expect continued popular pressure to expand the permitted use of force in self-defense. It may be that even with falling crime rates, citizens' intuitions about the proper scope of self-defense lead them to want to reform current law in some countries. It may be better to encourage certain

---

It is not easy to explain and compare trends in national crime rates because of differing measurement methods, recording practices, and lack of comparability over time between countries. *See* Michael Tonry & David P. Farrington, *Punishment and Crime Across Space and Time*, 33 CRIME & JUST. 1, 6 (2005). For a discussion on the comparability and sources of international crime data, see *id.* at 11-14. The national crime rates that follow were chosen because the countries had conducted representative national crime-victimization surveys from 1981-89 that could be compared to the reported crime rates. *See* Phillip J. Cook & Nataliya Khmilevska, *Cross-National Patterns in Crime Rates*, 33 CRIME & JUST. 331, 331 (2005). The following crime rates are per 1,000 population. According to recorded crime rates, in 1999, the United States rate of homicide was .057, a decrease of forty-two percent from 1981. *Id.* at 332. In 1999, the rate of homicide in Scotland was .023, which was an increase of thirty-one percent from 1981. *Id.* In 1999, the rate of homicide in the Netherlands was .015, an increase of twelve percent from 1980. *Id.* In 1998, the rate of homicide in Sweden was .019, an increase of thirty-six percent since 1980. *Id.* In 1999, the rate of homicide in Switzerland was .011, a decrease of twenty-one percent from 1985. *Id.*

The victimization survey results are several times higher than the reported estimates, save Switzerland, and sometimes exhibit different trends, possibly because certain crimes were never reported, the authorities failed to record them, or survey participants were unable to remember when they were victimized and may have reported the same incident during separate time periods. *Id.* at 334-35. Homicide is not included in victimization surveys because one does not comment on one's own murder, but crimes like assault are. *Id.* at 335. The following statistics discuss the reported crime rates for assault and their change over time, while the change from the survey data over the corresponding period is in parenthesis. In 1999, the rate of assault in the United States was 3.4, an increase of sixteen percent from 1981 (forty-four percent). *Id.* at 332, 335. Over the same time period, the rate of assault in Scotland increased ninety-three percent to 11.9 (twenty-one percent). *Id.* In 1999, the rate of assault in the Netherlands was 2.7, an increase of 176% from 1980 (fifteen percent). *Id.* In 1998, the rate of assault in Sweden was 5.5, an increase of 100% from 1980 (thirty-six percent). *Id.* In 1999, the rate of assault in Switzerland was 1.9, an increase of seventy-three percent from 1985 (144%). Comparing the overall data, it seems that the United States enjoyed the most favorable trends, placing first or second in every crime category (homicide, assault, rape, burglary, motor vehicle theft, and robbery) when the countries are ranked from the lowest (or most negative) to the highest growth rate (the survey included eight countries: England and Wales, Scotland, Australia, Canada, Netherlands, Sweden, Switzerland and the United States). *Id.* at 333-35.

legal changes now than to wait for popular frustrations to grow more bitter, and to poison attitudes toward the law and government generally. In particular, changes that clarify the law, making a standard more of a rule, such as presumptions about the use of force against home intruders may help to satisfy reasonable popular demand. The costs of such laws may not be as high as some predict. The U.S. states have greatly varying laws about self-defense and gun ownership, but in none of them so far has there been an epidemic of people using deadly force in questionable circumstances and escaping punishment by claiming self-defense. This gives reason to trust that citizens generally may exercise discretion more responsibly than some members of the elite fear.

PREVENTING CRIME: PRIVATE DUTIES, PUBLIC IMMUNITY

Robert Weisberg[*]

INTRODUCTION

I was asked to opine on a very specific question: Is it possible to reconcile two legal rules? (1) Landlords and some business owners sometimes have a duty under tort law to prevent criminal harm to people on their premises. (2) Police departments have no duty to protect people in their precincts from criminal harm.

The relevance of this question to debates over gun control is both simple and subtle. It is at least *apparently* simple in the sense that if the no duty rule for police is a stable legal doctrine, the argument for citizen defensive gun use is greater. Opponents of gun control traditionally cite this doctrine to disabuse people of the notion that they can count on the police, rather than their capacity for armed self-defense, to protect them from violent criminals.[1] But exactly *how* the no-duty rule enhances the arguments

---

* Robert Weisberg is the Edwin E. Huddleson, Jr. Professor of Law at Stanford University, where he teaches in the areas of criminal law, criminal procedure, and white collar crime. He received his B.A. from the City College of New York, his M.A. and Ph.D. (in English and American Literature) from Harvard, and his J.D. from Stanford. Before joining the Stanford Law School faculty he served as a law clerk to Justice Potter Stewart of the U.S. Supreme Court and Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia Circuit. He has served as a consulting attorney for the NAACP Legal Defense Fund and the California Appellate Project, working on death penalty litigation in the state and federal courts.

Weisberg is also founding Director of the Stanford Criminal Justice Center. The SCJC serves as Stanford's vehicle for promoting and coordinating the study of criminal law and the criminal justice system, including legal and interdisciplinary research, curriculum development, and preparation of law students for careers in criminal law. SCJC's activities cover areas such as criminal investigation and criminal trial practice and procedure, institutional examination of the police and correctional systems, social science study of the origins and criminal behavior and methods of punishment, and criminal legislation and enforcement in areas ranging from drug crimes to federal white collar crimes.

[1] Don B. Kates, Jr., *Guns, Murders, and the Constitution: A Realistic Assessment of Gun Control*, PACIFIC RESEARCH INSTITUTE FOR PUBLIC POLICY, 19-21 (1990). Kates cites the tragic case of Warren v. Dist. of Col.., 444 A.2d 1 (D.C. Ct. App 1981), where rape victims whose made emergency calls to the police went unanswered while they were under attack, the court holding that it is "fundamental [in] American law" that the police owe no tort-based duty to protect individual citizens. *Id.* at 6. Kates also cites statute law removing any possible ambiguity on this score. For example, CAL. GOV'T. CODE §§845-46 (2006) states:

> 845. Neither a public entity nor a public employee is liable for failure to establish a police department or otherwise to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service . . .

for private gun possession and defense gun use is more complicated. If the no-duty rule is simply entrenched as positive law—regardless of whether it is right or wrong on either normative or empirical grounds—then police will have some lesser incentive to protect people. If the no-duty rule is a normatively good rule, perhaps for some reason reflected in the actual limitations of police ability to protect, then it enhances the gun-rights argument more strongly. If it is normatively bad positive law—because, for example, it understates police ability to protect or because it wrongly discourages police from exercising those abilities—then the logical conclusion might be to change the legal regulation of police, through tort law or otherwise.

Gun-rights proponents take diverse views on these matters. Sometimes they argue that the rule is indeed rooted in the unavoidable realities of police resources.[2] Yet sometimes gun-rights proponents hold police (or the political authorities who control them) accountable for not doing all they can to prevent crime. Thus, arguments for broader gun rights or for the relative utility of defensive gun ownership frequently attack particular state or local policies surrounding the allocation of police resources. Most interestingly, these arguments attack the war on drugs for diverting police from fighting violent crime to the less important task of investigating and arresting people for victimless drug crimes.[3]

Of course, we still face the question of just how the *consistency* of the opposite-pointing duty rules bears on the *validity*, normatively or otherwise, of the police no-duty rule. Obviously, if we take the private landowner duty rule as good law by some principle of jurisprudence, then the consistency of the police no-duty rule with it provides *some* parallel jurisprudential support for the latter rule. Though I will return to this question of relevancy briefly at the end, for now I will assume that arguments for either the positive law entrenchment or the normative rationality of the no-duty rule make some difference in the gun debates, and that proof of or grounding for the consistency of the opposite-pointing duty rules thereby underscores that relevancy.

Now as to whether we can fairly reconcile the rules, the short answer, or short rhetorical answer is—of course we can. This is classic, and classically nuanced, common-law doctrine; thus, anyone with a year of law school could first show the two rules to be mutually consistent and then switch lawyerly roles and prove them inconsistent. But the *better,* and less rhetorical, short answer is—truly yes, they are mutually consistent. The reasons for these answers reveal some interesting things about the special

---

846. Neither a public entity nor a public employee is liable for injury caused by the failure to make an arrest or by the failure to retain an arrested person in custody.

[2] Kates, *supra* note 1, at 20-21; David Kopel, Paul Gallant, and Joanne Eisen, *911 Is a Joke...or Is It? Let's Find Out*, TECH CENT. STATION, Jan. 05, 2005.

[3] DAVID KOPEL, *Children and Guns*, *in* GUNS: WHO SHOULD HAVE THEM? 309, 346-48, 407, 413-16 (David Kopel ed., 1995).

identity of the state as defendant in general and as a defendant in particular in relation to one of the most politically contested of all social phenomena—street crime.

Let me telegraph my final punch a bit more: The basic doctrinal split between landowner and police duties became clarified in the 1960s and 70s, when fighting crime became one of the major themes of American electoral politics and popular political culture.[4] To stake out a position on crime in an era with soaring violent crime rates, but when the crime issue was also intertwined with controversies over the civil rights movement and race generally, was to stake out one's general position in American politics more generally. Indeed, Richard Nixon's "war on crime" was a major component of the drastic reconfiguration of American politics, especially during the 1968 Presidential election that led to the Republican takeover of the Deep South and the rise of modern conservatism.[5] I will suggest that tort law understandably steered clear—and continues to steer clear—of such ideologically contested matters. In fact, the police do have a duty to protect the vulnerable from crime, but the court in which that duty gets enforced is the venue of politics, not tort.

And I mean to stress the blunt word "*politics*," because, as I suggest later, it seriously understates matters to rely on the unhelpful legal cliché "policy." "Policy"—that vague noun often used clumsily as an adjective in our legal vocabulary—complicates the line-drawing courts have done in this area. Sometimes we can speak of common-law courts engaged in "public policy questions" about assessing the reasonable calculus of costs and benefits that should determine matters of duty—hence the landlord/landowner doctrines. But sometimes it refers to the broader kind of policy, involving more eclectic types of values and considerations that belong in the hands of legislatures or possibly executive branch officials implementing legislation. I would prefer to put the latter in the rougher term "politics" because it better explains the opposite-pointing duty rules addressed here.

---

[4] *See generally* STUART A. SCHEINGOLD, THE POLITICS OF STREET CRIME: CRIMINAL PROCESS AND CULTURAL OBSESSION (Temple Univ. Press 1991) (tracing these political issues from the Nixon White House war on crime).

[5] These cultural and political vectors lasted well through the 1980s. The most dramatic example is the 1988 Presidential election, when Democratic candidate and Massachusetts Governor Michael Dukakis was skewered by Republican attacks on his state's "furlough" of prisoner Willie Horton, who went on to commit a brutal rape. *See* DAVID C. ANDERSON, CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE 214-43 (1995). Four years later, Governor Bill Clinton of Arkansas, running for the Democratic Presidential nomination, famously signed the death warrant for an inmate who had shot himself in the head and thus was virtually nonsentient as he awaited execution. Robert Weisberg, *The New York Statute as Cultural Document: Seeking the Morally Optimal Death Penalty*, 44 BUFF. L. REV. 283-84 (1996) (citing the case of Ricky Rector and suggesting it was crucial in the 1992 election).

I. THE MEANING OF "DUTY" IN GENERAL

The premise of this inquiry, of course, is that when we speak of "duty" we mean that its source and means of enforcement is tort law. Let me briefly comment on that premise. First, to speak of duty in tort law is to acknowledge that the law cannot truly force anyone to do anything; it can only threaten sanctions for failing to do something. I stress that banal point because to view tort law as even potentially relevant to the gun control debate is to imply considerable faith in the deterrent power of tort law—after all, few people otherwise motivated to possess and use firearms in self-defense would refrain simply because they know that they can seek financial recompense if a duty-bound police officer does not intervene.[6]

The Common Law Private Duty

Now, for one immersed most of his days in criminal law and episodically in gun debates, to return to the common law of torts is intriguing. It underscores, by contrast, how much the so-called "common law of crimes" is really more in the nature of statutory law and how much a matter of constitutional law is criminal procedure. This is because looking at these tort duty questions is to encounter again the purest kind of common law, full of multi-part doctrinal criteria, "better rules," interstitial "public policy" argu-

---

[6] In effect, a legally enforceable duty to act can only come in three forms—contract, crime, and tort. But it all may really come down to tort law anyway, at least for this set of questions about duty to prevent crime. Tort and contract might mix in under the doctrines of tortious interference with contract. *See* DAN B. DOBBS, THE LAW OF TORTS 1257-74 (West Group 2000). But in any event, it is only in an impressionistic sense that the state can have a "contract" to protect citizens: There is the broad notion of a social contract; there is the contractual duty of an individual officer if her government employer has imposed on her a job requirement with any degree of specificity; and, finally, the term "contract" *somewhat* captures the kind of engagement in commerce or service that a party may voluntarily undertake that establishes a duty under tort law. Next, there can be a criminal law "duty to act," but this is something of a shadow category. *See* Jones v. United States, 308 F.2d 307 (D.C. Cir. 1962) (no omission liability without legal duty to act). There could be an absolutely explicit criminal law making it a crime for a police officer not to do something (i.e., by analogy to child abuse reporting laws), or the failure to act can supply the *actus reus* for some other crime, say homicide, in the presence of a so-called independent legal duty. *Id.* at 410 (legal duty can derive from specific contract for care, assumption of care, or certain status relationships). But the latter requirement just confirms that a criminal law duty to act really is contingent on a tort-based duty. Finally, there is, in theory, the possibility of a constitutional tort suit under 28 U.S.C. §1983 against an officer for not acting to protect someone from criminal harm. *But see* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) (no permissible civil rights tort action against state agency for failure to protect plaintiff from harm inflicted by others). In the unlikely event it succeeds, such an action might resemble criminal law only in the sense that a judge could in theory issue an injunction requiring performance of a required duty and could then punish violation of that order by jailing for contempt. But the likelier hope for such a case would be money damages, so we would be back in tort law anyway.

ments, and all the other traditional apparatus of common law reasoning and vocabulary.

So, under the common law, why is the duty of landlords to protect others from intentional crime? They have a duty to protect people they allow or invite on the property from harmful conditions on the property, under complex and somewhat varied rules distinguishing trespassers from licensees from invitees.[7] More specifically, landlords have a duty of care with respect to their tenants.[8] And if this species of duty starts with a responsibility to cure such negligent hazards as hidden holes, falling objects, slippery stairs, or bumpy paths, the common law has taken the challenging, but not overwhelming, step of extending that duty to concern for harms in the form of criminal acts performed on that property by others.[9]

The scope and details of this duty merit a brief summary. In one line of cases, the landlord is liable because she actually helped to create the danger, by either leasing to dangerous people or by negligently failing to ward off dangerous intruders.[10] In an alternate line of cases, more comparable to general landowner duty cases, the landlord is liable for failing to provide sufficient protection against exogenous criminal dangers; thus, the physical condition of the premises must include protections against assaults, robberies, and rapes committed by outsiders.[11] Often, a key factor in determining landowner liability is the history of crime in the general neighborhood,[12] even a very minimal history of crime if the property is

---

7 *See generally* DOBBS, *supra* note 6, at 587-624.

8 *Id.* at 625-30.

9 *Id.* at 876-83.

10 Samson v. Saginaw Professional Bldg, Inc., 393 Mich. 393 (1976) (landlord liable for renting to mental health clinic whose clients were parolees, without informing other tenants); Rosales v. Stewart, 113 Cal. App. 3d 130 (1980) (landlord liable for failure to restrain tenant who had habit of illegally shooting gun in backyard); *but see* Muniz v. Flohern, Inc., 77 N.Y.2d 869 (1991) (landlord whose commercial tenant engaged in drug trafficking on premises not liable when passerby near store was assaulted by another person in store, because assault not related to drug activity.).

11 Braitman v. Overlook Terrace Corp., 68 N.J. 368 (1975) (broken locks left resident vulnerable to rape); Cordes v. Wood, 918 P.2d 76 (Okla. 1996) (tenant had pleaded with landlord to fix lock after numerous threats of assault); Trentacost v. Brussel, 82 N.J. 214 (1980) (between 75 and 100 incidents of crime against persons in and around apartment house in recent years); Duncavage v. Allen, 147 Ill. App.3d 88 (1986) (failure to provide light and adequate locks and to remove ladder that provided attacker access made landlord liable for rape/killing of tenant); Walls v. Oxford Mgmt. Co., 137 N.H. 653 (1993) (landlord only liable if it actually created dangerous conditions on property, such as remote unattended parking areas); Rowe v. State Bank of Lombard, 125 Ill.2d 203 (1988) (landlord negligent in allowing master keys to fall into wrong hands).

Sometimes that landlord's duty is explicitly established by statute, Brock v. Watts Realty Co., 582 So.2d 438 (Ala. 1991) (applying state law and city building code ordinance requiring landlords to make premises safe from dangerous conditions, including crime).

12 Jacqueline S. v. City of New York, 81 N.Y.2d 288 (1993) (evidence of frequent drug use sufficient basis for requiring foresight of rape and robbery).

foreseeably an especially attractive target.[13] In addition, a secondary reasonableness inquiry will determine just what the landlord has to do to prevent crime, from better physical conditions to supplying patrols or security guards.[14] Finally, these duties may extend to commercial properties, protecting office workers in elevators or offices[15] or mall employees entering parking lots.[16]

A major early statement of this doctrine is in *Kline v. 1500 Massachusetts Avenue Apartment Corp.*[17] A tenant of a large apartment building had been assaulted in a common hallway. The plaintiff was able to show that crime had been occurring in the common areas with some frequency, and, in the court's view, though the individual tenants could take some steps to protect themselves, they were unavoidably exposed to some of this crime absent special measures by the landlord.[18] Notably, the court held that the landlord was not only the best crime suppressor as compared to the tenant[19]—it was also the best crime—suppressor as compared to the police.[20]

Now it may seem obvious that the police could not be expected to guard the common areas of buildings—this was true as a matter of simple fact. But it is still noteworthy that in this choice of best cost-avoider, the court essentially took the power or duty of the police as an exogenous factor—as, in effect, a part of the natural landscape rather than an alternative cost-avoider/defendant. Surely, the landlord could have conceivably argued that the residents should depend on the police for protection to *some* extent. But whatever goes into the political dynamics, financial accounting and logistical administration that determines the scope of police duty or logistical capacity of the police, law enforcement was wholly outside the equation. Indeed, it seems wholly out of the court's equation even to suggest that one of the landlord's failings was in not demanding greater police protection. Thus, though the court conceded that the landlord could not be an

---

13 Gans v. Parkview Plaza P'ship, 253 Neb. 373 (1987) (unlocked office door left employee vulnerable to rapist after regular business hours).

14 Martinez v, Woodmar IV Condominiums Homeowners Ass'n, 189 Ariz. 206 (1997) (gap in security guard coverage of parking garage), *but cf.* Ann M. v. Pacific Plaza Shopping Ctr., 6 Cal. 4th 666, 679 (1993) (no security guard necessary when prior crimes were in different locations on property and of different nature).

15 *Samson*, 393 Mich. at n.10; Doe v. Dominion Bank of Wash., 963 F.2d 1552 (D.C. Cor. 1992) (landlord liability depends on foreseeability of crime in context of particular premises); Gans, 253 Neb. at 373.

16 Doe v. Montgomery Mall Ltd. P'ship, 962 F.Supp. 58 (D. Md. 1997) (landlord liability for assault on tenant depends on specific facts of own security measures and comparable measures in similar buildings).

17 Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477 (D.C. Cir. 1970).

18 The building entrance was unattended by building personnel, and one door was often left unlocked at night. *Id.* at 479.

19 *Id.* at 480 (tenants could put extra locks on their apartment doors, but this would be insufficient protection).

20 *Id.* at 480.

"insurer" of tenant security,[21] it held there was a triable issue of whether the landlord had failed to meet the standard of reasonable care. The court necessarily acknowledged the general principle of proximate cause that the intervening acts of an intentional malefactor might supersede the causal role of a negligent party, but it held that the circumstances of life in a modern urban apartment building required some finessing of that principle.[22]

Now notably, the defendant in *Kline* declined clear opportunities to proffer competing statistics on the actual frequency of crime in the premises.[23] In addition, the defense was oddly thwarted by the trial judge in its efforts to proffer comparative information about crime-preventing practices in about other apartment buildings in the city.[24] Of course, the goal of the defense in offering this comparative evidence would have been to show that its own measures met the customary standards for the city. But opening up that question would have allowed an empirical debate on whether those other buildings had similar on-property crime rates or whether the buildings were in similarly crime-blighted neighborhoods. That is, the relevancy of that comparative standard-of-care evidence would have depended to some extent on how other buildings' practices correlated with or played some causal role in crime. The absence in *Kline* of a statistical record on these questions leaves us to speculate—indeed, might *pique us* to speculate—on how such statistics might have made a difference in the case. In addition, the defendant made at best a muddled effort a trial—which it seems not to have pursued on appeal—to introduce another key question to the case: The building had commercial tenants as well as residential tenants, and some testimony showed that the more "public" nature of commercial tenancies blurred the simplistically neat line between private and public property on which the court's holding substantially depends.[25]

Might the *Kline* court have been moved by more empirical debate about how the actual crime rate in Kline's building compared to that of buildings in the area? Or might it have been moved by information about comparative urban crime rates in different neighborhoods of various apartment buildings? Or about the incremental crime threat posed by commercial tenants in residential buildings? Had the defendant been able to force open these issues, would it have been, in effect, impleading the police as the truly duty-bound actor? Might the landlord have been able to argue that the police have some duty to take anti-crime measures that might have miti-

---

21 *Id.* at 487.

22 *Kline*, 439 F.2d at 481.

23 *Id.* at 479 & n.2.

24 *Id.* at 479.

25 *Id.* at 487 n.24.

gated the landlord's exposure? If the court had gone off in this direction,[26] we might have learned more about how the law of torts views the world of law enforcement and criminal law policy. And this is a matter the law of torts does have to address, as we will see below, when the defendant is the police department itself.

But happy to take judicial notice in the absence of such a trial record, the dissent in *Kline* gives us some clues about these speculations.[27] For one thing, the dissent stressed that the presence of commercial tenants in Kline's building did indeed blur any simple divide between public and private space. Obviously, more open access to the building was necessary because of the businesses, but in addition, in the dissent's view, the more "public" the property became, the more expensive it would be for the private landlord to secure, and therefore, the more the landlord could reasonably defer to the police as the primary regulator of crime. But the dissent then conceded that police surveillance of all the internal premises of the building, even the "public" parts, was impossible. Hence, from this perspective, urban commercial space seems to constitute an in-between social area which must remain relatively open to the public, but where the police are peculiarly incapable of offering protection.

Now the dissent could have argued that the inability of the police to patrol inside the premises was peculiar to this quasi-public space, either because of architectural and logistical constraints or because to do so would conflict with certain purely private rights or interests of the landlord or of commercial tenants. But more tellingly, the dissent essentially conceded that the police have little power even *off* the premises: In the dissent's view, however reasonably frightened the plaintiff was in the building, she would be no less reasonably scared on the streets of Washington, D.C.[28] The dissent even oddly noted as an empirical fact that this court's own docket was two-thirds devoted to criminal appeals, and that major hotels in the city had even higher crime rates than the plaintiff's building.[29]

Thus, with a strange kind of tragic resignation, the dissent complained that the landlord was being asked to supply a level of protection "that is not available from the duly constituted government in the locality."[30] The crime rate in the city, which is the benchmark expectation/comparison for crime in a publicly accessible building, is a fact of exogenous nature, as is,

---

[26] A few courts have come slightly closer to addressing these issues. *See, e.g.*, Clohesy v. Food Circus Supermarkets, 149 N.J. 496 (1997) (relying on record evidence of rising crime rate in neighborhood and national epidemic of rapes and robberies in parking lots).

[27] Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d at 488 (MacKinnon, J., dissenting).

[28] *Id.* at 490, 492.

[29] *Id.* at 492 n.8.

[30] *Id.* at 492.

presumably, the power or willingness of the city government to supply sufficiently police resources to reduce that crime.

But the dissent in *Kline* is, nevertheless, still just a dissent. In the progression of common law doctrine, private landowners indeed turn out to have some duty to protect against crime, even if to some undeniable extent their private space is "public," and even if the public authorities have only limited control over crime, either because of inherent incapacity, or because of political decisions about how to allocate public resources. And so on to the next step: The duty to prevent crime may apply flexibly to all manner of business, in favor of people on their premises,[31] especially, as in the residential cases, where the owner had notice of earlier crimes on the property.[32] But the scope of the duty is itself a complex matter of common law analysis and classification. The recent case of *Posecai v. Wal-Mart Stores*[33] can serve as a frame.

The plaintiff in *Posecai* was mugged and robbed in the store's parking lot. Though the store had security guards inside, it had never posted any outside, and the trial record clearly established that even a minimum security presence in the parking lot would have prevented the kind of crime the plaintiff suffered.[34] As a matter of doctrine, the case synthesizes several tests used in state courts around the country on the subject of commercial landowner liability for the intentional harms caused by criminals, in cases where the defendants have ranged from hotels to stores, to restaurants, to fraternities.[35] These tests are worth a brief summary to help us understand the landowner duty at this stage, but also to help understand, the absence of police duty, as we will examine below.

One test is the now-outdated rule called "the specific harm rule," which requires the plaintiff to establish that the defendant was aware of the specific imminent harm about to occur.[36] As the *Posecai* court notes, this rule has become outdated, condemned as simply unfairly hard for plaintiffs to meet.[37]

---

31 *See* Butler v. Acme Mkts, Inc., 445 A.2d 1141 (N.J. 1982) (store has duty to protect customers from assaults in a parking lot); Erickson v. Curtis Inv. Co., 447 N.W.2d 165 (Minn. 1989) (owner of parking garage has duty to protect users of that garage from crime because of peculiar susceptibility to crime in such a structure); *but cf.* Errico v. Southland Corp., 509 N.W.2d 585 (Minn. Ct. App. 1993) (no parallel duty in Minnesota in regular store parking lots).

32 Sharon P. v. Arman, Ltd., 989 P.2d 121, 129-30 (Cal. 1999) (absence of sufficiently similar and spatially proximate crimes refutes foreseeability even where store employee left highly exposed to intruders).

33 Posecai v. Wal-Mart Stores, Inc., 752 So.2d 762 (La. 1999).

34 *Id.* at 764-65.

35 *Id.* at 764-68.

36 *See, e.g.*, Delta Tau Delta v. Johnson, 712 N.E.2d 968 (Ind. 1999) (fraternity liable for assault on guest at party where earlier similar assaults proved).

37 Savannah Coll. of Art & Design v. Roe, 409 S.E.2d 848 (Ga. 1991) (duty upheld even though no prior rape on premises; "prior crimes" standard criticized); Sharp v. W.H. Moore, Inc., 796 P.2d 506,

A second is the "prior similar incidents test," which quite commonsensibly requires proof that similar incidents had put the defendant on reasonable notice of the risk of occurrence. But this rule has been criticized as arbitrary, or at least unpredictable, because it sets out no metric for the frequency of crimes and the degree of similarity required.[38]

A third is, in the clichéd locution, the "totality of circumstances test," which includes in the reasonableness calculus such circumstantial details as the nature and location of the premises, as well as the predictable rate of crime in the area.[39] As the *Posecai* court notes, this requirement is troublesome, because it raises unrealistic empirical expectations, but also perhaps because even if the calculus is empirically sound, it may be unfair to impute this empirical wisdom to business owners or make it a basis for liability.[40] Indeed, it might impute a remarkable kind of criminological sophistication, since it could be stretched to hold the property owner to knowledge that increases in minor property crimes are often precursors of violent assaults.

In a subtle verbal distinction, the fourth test moves from "totality of circumstances" to "balancing." Very roughly put, the balancing test invites consideration of all the factors covered by the totality test, but it pays due heed to the cost side of the equation—i.e., the burden of preventing the predictable harm.[41] Unsurprisingly, it increases the defendant's duty both as the risk goes up (in terms of both frequency and severity) and the cost goes down.

In the *Posecai* case, the court preferred this last test,[42] and by that metric it found the plaintiff's case wanting, mainly because the trial record showed only a few serious crimes on the store's premises in the previous six and half years, and only one against a customer.[43] Nevertheless, the court then cryptically alluded to a potentially contradictory fact—that the store's neighborhood, which was undeniably economically blighted, was "considered a high crime area by local law enforcement."[44] Thus, the court treated the high local crime rate as an almost natural consequence of the economic miseries of the region and casually cites the police only as a source of sociological wisdom about local crime, not as a potential factor in

---

520 (Idaho 1990) (similar, rejecting any analogy to "one free bite" doctrine for animal owners); Isaacs v. Huntington Memorial Hosp., 38 Cal.3d 112, 126-27 (1985) (prior similar crimes test is vague as to criteria for "similarity" and takes too limited view of foreseeability).

38 *See, e.g.*, Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 757 (Tex. 1998) (plaintiff must establish other crimes on property or in vicinity; statistics should be regionally specific).

39 *See, e.g.*, Clohesy v. Food Circus Supermarkets, 149 N.J. 496 (1997) (store owner held to awareness of rising crime rate in neighborhood and national epidemic of rapes and robberies in parking lots).

40 Posecai v. Wal-Mart Stores, 752 So.2d 762 (La. 1999); Delta Tau Delta, 712 N.E.2d at 972.

41 Ann M. v. Pacific Plaza Shopping Ctr., 6 Cal. 4th 666, 679 (1993).

42 Posecai, 752 So.2d at 768.

43 *Id.* at 769.

44 *Id.*

controlling the rate of crime. Indeed, to recall the dissent in *Kline*, the court accepted that even if the local crime rate was a basis for predicting crime in the parking lot, the property owner could hardly be blamed for failing to do what, in the court's implied view, even the police could not control.

So once again, the duty of private land-controllers to prevent crime treats the actual crime rate as an exogenous force or fact, part of the "natural world" of politics and economics. In this case, the court assumed that if crime had greatly and perhaps disproportionately encroached on the property, the plaintiff would have had a much better case that the attack on her was foreseeable. But that still would leave the question as to why crime had been encroaching so severely. Might it have been because of appalling failures of the police in the surrounding neighborhood?

In fact, the court came close to the brink of having to confront these matters, because of a strange factor in the evidence, the significance of which will be discussed in the context of the police no-duty doctrine below: The plaintiff put on an expert witness as to the number and frequency of criminal acts that occurred in the parking lot.[45] The expert recounted the actual (few crimes) that had occurred in the parking lot, and also opined on the frequency of crime in the neighboring area and found that rate extremely high. But, as the court noted, the expert woefully failed to compare the neighborhood rate to that in other areas.[46] The court's implied criticism of the expert is telling. He did not make out much of a case of high frequency at this store—apparently he thought he had done so, but his figures were muddled. More notably, the expert offered no regional comparison. But what does that suggest would establish a duty in such cases? An "absolutely" high rate on the premises? A high rate compared to that in the immediate neighborhood, so that the defendant should have been aware that it was a virtual attractive nuisance for crime? A higher rate for the defendant's store than for other stores in the area? Or, as the court suggests, a higher crime rate in this area as compared to others?

To ponder the potential relevance of these questions, consider the following verbal experiment. In these cases, we can imagine the property owner arguing as follows:

"I should have no duty to prevent crime on my premises because the on-premises crime is a consequence of off-premises crime, which either (a) is the duty of the police to control, or (b) is uncontrollable if the police department itself has been unable to control it within the limits of the legal and economic resources the polity provides it. Moreover, to the extent that the off-premises crime rate might make on-premises crime theoretically foreseeable, it take would expert criminologists to perform the extrapolations, and I do not have the data, much less the analytic skills and resources, to accomplish this."

---

45 *Id.* at 764-65.

46 *Id.* at 765.

We can imagine the courts responding in two nervously alternating ways:

(1) "You are opening up larger criminological questions than are relevant to tort law. However clearly the cause of crime on your premises can be traced to the outside world, we are unconcerned about causes—rather, we focus on preventable effects. As long as *some* crimes on your premises are predictable and as long as preventive measures are not too burdensome, we will treat you like a medieval inn-keeper with a duty to her patrons."

(2) "You may be right after all. But we cannot address these questions, because your tort trial will then become (a) a criminological seminar; (b) a version of a trial on scientific issues, in which we have to qualify scientific experts and then ask the judge or jury to evaluate the relatives strengths of their data or conclusions; (c) a legislative or political shouting match; or (d) some volatile combination of any or all of the above. We worry about a separation of powers principle here, but it is more broadly a sort of separation of political and intellectual spheres. We will try to protect you from excessive liability, but please do not ask us to use the common law to assess the duties and capacities of the police or the political salience of crime in modern politics."

Kline and *Posecai* illustrate how the courts ponder the dangers of the second answer above—and then find ways to retreat to the first. To take the pondering one more step, consider one wonderfully contrarian case, *Williams v. Cunningham Drug Stores, Inc.*[47] Williams was shot by a robber in a store in a high-crime area of Detroit. The store usually had an unarmed security guard on the premises, but the guard assigned that day was ill and no substitute was provided. The state supreme court upheld the trial court's directed verdict for the defendant, even though the plaintiff's claim seemed remarkably consistent with the landowner duty cases, and even though the failure to supply a substitute guard in a high-crime area made a rather strong case for negligence here. But the court wanted to rule no-duty as a matter of law, rather than to allow a jury to get into the details of reasonable care in these circumstances. Holding that "public policy concerns" argued against a duty here, it characterized the issue as whether in effect the landowner had to provide "police protection" itself. And it concluded that police protection was a duty "vested in the government by constitution and statute."[48]

As if fulfilling the admonitions of in *Kline*, dissent, the Michigan court went on to hold that the defendant could hardly be asked to control the "incidence of crime in the community" or "to provide a safer environment on his premises than his invitees would encounter in the community at large." Finally, the court noted that even if it attempted to impose that duty, the nature of urban crime was such that the duty would be too vague to be cir-

---

47 Williams v. Cunningham Drug Stores, Inc., 429 Mich. 495 (1988).

48 *Id.* at 501.

cumscribed in a legal doctrine. A landlord cannot be a criminologist, and even if the landowner could be expected to tell, for example, whether a stairway was defective, "how can one know what measures will protect against the thug, the narcotic addict, the degenerate, and the psychotic?"[49]

Thus, *Williams* contemplates the specters raised by the second answer above, but it recoils from them. Its refusal to find a duty is consistent with the first answer above because of the special facts of the case. But also arguably, *Williams* takes the extreme position of saying that, indeed, property owners should not be expected to do what the polity refuses to make the government do. In any event, it admonishes us to worry about what will happen when we really do consider the duty of the polity and the police directly.

II. THE COMMON LAW PUBLIC NON-DUTY

The law of torts offers municipalities several ways to avoid liability for failing to protect people from violent crime. At the state and sometimes the local level there is, of course, classic categorical immunity. But municipalities do not necessarily enjoy such immunity,[50] and even when they do, that immunity has been limited by a variety of doctrines. Some of these limitations are conceptually within the law of immunity. In other situations, courts assume that immunity per se is removed but nevertheless find room under common law tort doctrines—or occasionally under explicit statutes—to conclude that the defendant simply has no duty or has exhibited no lack of reasonable care.

Most fundamental is the limitation within immunity law that distinguishes "governmental" or "discretionary" activities of a state agency from its "proprietary" functions.[51] The city may lose its immunity when a particular function moves along the continuum from government authority over the economy to actual participation in the economy. Needless to say, there are several common law-type factors to help locate the decisive point on the continuum in particular cases. Was the government agency seeking a profit from the activity under review? Or did it least accept a market rate fee for services rendered, or is that service one that normally is provided by the private sector?[52] Under these tests, it is safe to say that police will remain at the immunity end of the continuum.

---

[49] *Id.* at 503, *quoting* Goldberg v. New Jersey Housing Authority, 38 N.J. 578, 589-90 (1962) (The court added that to shift the duty of police protection onto the store owner was to "amount to advocating that member so the public resort to self-help.").

[50] Edwin Borchard, *Government Liability in Tort*, 34 YALE L.J. 129, 132-33 (1924).

[51] DOBBS, *supra* note 6, at 718-19.

[52] Ranells v. City of Cleveland, 41 Ohio St.2d 1 (1975) (release of chlorine gas from city water facility).

Next, the legislature may explicitly remove the municipal agency immunity for specific reasons, such as the availability of insurance.[53] Again, the police will retain their immunity.

Next, there is the public duty doctrine. This doctrine is probably best viewed not as an inherent limit on liability *within* the definition of immunity, but rather as limit on tort liability even where categorical immunity has been removed. But the subtlety of that definitional distinction only replicates the subtlety of the practical distinction between the public duty doctrine and the distinction between governmental/discretionary functions and proprietary ones.[54] Under the public duty doctrine, the key question is whether in the relevant function the agency (regardless of its branch of government) engages in the conscious art of allocating public resources, especially according to some kind of methodical cost-benefit or risk analysis. Some courts follow the "conscious choice" rule, inquiring whether the agency consciously or explicitly engages in a cost-benefit analysis;[55] some ask simply whether the relevant function is one normally appropriate for some kind of rational policy analysis,[56] or, to put it slightly differently, whether the function seems to be in the nature of p*lanning* policy or merely *executing* it.[57]

A second question under the public duty doctrine—sometimes alternative, sometimes supplementary—is about the generality of the class of protected people. Sometimes the statute mandating the authority imposes no duty toward individuals, so it just operates as a form of legislative preemption, a denial of any implied private right of action.[58] There may be a duty where a statute requires officials to do something very precise, such as to report child abuse;[59] or when the officials take some action that induces a reasonably-relying individual to relax her self-protection,[60] as by issuing a

---

53 N.C. GEN. STAT. § 153A-435 (2006).

54 Hill v. Aldermen of City of Charlotte, 75 N.C. 55 (1875) (city suspended anti-fireworks ordinance).

55 Thompson v. Newark, 108 N.J. 525 (1987) (distinction between building structure design and possibly faulty implementation).

56 Bowman v., United States, 820 F.2d 1393 (4th Cir. 1987) (absence of guard rail on highway cannot be basis for liability where government deliberately balanced cost, need, and scenic value).

57 Costa v. Josey, 83 N.J. 49, 55 (1980) (distinguishing improvements in from maintenance of public roads).

58 Suter v. Artist M., 503 U.S. 347 (1992) (no implied private right of action under federal statute where enactment explicitly limits remedy to government suit).

59 Landeros v. Flood, 17 Cal.3d 399 (1976) (medical malpractice for state doctor not to act on evidence of child abuse).

60 Hurst v. Ohio Dept. of Rehab. & Corr., 72 Ohio St. 3d 325 (1995) (no government liability merely for corrections department's failure to alert local police that parolee was out on streets in violation of parole); Morgan v. County of Yuba, 41 Cal. Rptr. 508 (Cal. 1968) (liability provable where police specifically promised to inform victim's family of release of prisoner); Kircher v. City of Jamestown, 74 N.Y.2d 251 (1989) (no reliance where police failed to act on earlier assault report but had no direct contact with victim of later crime).

protective order against the source of a criminal threat;[61] or where the official exacerbates a threat through his own malicious or reckless conduct.[62] Even in the presumptively no-duty area of criminal law enforcement, a police department could be liable if it fails to protect one of its own confidential informants[63] or some other witness vulnerable to retaliation,[64] or if (in rare cases) the city negligently releases one of its prisoners, knowing that a particular victim faces harm from him.[65]

On the whole, however, even those states that have drastically restricted the public duty defense leave it intact in the case of a claim that the police generally failed to protect citizens from foreseeable crime.[66] A few cases of egregious police stupidity or insensitivity aside,[67] the no-duty doctrine stands. So that, for example, the police cannot be held liable where they flatly ignore a kidnap report when simple action might have saved the victim[68] or where they fail to act on a warning of a drunk driver whose arrest could easily have saved a crash victim from disaster.[69]

The lines drawn between the two broad categories of governmental functions sometimes seem arbitrary enough that even an expert on the common law of torts finds them a strain on common law reasoning.[70] And

---

61 Sorichetti v. City of New York, 65 N.Y.2d 461 (1985) (victim had specifically sought police help under terms of protective order against attacker).

62 Calloway v. Kinelelaar, 168 Ill.2d 312 (1995) (egregious failure of police to assist beneficiary of protective order creates triable issue on whether they acted maliciously, not just negligently).

63 Schuster v. City of New York, 5 N.Y.2d 75 (1958) (informant pleaded for protection after his role in investigation became known to fugitive criminal).

64 Wallace v. City of Los Angeles, 16 Cal. Rptr. 2d 113 (1993).

65 State v. Silva, 86 Nev. 911 (1970).

66 Hamilton v. Cannon, 267 Ga. 655 (1997) (immunity removed for such public functions as operating swimming pools, but immunity remains for police). On the other hand, in one truly anomalous decision, a federal trial court held it a violation of the equal protection clause that police department did not give sufficient priority to domestic violence complaints in allocating their resources. Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984). For one case that flat-out imposes a duty on the police see Austin v. City of Scottsdale, 684 P.2d 151 (Ariz. 1984) (police can be held liable when they failed to comply with own protocol for responding to emergency calls).

67 DeLong v. County of Erie, 60 N.Y.2d 296 (1983) (emergency hotline dispatcher had reassured caller that help was on the way and then got location wrong); *cf.* Torres v. State, 119 N.M. 609 (1995) (local police failed to request out of state warrant or consult FBI).

68 Kircher v. City of Jamestown, 74 N.Y.2d 251 (1989) (no special relation to or reliance by victim).

69 Ezell v. Cockrell, 902 S.W.2d 394 (Tenn. 1995) (police officer had directly confronted drunk man and warned him not to drive, yet did not stop him).

70 "Liability . . . means that if the entity chooses a dangerous course of conduct, it should pay its way, just as private businesses must do. Besides that, since costs of many governmental decisions and actions represent a real loss or expense to someone in the polity—either the individual victim or the public entity—judges must not defer too readily to misconduct in another branch of government." DOBBS, *supra* note 6, at 721. Dobbs goes on to note that government workers can and should be held to standards of due care in their professional work regardless of what side of the immunity or public duty line they sit on. Moreover, he objects to the rule that the availability of an alternative defendant

the nuances of the immunity/non-immunity or the duty/non-duty line are nuanced enough for one torts expert to refer to this as "one of the law's ghostlier demarcations."[71] To explore them further, one major case may be sufficient. If *Kline*, modified by *Posecai*, concisely sets out the "private" duty to prevent crime, a perfect illustration of the non-duty of public governments is the tragic case of *Riss v. City of New York*.[72]

In *Riss*, a woman being stalked by a rejected suitor alerted the police to the threats he posed and pleaded unsuccessfully for protection. Soon the suitor arranged for her to be viciously assaulted with acid that disfigured her for life. In rejecting her tort claim against the city, the majority stated the basic principle:

> The amount of protection is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources of the community should be allocated and without predictable limits. This is quite different from the predictable allocation of resources and liabilities when public hospitals, rapid transit systems, or even highways are provided.[73]

This is a wonderfully rich passage to mine. Although the large cloak of sovereign immunity has been lifted, a concern over separation-of-powers leaves a kind of presumption against municipal liability here, because the allocation of resources in so wide and diffuse an area as criminal enforcement seems, to the court, a peculiarly legislative or executive task. Of course, we know that if the legislature has assumed a risk of liability by entering areas of commerce or service through presumably studied budgetary decisions (hence the transit, hospital, and highway examples), then we are in effect merely reading its legislative intent in determining the scope of liability. Put another way, the consequence of a supposedly targeted municipal entry into service or commerce is predictability of risk and thus of liability. As the court also says, in those exceptional situations where the legislature addresses criminal harm through such targeted rules as Victim Compensation or Good Samaritan statutes, it does so as a scientific regulator of definable risk "only after the most careful study of conditions and the impact of such a scheme upon governmental operations and the public fisc."[74]

Thus, by implication, crime is a prime example of a form of conduct that the legislature cannot predict and over which it therefore cannot impose

---

justifies sustaining immunity for dangerous government functions because, as he notes, such a rule is never imposed on private plaintiffs. *Id.* at 726.

71 *Id.* at 722.

72 Riss v. City of New York, 22 N.Y.2d 579 (1968).

73 *Id.* at 581-82.

74 *Id.* at 582-83.

some methodical policy of control. Obviously, legislatures can *somewhat* control crime, but crime remains part of the vagaries of social life in a more diffuse way than other social phenomena. Put still another way, there is the issue of space. In the area of services, the government either acts as landowner or land patroller, and in such defined space it can set some boundaries around risk. But this is not so in the case of police patrols, where, in effect, all of public space and all of social life are the venue.

On the one hand, the court suggests that the police cannot be held liable to control crime, because they cannot predict crime or measure its risks as they can other phenomena. On the other hand, in a strangely dissonant note, the court invokes, as did the dissent in *Kline*, the specter of crime as the irreducible force of nature, outside the realm of regulation, and in doing so it turns the matter of predictability around:

> When one considers the greatly increased amount of crime committed throughout the cities, but especially in certain portions of them, with a repetitive and predictable pattern, it is easy to see the consequences of fixing municipal liability upon a showing of probable need and request for protection. To be sure these are grave problems at the present time, exciting high priority activity on the part of the national, State, and local governments, to which the answers are never simple, known, or presently within reasonable controls. To foist a presumed cure for these problems by judicial innovation of a new kind of liability in tort would be foolhardy indeed and an assumption of judicial wisdom and power not passed by courts.[75]

Notice that here that the amount, or more specifically, the *pattern* of crime, is quite predictable—as are, in effect, the consequences of fixing legal responsibility for it. What is unpredictable is the right answer for curbing crime, though the court adds the odd phrase "or presently within reasonable controls," a phrase which would make some sense if it modifies "crime" but not so much sense if it modifies "answers." So a suspicious interpreter of this passage might construe its message as something like this: In fact, we can predict crime in terms of amount and pattern and location. But how a legislature would respond to the incidence of crime, if it really confronted it, is very hard to predict, because this prediction would require an assessment of the volatile dynamics of politics and economics that underlie the governing of the crime problem in America. Crime is in one sense a force of nature for which we cannot expect cities to accept the risks. In another sense, the exogenous force of nature is not crime per se but the amount and form and location of crime a society is willing to accept, and which is in turn contingent on the real force of nature here, which is the politics of crime.

It is not hard to elaborate a critique of this decision, because the dissent does so quite forcefully for us.[76] The dissent will have none of this stuff about uniquely horrible consequences, and it offers a passionately

---

[75] *Id.*

[76] *Id.* at 583 (Keating, J., dissenting).

negative answer to the question whether the two duty doctrines I am addressing are consistent. Crime is no different from other problems that legislatures and societies take on. Whatever the exogenous forces that produce risk, cities set up offices to deal with them and can generally be held to a standard of reasonable care in doing so. Crime is no more an "external hazard" than snowstorms. If police departments fail, they can be sued, and they will then face the perfectly mundane choice of paying the victims of this risk in judgments or in redistributing the dollars for prevention. If the majority is implicitly afraid that liability in crime cases would import politics into tort law, the dissent's view is that politics is already part of tort law, and in a benign, co-existing way.

As for parades of horribles, cities do not face bankruptcy because of other risks, and the risk of liability for crime is not categorically different.[77] The dissent may be empirically wrong here, because there may be huge differences in terms of cost and controllability between the "active negligence" of officials and the kind of negligence alleged in *Riss*. The dissent keeps sneaking in references to the limitations on liability that would be implicit in holding for Riss here. After all, she alerted the police to the risk and pleaded with them for help, and the risk apparently could have been pre-determined to be very severe. But the dissent may not do a very good job of reassurance along these lines, because much of its argument would support a much broader rule of liability. It is not reassuring to keep saying that the police need only act as a reasonable police department would, because the open-endedness of that standard probably has scared off the majority.

Of course, the dissent strains to say that "the unlikely but devastating effects of 'mass riots' would lie outside the scope of liability—that liability would be limited to "the everyday problem posed by the relatively few cases where single, known individuals threaten the lives of other persons."[78] But would the "single, known" standard remain stable and strong against future claims where the argument is that even if no "single" threat was known by name, the inevitability of criminal harm in certain urban situations is nonetheless as strong or stronger? The dissent confidently says that tort liability "will act as an effective inducement for public officials to provide at least 'a minimum adequate number of police."[79] And it suggests that a decision that could be made by a reasoned administrative process in the executive and legislative branches, whereas the *Riss* case resulted from random police carelessness, not high-level management choice.

But what does it mean to keep the courts out of the process of reviewing choice where the question is "minimally adequate number of police"?

---

[77] Of course the dissent might have said that cities may indeed go bankrupt, but the bankruptcy laws themselves allow the city to survive the debt.

[78] *Id.* at 587.

[79] *Id.*

Just in the last few years, as America has experienced a remarkable drop in crime rates, especially for violent street crime, a new scholarly subfield has naturally emerged to study its causes and implications. Political credit-claimants for and academic analyses of the late 1990's drop have proliferated.[80] World-class social scientists have done statistical analyses to identify potential causes, including careful parsing of the role of police,[81] while others have cautioned skepticism about the ability of social science to draw meaningful conclusions.[82] Would tort trials become the venue for this profoundly difficult inquiry?

III. CONCLUSION

Now recall that in the *Posecai* case the hapless expert witness was faulted for the incompleteness and muddiness of his evidence, and the court implicitly laid out the kind of expert testimony that might have won the case for the plaintiff.[83] If the dissent in *Riss* is right, by implication we could have such expert testimony in police-defendant cases. But what would it be? Who could opine on the cost of training and monitoring it would take to prevent the harm that happened to a risk-alerter like Linda Riss? More importantly, though the *number* of police was not an issue in Linda Riss's own case, the broad implications of the dissent suggest that we might have to take on that larger issue of minimal adequate police protection.

What would that mean? Comparing crime rates in some parts of the city to others to determine what a "reasonable crime rate" is? Comparing the crime rate in one city to that of another? Comparing differing police intervention techniques among cities? Measuring the budgetary limitations of cities in relation to other cities, or in relation to the power of state or federal government to enhance police resources? Would the expert have to opine on the correlation, or even causation, between density of police and crime reduction? Or on how the legal rules governing police can channel or even distort the allocation of otherwise fixed police resources to different

---

80 *See generally* ALFRED BLUMSTEIN ALFRED, JOEL WALLMAN & DAVID FARRINGTON, THE CRIME DROP IN AMERICA (Cambridge Univ. Press 2000).

81 Steven Levitt, *Understanding Why Crime Fell in the 1990's: Four factors That Explain the Decline and Six that Do Not*, 18 J. ECON. PERSPS. 163 (2004) (major causes were increase in ratio of police to population (but not new policing techniques), legalization of abortion, rise in incarceration rates, and demise of crack-cocaine epidemic). For a review of studies on the crime-reducing effects of innovative new policing techniques in various major cities, *see* Richard Rosenfeld, Robert Fornango & Eric Baumer, *Did* Ceasefire, Compstat, *and* Exile *Reduce Homicide?*, 4 CRIMINOLOGY & PUB. POL. 419 (2005); Robert Weisberg, *Reaction Essay: Meeting Consumer Demand in Modern Criminology*, 4 CRIMINOLOGY & PUB. POL. 471 (2005) (assessing political implications of these empirical studies).

82 FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DROP (2006).

83 *See* Posecai v. Wal-Mart Stores, Inc., 752 So.2d 762 (La. 1999).

parts of the city? The dissent sets in motion a tropism towards a bizarre kind of expert evidentiary hearing where, first, the profession of criminology comes to the stand, and, even worse, the profession of political science. Before long, the political processes that address the "crime problem" in the United States take over the courtroom.

I have, of course, just engaged in wild and fanciful speculation. The dissent may be right that we can cabin the tort duty of police to the known specific threats of the sort that Linda Riss faced, and maybe we would thereby make the tort duty of the police simply a mundane extension of the liability of private defendants. The law seems to fear otherwise. *Riss* is pretty good law in the United States. As noted above, a few state cases draw a subtle line whereby the police will face some liability if the courts have issued a protective order against a threatener (though some courts reject even that). So most states would limit the police duty to cases where the officers have acted like negligent Good Samaritans—that is, where they have actively undertaken to help particular crime victims and have failed to do so reasonably well. And I suggest that the reason for this equilibrium in the law might have something to do with fear of the wild and fanciful speculations I have offered.

I suggest that this is how, and not entirely happily, the two doctrines I set out at the start can be reconciled. Crime control is not just a matter of "policy"—indeed not merely "political." It has become one of the major forms that modern American politics has taken. Tort cannot be neatly separate from politics, but it needs to try to keep the larger dynamics of politics outside its boundaries. In fact, the police do have a duty to protect citizens from harm, but the duty is enforced through politics. Without any possibility of empirical proof, I suggest here that the split tort doctrine reflects a fear that tort law will not just become "politicized" but that it will become the arena of politics more generally. Perhaps the police should have a duty to prevent crime, enforceable in tort, but if we are to have that rule, we might have to create a different kind of politics of crime—cool administrative or regulatory politics in which the Willie Hortons of the world are simply topics for technical discussion of furlough programs, not icons in national elections.

FROM DOMESTIC TERRORISM TO ARMED REVOLUTION: WOMEN'S RIGHT TO SELF-DEFENSE AS AN ESSENTIAL HUMAN RIGHT

*Mary Zeiss Stange**

I. EMBODIED PARTICULARS

> Inequality is treating someone differently if one is the same, the same if one is different. Unquestioned is how difference is socially created or defined, who sets the point of reference for sameness, or the comparative empirical approach itself. Why should anyone have to be like white men to get what they have, given that white men do not have to be like anyone except each other to have it?[1]

Any discussion of the gun as a "great equalizer" in the debate about a human right to self-defense is probably well-advised to begin with the question of what constitutes equality in the first place. This is especially the

---

* As the author of *Woman the Hunter* (Boston: Beacon Press, 1997/1998), the first cultural history of the relationship of women and hunting, Mary Zeiss Stange has gained national recognition as the primary scholar working on the subject today. She has been profiled in *The Chronicle of Higher Education, USA Today,* and in widely syndicated Associated Press stories; has been interviewed by *The New York Times, Outside Magazine* and the BBC; and has done numerous interviews on National Public Radio, including "Talk of the Nation" and "To the Best of Our Knowledge." Stange and her work were the subject of "She Got Game," a lengthy feature interview by Barbara Ehrenreich, in the June/July 1999 issue of *"Ms." Magazine.*

Her second book was a collaboration with psychologist Carol K. Oyster. *Gun Women: Firearms and Feminism in Contemporary America* (New York: New York University Press, 2000). It deals with women's various positive relationships with firearms (self-protection, hunting, recreational and competitive shooting, careers like law enforcement and the military). Stange's third book, *Heart Shots: Women Write about Hunting*, a critical anthology of historical and contemporary women's outdoor writing, was published in August 2003 by Stackpole Books. Her next book, tentatively titled *Hard Grass: A Crazy Woman Memoir,* traces the changing realities of high plains ranch life. It will be published by the University of New Mexico Press in 2008.

She is Professor of Women's Studies and Religion at Skidmore College, where for eight years she served as Director of the Women's Studies Program. Stange was the 2004-2005 Edwin R. Moseley Faculty Lecturer at Skidmore, an award which "acknowledges an exemplary level of scholarship and achievement that sets a standard for academic excellence at Skidmore. It is the highest honor that the Skidmore faculty can bestow on one of its own." She writes regularly for *USA Today* and is a member of its editorial Board of Contributors. She also writes about women and guns, hunting and environmental issues, and various social issues for such national publications as *Outdoor Life, Sports Afield, Bugle, American Hunter, The Chronicle of Higher Education, The Women's Review of Books,* and the *Los Angeles Times.*

[1] Catharine A. MacKinnon, *Sexual Abuse as Sex Inequality, in* WOMEN'S LIVES, MEN'S LAWS, 119-120 (2005).

case when the question is women's right to self-defense as a basic human right, which must start from the dual realities of the fiction of equality under the law, and the concomitant fact of women's systematic subordination to men. As Catharine MacKinnon remarks, "That women have voluntarily engaged law at all is a triumph of determination over experience. It has not been an act of faith."[2] Feminist legal theorists[3] have pointed out that male-constructed equality doctrine—which amounts to "be like us and we will treat you the same as we treat each other"[4]—has had the net effect of shoring up male dominance, under the guise of taking into account the ways in which women and men find themselves differently or similarly "situated" in various legal contexts. Patricia Cain concludes that this appeal to a formal concept of equality is a legal dead-end, in that, "In a sense, the result is to make women into men."[5]

"Woman" remains such a problematic category in legal discourse that MacKinnon at one point invokes the philosopher Richard Rorty's observation that "a woman is not yet the name of a way of being human."[6] Elsewhere, she observes:

> Inequality is not conceptually reversible, only concretely changeable. To be "similarly situated," a test that relies on and produces abstract counter-hierarchical comparisons as the essence of equality reasoning, thus cannot remain the threshold for access to equality guarantees. If inequality is concrete, no man is ever in the same position a woman is, because he is not in it as a woman.

Phrased more simply, "Inequality . . . is not a bad attitude that floats in the sky, but an embodied particular that walks on the ground."[7] It is that concrete particularity that MacKinnon cares about—as do I in this essay. Reflecting, as she almost invariably does, on the real-life situations in which battered and sexually abused women find themselves, she writes:

> Their screams of pain and terror are not generally valorized as a "different voice." Their difference lies in being on the bottom. It is this hierarchy that defines whatever difference matters, not the other way around. . . . Tolerance of their differences or abolishing sex as a legal category or getting law more accurately to reflect their individuality is not even a watered-down approximation of what they need. What they need is change: for men to stop hurting

---

2 *Id.* at 118.

3 *See, e.g.*, FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER, (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

4 MacKinnon, *supra* note 1, at 120.

5 Patricia A. Cain, *Feminism and the Limits of Equality, in* FEMINIST LEGAL THEORY: FOUNDATIONS, 237, 238 (D. Kelly Weisberg ed., 1993).

6 MacKinnon, *supra* note 1, at 25.

7 *Id.* at 147.

> them and using them because they are women, and for everyone to stop letting them do it because they are men.[8]

Here she writes in much the same spirit as did Carol Silver and Don Kates in 1979, when they remarked that "musings about better solutions are of very little aid to a woman who is being strangled or beaten to death."[9] Like Silver and Kates, MacKinnon locates the problem in the interpretation of self-defense law as it applies to women. The fact that a generation has passed, during which the pace of legal reform may at best be described as glacial, amply illustrates that the law almost invariably falls short of serving the interests of those women most in need of its protection.

Unlike Silver and Kates, MacKinnon has not generally invoked women's right to bear arms in self-defense against domestic violence and/or rape. However, in an article recounting a report of the sexual abuse of Muslim girls in Serbia by United Nations forces stationed there ostensibly for those same girls' protection, she has remarked:

> It pointedly poses a problem women have always had with male protection: who is going to watch the men who are watching the men who are supposedly watching out for us? Each layer of male protection adds a layer to violence against women. Perhaps intervention by a force of armed women should be considered.[10]

That she raises the latter idea only to drop it in the next paragraph suggests that for MacKinnon the "embodied particularity" of armed women actually fighting back remains largely rhetorical.

The same was not necessarily the case for her long-time collaborator, the late Andrea Dworkin. Writing as a feminist, rather than legal, theorist, and as an abuse survivor herself, Dworkin connected the psychology often at work in abusive contexts with the legal consequences of fighting back:

> Women don't understand self-defense the way men do—perhaps because sexual abuse destroys the self. We don't feel we have a right to kill just because we are being beaten, raped, tortured, and terrorized. We are hurt for a long time before we fight back. Then, usually, we

---

[8] *Id.* at 124. MacKinnon is playing off psychologist Carol Gilligan's theory of women's "different voice," arising from their differential social and cultural positioning relative to men. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE (Harvard University Press 1982). MacKinnon's remark here tacitly connects Gilligan's theory to the line of thinking commonly referred to as "victim feminism," an intimation with which I would concur, to the extent that theories like Gilligan's often wind up ironically accounting for the position in which battered women find themselves.

[9] Carol Ruth Silver & Don B. Kates, Jr., *Self-Defense, Handgun Ownership, and the Independence of Women in a Violent, Sexist Society, in* RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 139 (Don Kates, ed., North River Press 1979).

[10] Catharine MacKinnon, *Rape, Genocide and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 13 (1994).

> are punished: "I have lived in a prison for ten years, meaning my marriage, . . ." says Jayne Stamen, "and now they have me in a real prison."[11]

In a similar vein, sociologist Ann Jones recounts a prison conversation between two women, both of whom had been convicted of murdering their abusive spouses: "When I get out of here," one (who claimed she accidentally shot her former husband to death with a shotgun) remarked, "I'll never have a gun around the house again." To which the other (who had hired a hit man to kill her spouse) responded, "If I ever get out of here, I'll never have a man around the house again."[12]

The exchange highlights a set of fundamental assumptions at work in attitudes about appropriate gendered behavior: Men abuse women not only because they can, but because they are men. Men abuse women not simply because they are vulnerable to abuse, but because they are women. Women, because they are women, are incapable of using violence instrumentally as men do. It is, therefore, up to (good) men to protect women both from (bad) men, and from their own incapacities. To the extent that social attitudes reflect legal assumptions (and vice versa), the persistence of the idea that it is up to men to protect women may be, as anthropologist Abigail Kohn suggests, "a long-standing echo of the early American tradition of coverture, in which the head of household had a duty and responsibility to maintain the physical safety of those dependents under his roof."[13] Yet darker stereotypes inform such male gallantry. Philosopher Lance Stell puts it this way:

> As cast by the stereotype, women should be no better at managing the means of applying deadly force than it would have them be at handling mice or snakes or changing oil filters. We still live with a social perception that threatened women are hysterical and that armed threatened women are a danger to everyone except their assailants.[14]

Better, then, to let the men take care of things.

---

[11] ANDREA DWORKIN, *Beaver Talks, in* LIFE AND DEATH: UNAPOLOGETIC WRITINGS ON THE CONTINUING WAR AGAINST WOMEN, 86-87 (1997). It bears remarking in this context that women who are convicted of murdering their husbands typically receive much harsher sentences than men who kill.

[12] ANN JONES, WOMEN WHO KILL, 323-324 (1980).

[13] ABIGAIL A. KOHN, SHOOTERS: MYTHS AND REALITIES OF AMERICA'S GUN CULTURE, 106-07 (2004), (noting that "some traditions die hard," Kohn relates in her ethnography that this idea persists even among men whose wives and daughters are gun-owners thoroughly capable of defending themselves).

[14] Lance K. Stell, *The Legitimation of Female Violence, in* JUSTICE, LAW, AND VIOLENCE 250 (James B. Brady & Newton Garver eds., 1991). On the idea that armed women are, ipso facto, dangerous to themselves and everyone else in the immediate area, see Mary Zeiss Stange, *High Noon at the Gender Gap: Feminism and the Firearms Debate, in* MARY ZEISS STANGE & CAROL K. OYSTER, GUN WOMEN: FIREARMS AND FEMINISM IN CONTEMPORARY AMERICA, 21-57 (2000).

Feminist theory has too often unwittingly bought into the same stereotype of female weakness. Human rights activist Charlotte Bunch, for example, approvingly quotes Lori Heise's pronouncement that violence against women "is not random violence . . . [T]he risk factor is being female." She then adds, "Victims are chosen because of their gender."[15] That such statements are unarguably true amounts on one level to a tautology—male violence against women is perpetrated by men against women. However, an ever-growing body of research attests that women are not all victims in the same way, either actually or potentially: The risk factors for rape and other forms of abuse are considerably higher for some demographic groups than for others. And women who aggressively defend themselves against threatened assault have a greater likelihood of averting attack, with the chance of escape increasing in direct proportion to the level of aggressive resistance.[16] Viewed in this light, the feminist focus on the universal "risk factor" of being female yields an unfortunate result aptly stated by sociologist Jocelyn Hollander:

> In calling much-needed attention to men's violence against women, women's experiences of violence have often become conflated with women's vulnerability to violence; because women are frequently victimized, many have assumed that women are innately and necessarily vulnerable to such victimization.[17]

Small wonder, then, that women live in a state of constant apprehensiveness regarding their vulnerability to rape, what sociologists Margaret Gordon and Stephanie Rigor have dubbed "the female fear."[18]

That feminist theory thus can itself become one of the factors reinforcing women's tendency toward "learned helplessness" is a point not lost on certain radical feminists. Among them, most notably, D. A. Clarke has argued that the prevailing feminist sentiment in favor of "nonviolent resistance" to abuse is utterly meaningless, as long as women both are perceived

---

15 Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 Human Rights Quarterly 486, 490 (1990).

16 *See, e.g.*, Sarah E. Ullman & Raymond A. Knight, *Fighting Back: Women's Resistance to Rape*, 7 J. INTERPERSONAL VIOLENCE 33 (1992) ; Sarah E. Ullman & Raymond A.Knight, *The Efficacy of Women's Resistance Strategies in Rape Situations*, 17 PSYCHOL. WOMEN Q. 23 (1993); Judith T. Becker et. al., *The Effects of Sexual Assault on Rape and Attempted Rape Victims*, 7 VICTIMOLOGY 106 (1982); Brenda S. Griffin & Charles T. Griffin, *Victims in Rape Confrontation*, 6 VICTIMOLOGY 59 (1981). *See generally* PAULINE B. BART & PATRICIA B. O'BRIEN, STOPPING RAPE: SUCCESSFUL SURVIVAL STRATEGIES (Pergamon Press, 1985).

17 *See* Jocelyn A. Hollander, *"I Can Take Care of Myself:" The Impact of Self-Defense Training on Women's Lives*, 10 VIOLENCE AGAINST WOMEN 205, 222 (2004).

18 *See* MARGARET T. GORDON AND STEPHANIE RIGER, THE FEMALE FEAR: THE SOCIAL COST OF RAPE (Chicago: University of Illinois Press, 1991) (1989). It is important to note that this fear, whether it is in every case "realistic" (given varying risk factors noted above), nonetheless has numerous genuine social and economic costs for all women.).

and perceive themselves as being incapable of genuine aggression. Women, she maintains, need both to experience their lives and selves as worth fighting for, and themselves as willing and able to fight:

> If women defended themselves violently, the amount of damage they were willing to do to would-be assailants would be the measure of their seriousness about the limits beyond which they would not be pushed. If more women killed husbands or boyfriends who abused them or their children, perhaps there would be less abuse. A large number of women refusing to be pushed any further would erode, however slowly, the myth of the masochistic female which threatens all our lives.[19]

Thinking along similar lines, Dworkin, in a trenchant essay "In Memory of Nicole Brown Simpson," catalogues the stories of women trapped in abusive relationships by a powerlessness both socially- and self-inflicted. In each case, the abuser went free. "You won't ever know the worst that happened to Nicole Brown Simpson in her marriage because she is dead and cannot tell you," Dworkin writes, "And if she were alive, remember, you wouldn't believe her." She concludes:

> Though the legal system has mostly consoled and protected batterers, when a woman is being beaten, it's the batterer who has to be stopped; as Malcolm X used to say, "by any means necessary"—a principle women, all women, had better learn. A woman has a right to her own bed, a home she can't be thrown out of, and for her body not to be ransacked and broken into. She has a right to safe refuge, to expect her family and friends to stop the batterer—by law or force—before she's dead. She has a constitutional right to a gun and a legal right to kill if she believes she's going to be killed. And a batterer's repeated assaults should lawfully be taken as intent to kill.[20]

Arguments such as Clarke's and Dworkin's remain peripheral to what might be called "mainstream" feminist discourse, which stresses women's role as nurturers and peacemakers, and condemns all forms of aggression, particularly those involving arms. In most feminist theory, violence is therefore gendered masculine, and pacifism gendered feminine. When it comes to the problematic cases of women who do, in fact, engage in various activities that involve actual or potential aggression, there is a marked tendency to dismiss these women as delusional dupes of patriarchal culture: They are either trying to be like men, or seeking male approval, or both.[21]

However, as so often proves to be the case, what is happening among women on the ground differs from what theorists—most of whom lead rela-

---

[19] *See* D. A. Clarke, *A Woman With a Sword: Some Thoughts on Women, Feminism, and Violence*, *in* TRANSFORMING A RAPE CULTURE 393, 401 (Emilie Buchwald, Paula R. Fletcher, & Martha Ross, eds., Milkweed Editions, 1993).

[20] *See* Andrea Dworkin, *In Memory of Nicole Brown Simpson*, *in* LIFE AND DEATH, *supra* note 11, at 41, 50.

[21] For a summary statement of this line of reasoning, *see* ROBIN MORGAN, THE DEMON LOVER: THE ROOTS OF TERRORISM (Washington Square Press/Pocket Books 2001 (1989)).

tively sheltered academic lives—say is happening. Women have not only become doctors, lawyers, professors, research scientists, religious ministers, and construction workers in record numbers in recent years. They have also entered the military and law enforcement, and taken up an array of shooting sports. At best a tiny minority of these women would, if questioned, respond that they are doing what they do because they want to be like men, or to bask in male admiration.[22]

Further, and more to the point of the present essay, women in growing numbers have discovered what gender theorist Martha McCaughey has termed the "physical feminism of self-defense"—that is, their ability to "get mean," and to mean it. The women McCaughey interviewed and trained with in a variety of settings—courses in martial arts and cardio-kick-boxing, padded attacker and firearms safety classes—did not necessarily self-identify as feminists. McCaughey argues, however, that in learning to use their bodies (and various extensions thereof, including firearms) actively and assertively, and experiencing themselves as powerful agents rather than powerless victims, these women were, literally, living feminism.[23]

Building on McCaughey's insights, Jocelyn Hollander mounted a study of feminist self-defense courses, that is, courses which are organized around an explicitly feminist message, "the idea that one's life and one's self are worth defending." She discovered a consistent pattern of female empowerment, which squares exactly with the propositions ventured by Clarke and Dworkin. "The knowledge," she writes, "that one can defend oneself—and that the self is valuable enough to merit defending—changes everything." Hollander goes on to observe that "the self is not all that self-defense classes change. Equally important are changes in ideas about women—and implicitly, about men and gender." On an individual level, this transforms what it means to be "a member of the category 'women.'"[24] More broadly, such change would entail a transformation of how members of the category "men" understand themselves, and conduct their lives, as well.

Of course, much depends on whether men are willing to buy into this program of transformational change, toward more genuine equality between the sexes. In this regard, the following case study is instructive.

---

22 I recognize that one line of feminist reasoning would argue here that these women have been so "colonized" by masculinist culture that they neither fully nor consciously understand the ways in which their behavior is rooted in socially constructed gender codes. To a certain extent, on a theoretical level, I agree with this argument. However, on a more practical level, I hold—as do a growing number of feminists, especially those dealing with cross-cultural women's issues—that precisely *as* feminists it is incumbent upon us to take seriously and at face value the reasons women provide for acting and thinking as they do. To do otherwise is the height of condescension.

23 *See* MARTHA MCCAUGHEY, REAL KNOCKOUTS: THE PHYSICAL FEMINISM OF WOMEN'S SELF-DEFENSE (New York and London: New York University Press (1997)).

24 HOLLANDER, *supra* note 17, at 226-227.

II. THE LIMITS OF LEGISLATING WOMEN'S SAFETY

In 1989, Puerto Rico passed domestic violence legislation which feminists quickly hailed as an international model for legal reform. According to the language of Law 54, the Domestic Violence Prevention and Intervention Law, domestic abuse is defined as follows:

> [A] consistent pattern of conduct involving physical force or psychological violence, intimidation, or persecution against a person by his/her spouse, former spouse, a person with whom he/she cohabits, or has cohabited, with whom he/she has, or has had, a consensual relationship, or a person with whom a son or daughter has been procreated, to cause physical harm to their self, their property, or another's self, or to cause him/her grave emotional harm.[25]

That the Law goes on to spell out in intricate detail what constitutes "emotional harm," regarding the full range of psychological abuse[26] to be equally important as physical abuse, clearly represents a significant advance over similar legal constructions. So, too, do the facts that it holds the abuser responsible for the abuse, rather than blaming the victim; and applies regardless of the current status of the relationship between the parties involved. Law 54 further provides for mandatory arrest of the abuser, which may be carried out without benefit of a warrant if law enforcement officers have sufficient reason to believe abuse has occurred, and without requiring the victim to file charges. Abusers may be charged with up to five crimes: aggravated abuse, abuse, threat to abuse, abuse and kidnapping, and marital rape. All are defined as serious offenses, and carry severe mandatory prison sentences.

Significantly, Law 54 was intended not only to apprehend and punish abusers, but to transform social relations between men and women. It mandated extensive community education on domestic violence, and the development of social services to address the needs of women and children, not only via providing shelter and psychological counseling, but also through loans and job-training programs. It also mandated a reorganization of government service agencies addressing abuse situations, to guarantee efficient and rapid response. And it empowered the Puerto Rico Commission for Women's Affairs to monitor and assess implementation. The goal was to

---

25 *Quoted in* Jenny Rivera, *Puerto Rico's Domestic Violence Prevention and Intervention Law: The Limitations of Legislative Responses, in* GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER 349 (Adrien Katherine Wing ed., 2000).

26 *Id.* (explaining that in the Law, psychological abuse includes "A constant pattern of conduct performed to the dishonor, discredit, or scorn of personal worth, unreasonable limitation to access and handling of common property, blackmail, constant vigilance, isolation, deprivation of access to adequate food or rest, threats of deprivation of custody of sons or daughters, or destruction of objects held in esteem by the person, except those that privately belong to the offender.").

transform gender relations in such a way as to genuinely empower women and girls.

On the face of it, this looks like legislation feminist jurists like Catharine MacKinnon might themselves have written. But—as MacKinnon would be the first to point out—since it was written and implemented largely by men, in the context of a male-dominated system (indeed, one driven by the cultural ideal of *machismo*), there would have to be a catch somewhere. Indeed, there is. Law 54 provides that the court has the discretion to "supercede" the case against any individual abuser: in the best case scenario, this means substituting participation in a rehabilitation program for prison time; in the worst case, it allows throwing out the charges entirely.

Law professor Jenny Rivera presents a case which amply demonstrates, as she puts it with well-modulated understatement, "the limitations of legislative responses" to domestic violence, *El Pueblo de Puerto Rico v. Lacroix Correa*:

> Lizette Maclun Valencia, the complainant, and Alejandro Lacroix Correa, the defendant, had been involved in an intimate relationship until 1988. They had lived together for one year when their relationship ended because of Lacroix Correa's unbearable conduct toward Maclun Valencia when he became drunk. One day, Lacroix Correa saw Maclun Valencia on a public street and physically and verbally accosted her. He stuck his hand through the car window where she was seated, punched her below the right cheekbone, and called her a dirty whore. As a result of her injuries, Maclun Valencia had to get nine stitches and was placed on antibiotics.
>
> At the plea colloquy, Lacroix Correa pleaded guilty to the lesser charges of aggravated assault and disturbance of the peace. In return, and pursuant to a plea agreement, the prosecutor recommended that the court impose a suspended sentence. The lower court rejected the recommendation and sentenced Lacroix Correa to two consecutive six-month terms of incarceration, one on each count.[27]

Puerto Rico's Supreme Court overturned the lower court's decision on appeal, and gave the abuser his suspended sentence. Their reasoning had to do with several "mitigating factors:" that he did not have a prior criminal record; that he held a college degree; that, being employed in a well-paying job as an automobile leasing company sales representative, he was socially upstanding; that, as the father of two dependent teenage children from a previous marriage, he had family responsibilities; and that his probation officer reported that he "has an adequate social conduct, except for some adulterated images of the female as a result of his prior marital experiences. This induces him to be aggressive with women when he comes into contact with liquor."[28] The Supreme Court did decide that, in addition to his suspended sentence, Lacroix Correa should abstain from alcohol, enter a

---

[27] *Id.* at 357.

[28] *Id.* at 357-58.

treatment program for his alcohol abuse, and stay away from Maclun Valencia.

In light of a case like this one, it comes as little surprise to learn that the Women's Commission's periodic reports on the status of Law 54 have been characterized by three "themes:"

> First, Law 54 represents a radical change in Puerto Rico's social and legal fabric. Second, law enforcement officials have resisted the change in legal and social culture envisioned by Law 54. Third, patriarchal ideologies threaten the Law's implementation and the criminalization of domestic violence.[29]

The more time has passed since Law 54's enactment, the more entrenched have become the positions both of law enforcement officers, who are ever less willing to intervene in domestic violence situations, and civil authorities ever more willing to define domestic violence as something that happens in private, and beyond their jurisdiction.[30]

Of course, the distinction between the public and private spheres—another legacy of coverture—has bedeviled women's rights advocates from the beginning of the movement to end domestic violence. In this respect, the Puerto Rican story mirrors developments in the United States. From the 1970s forward, the women's movement made major strides, both toward raising public awareness about the nature and extent of domestic abuse and sexual violence, and toward developing legal mechanisms and social structures to address the violence against women that had clearly achieved epidemic proportions. But, as journalist Sara Catania recounts, "What began as a scrappy, grassroots effort has become a bureaucratized entity allied so closely with the criminal justice system that it has sacrificed much of its ability to effectively critique that system and push for reform." Catania quotes Ellen Pence, a national leader in the abuse intervention movement: "Twenty-five years ago we had a notion that we were organizing to change the system. Then this funny change happened, where instead of us advocating for what women needed from the system, we started advocating the system to women."[31]

Of course, and far from being "funny," this was not the change women and children at risk needed. What they needed was for the violence to stop.

In fact, tragically little has really changed. Police officers still go out of their way not to intervene in cases of domestic abuse. Orders of protection remain notoriously ineffective. Prosecutors persist in placing the bur-

---

[29] *Id.* at 353.

[30] Even if that "private" space is a city street. Note, in this regard, that had LaCroix Correa attacked a man in the same way he assaulted his former lover, it is highly unlikely that the court would have taken any of those "mitigating factors" into consideration.

[31] Sara Catania, *The Counselor*, part of the feature series "Domestic Violence: No Safe Haven," Mother Jones, July/August 2005, at 46.

den of proof on victims to demonstrate that they were not in some fashion to blame for the violence visited upon them. Rape and domestic violence are, not coincidentally, among the most underreported crimes. As many as one in three women will be sexually assaulted in her lifetime, most likely by a man she knows. One in three women murdered is killed by her abuser, generally after a long history of escalating violence, and most often after trying to leave the abusive relationship. Murder is the leading cause of death among pregnant women. If anything deserves the name "domestic terrorism," this is it.

Many women's advocates see a form of "backlash" here. According to Joan Meier, a professor of clinical law at George Washington University, having succeeded in educating the public about domestic violence, feminists now face "a much more difficult challenge, because the resistance is much more deep and fundamental and bedrock."[32]

And still, women at risk are cautioned not to fight fire with fire, because "taking matters into their own hands" would amount to "amplifying" the violence. Should a woman be determined to find a way to defend herself, the advice—even in many self-defense courses—is to steer clear of serious weaponry. Use words and reason, they are told. Scream, if you must. Do whatever you can to flee the scene. Use your car keys as a weapon. Keep a baseball bat by your bed. Plenty of household items can be used defensively: rolling pins, aerosol sprays, combs with metal teeth, you name it. If you absolutely must, get some pepper spray. Call 911. But whatever you do, do not even think about getting a gun, for that would only add to the violence. And, besides, you'd probably just wind up hurting yourself or your kids with it. You know how inept you are with complicated mechanical "guy" things.

The pronouncements of male "authorities" about female self-defense have generally ranged from the ludicrous to the insulting. In *The Citizen's Guide to Gun Control,* Franklin Zimring and Gordon Hawkins note in passing that "women, predominantly, are targets of sexual violence." They then proceed to fret about the implications of women's actually arming themselves—and in the process to paint a rather bizarre picture of what, in their estimation, really differentiates women from men, when it comes to self-defense:

> Further, female attitudes toward household burglary, *far and away the most frequent form of home victimization*, seem to diverge from male attitudes. Many men tend to shrug off burglary as a loss of property; women experience it as a gross invasion of personal privacy that produces high levels of fear and insult. *If single women demand guns for self-defense pur-*

---

[32] *Id.* at 48. Catania adds, "Advocates say the time has come for the movement to address the burgeoning resistance associated with the men's rights movement, the legal challenges being mounted on behalf of batterers by the defense bar, and entrenched resentment and apathy within the criminal justice system itself."

> *poses,* federal firearms control will, at maximum, require screening, waiting periods, and some registration. The 50-million-handgun society of the future may be foreordained.
>
> But what if a substantial majority of America's single women reject the handgun as a personal option? There are other anti-burglary options: dogs, alarm systems, deadbolt locks . . . .[33]

Note the passages I have italicized. The first manages to completely erase the fact that for women, the "most frequent form(s) of home victimization" are domestic battery, and spousal and acquaintance rape. The second passage complements this erasure: the authors' concern is only with single women. Presumably, married women have husbands to protect them.

A similar fiction has been at work in the research studies of Arthur Kellermann, studies on which the anti-gun movement continues to rely—even though several of them have been largely discredited—not simply to dissuade women from arming themselves, but to convince them that guns are inherently dangerous to them.[34] Yet, in an interview with a reporter for *Health* magazine, Kellermann made a surprising admission: "If you have got to resist, your chances of being hurt are less the more lethal your weapon. . . . If that were my wife, would I want her to have a thirty-eight special in her hand? . . . Yeah."[35]

The classism and condescension underlying such hypocrisy warrant no additional comment. Rather, leaving Mrs. Kellermann to her own devices,

---

[33] Franklin Zimring and Gordon Hawkins, The Citizen's Guide to Gun Control (Macmillan, 1992) (1987). N.B. the publication dates: By the time this book was published, there was extensive literature on spousal/acquaintance rape and domestic abuse.

[34] Chief among them: A. Kellermann, et. al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. MED. 1084 (1993); A. Kellermann and D. Reay, *Protection or Peril? An Analysis of Firearms-Related Deaths in the Home*, 314 NEW ENG. J. MED. 1557 (1986); A. Kellermann et. al., *Suicide in the Home in Relationship to Gun Ownership*, 327 NEW ENG. J. MED. 467467-72 (1992); A. Kellermann and J. Mercy, *Men, Women and Murder: Gender-specific Differences in Rates of Fatal Violence and Victimization*, 33 J. TRAUMA 1, 1-5 (1992); J. Sloan, A. Kellermann, et. al., *Handgun Regulations, Crime, Assaults and Homicide: A Tale of Two Cities*, 319 NEW ENG. J.M. 1256, 1256-62 (1988). For critiques, by medical professionals, of the methodological problems raised by these and other patently anti-gun articles in the medical literature, see Edgar A. Suter, MD, *Guns in the Medical Literature—A Failure of Peer Review*, 83(13)J. MED. A. GA., 133, 133-48 (1994); Miguel A. Faria, MD, "Second Opinion: Women, Guns and the Medical Literature—A Raging Debate," *Women & Guns*, October, 1994, pp. 14-17, 52-53. *See also*, Lawrence Southwick, Jr., "Are Guns Really a Risk Factor for Homicide in the Home?", unpublished paper (Southwick is Associate Professor of Management Science, State University of New York at Buffalo). On refutations of these studies, see Stange & Oyster, *Gun Women*, 66-67; Don B. Kates, BAD MEDICINE: DOCTORS AND GUNS, *in* David Kopel, ed., GUNS: WHO SHOULD HAVE THEM? (Amherst, NY, Prometheus Books 1995), 233-308; Edgar A. Suter, *Guns in the Medical Literature—Failure of Peer Review*, 83(13) J. MED. A. GA. 133, 133-48 (1994); Don B. Kates, et.al., "Sagecraft: Bias and Mendacity in the Public Health Literature on Gun Usage," *in* Don B. Kates, Jr. & Gary Kleck, THE GREAT AMERICAN GUN DEBATE: ESSAYS ON FIREARMS & VIOLENCE (San Francisco, Pacific research Institute for Public Policy 1997) Chapter 5.

[35] Ann Japenga, *Would I Be Safer With a Gun?*, HEALTH, March/April 1994, at 59, 61.

let us at this point assume that it is not only reasonable, but in many contexts highly rational, for a woman to decide that her best defense against potential or actual assault is a firearm. Let us further assume that this woman is a feminist, and decides that procuring a gun and becoming proficient with it is, in fact, an act of "physical feminism," by way of which she asserts her human right to self-defense. And now, let us imagine her surprise, when consulting the literature (both feminist and non-feminist) on human rights, she discovers that—at least in theory—her individual right to self-defense apparently does not exist.

III. CONVENTIONS AND CONUNDRUMS: THE WONDERFUL WORLD OF THE U.N. AND NGO'S

While some commentators would venture to take its roots back to Aristotle, by and large the discourse surrounding human rights is regarded as an outgrowth of post-Enlightenment liberal philosophy, focusing on the rights and responsibilities of the individual in the context of that collective called the state, and the concomitant obligations of the state toward the individual. More particularly, since the adoption in 1948 of the Universal Declaration of Human Rights, the literature of human rights has evolved under the auspices of the United Nations. The Universal Declaration was largely the work of Eleanor Roosevelt, and no doubt in her spirit and honoring her legacy, some feminists have tried to discern in its language an acknowledgment of the equal rights of women. This interpretation hangs on Article 2 of the Declaration, which ensures to all people "the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status." As Charlotte Bunch argues, "Eleanor Roosevelt and the Latin American women who fought for the inclusion of sex in the Declaration . . . clearly intended that it would address the problem of women's subordination."[36]

Maybe. But, as even Bunch finally admits and as numerous other feminist commentators have argued, the Declaration is, fundamentally, a declaration of the rights of Man. In its face, 20th Century feminists found themselves in a position analogous to that of their 18th Century foremothers: The revolutionary *Declaration of the Rights of Man and Citizen* (1789) was so patently androcentric that it spurred Olympe de Gouges to privately publish, in 1791, her *Declaration of the Rights of Woman and Citizen* (addressed to, of all people, Marie-Antoinette). Meanwhile, on the other side of the Channel, the ideological battle the French Declaration spawned between Edmund Burke (*Reflections on the French Revolution*) and Tom

---

[36] Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486, 487 (1990).

Paine (*The Rights of Man*), led Mary Wollestonecraft first to pen a now little-read *Vindication of the Rights of Men* (1790), and then to cut directly to the chase with her in many ways still-revolutionary *Vindication of the Rights of Woman* (1791).[37] Fast-forward two centuries, and by 1980 women were pressing the UN to adopt the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), a document which uses the Universal Declaration as a model, filling in the blank represented by the 51% of the world's population whose rights were not explicitly included in the original. This is, essentially, what both de Gouges and Wollstonecraft did (although the latter did it quite spectacularly). The more things change, the more they stay the same.

In terms of theory, the feminist debate over human rights doctrine presents a fascinating study in its own right—a study which largely (and the reader may come to feel, blessedly) falls outside the purview of this paper. Suffice it to say that there are essentially two sides to the argument: On the one hand, some legal and political theorists affirm that women's rights *are* de facto human rights, and that any instrument generated by the UN and ratified by member States (and such generation and ratification constitutes a veritable cottage industry) must be made to apply to women as well as to men. The problem raised by this line of thinking—and it is a problem to which we shall return below—is that, because most UN Declarations, Conventions, and such-like are written by men from the point of view of male experience, rights issues that pertain more especially (some would argue exclusively) to women's experience fail to be taken into account. Woman, in this context and to recall Rorty's comment cited earlier, is not yet in human rights discourse a name of a way of being human. Proponents of this view see CEDAW as a vitally necessary corrective.

On the other side of the argument are those feminists who hold that because human rights discourse is so deeply rooted in Western liberal political philosophy, it largely represents the imposition of Western cultural ideals on the rest of the world. It is, then, but the latest—and in some ways most insidious—chapter in the history of imperialist expansion. These theorists, who tend to be of a more activist bent, call for attentiveness to cultural specificities and to the diversity of women's experiences, while simultaneously affirming that there are certain female universals grounded in women's experiences—especially those experiences having to do with reproduction and motherhood on the one hand, and sexual subordination (including various forms of sexual violence) on the other. Though they are a bit wary about its similarity to the Universal Declaration, in terms of the

---

[37] For a good, concise history of the evolution of gendered human rights discourse, *see* KATARINA TOMASEVSKI, WOMEN AND HUMAN RIGHTS (1995). Tomasevski includes the complete texts of both French *Declarations* (in English) on pages 6 & 7, printed in parallel fashion to illustrate that de Gouges was deliberately casting her declaration as, simultaneously, a complement to and a rebuttal of the exclusively male original. Hers, of course, achieved neither legal status nor wide distribution.

Western political ideals it enshrines, they, too, view CEDAW as a vitally important step toward women's global empowerment.[38]

Neither the Universal Declaration of Human Rights nor CEDAW makes any explicit mention of an individual right to self-defense. It is up to the state to ensure those individual rights and freedoms each instrument enumerates. When it comes to the right to live in peace, and free of violence against one's person, the U.N. documents—against, literally, a world of evidence to the contrary—assume these things to be a matter for effective legislation and law enforcement (or, in post-conflict situations, "peacekeeping").

To date, 181 nations (the U.S. among them) have become signatory states to CEDAW; of these 180 (the U.S. not among them) have ratified the convention, becoming Party States. Party States are, in theory, working to eliminate from within their borders all forms of discrimination against women and girls, and CEDAW is comprehensive in this regard, covering equal rights within marriage and divorce, the right to manage their own reproductive lives (including deciding when, and whether or not, to bear children), the right to own and inherit property, the right to education and employment, the right to vote, the right to privacy, freedom from fear and deprivation, freedom of access and of movement, and so on.[39]

As things turn out, of course, theory departs from practice, in much the same way and for the same reasons as were the case with Law 54. Any Party State can, in ratifying CEDAW, articulate "reservations" about certain articles of the convention—that is, can specify which specific provisions of CEDAW the Party State does not consider itself bound by, generally for legal, religious or cultural reasons. Thus, while several Muslim countries have ratified CEDAW, every one has done it with reservations regarding those articles dealing with marriage, property, freedom of move-

---

[38] For a representative sampling of this literature, see Nancy Kim, *Toward a Feminist Theory of Human Rights: Straddling the Fence between Western Imperialism and Uncritical Absolutism*, 25COLUM. HUM. RTS. L. REV. 49, 49-105 (1993); Berta Esperanza Hernández-Truyol, *Women's Rights as Human Rights—Rules, Realities and the Role of Culture: A Formula for Reform*, XXI:3 BROOK. J. INT'L L. 605, 605-76 (1996); Karen Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 MICH. J. INT'L L. 518, 518-610 (1992); Vasuki Nesiah, "Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship;" Celina Romany, "Themes for a Conversation on Race and Gender in International Human Rights Law;" and Antoinette Sedillo Lopez, "Comparative Analysis of Women's Issues: Toward a Contextualized Methodology," in A. Wing., ed., *Global Critical Race Feminism*, 42-80; also Bunch, "Women's Rights as Human Rights: Toward a Re-Vision of Human Rights," and MacKinnon, "Rape, Genocide and Human Rights."

[39] The failure of the U.S to ratify CEDAW probably owes primarily to two facts: Critics fear it would pave the way for ratification of an Equal Rights Amendment to the Constitution; and CEDAW's guarantee of women's reproductive freedom would logically include abortion. Then again, given that the U.S. could ratify it with reservations, it might simply be part of the larger pattern of U.S. disinclination to be bound by any international governing bodies or agreements, from the World Court to the Kyoto Accords.

ment, etc., that conflict with Shari'a Law.[40] Israel rejects the article dealing with equal rights in divorce, as well as one which could be read to mandate the inclusion of women on religious courts. England is so all-embracing in its reservations (including a specification that CEDAW does not apply to members of the Royal Family!) that one suspects Parliament took the matter up at all only to provide a respite from the debate over fox-hunting. Among all ratifying nations, only Ireland expresses any reservations based on the idea that CEDAW does not go far enough in women's behalf, since Ireland's custody, child support and social security laws give decidedly preferential treatment to women. As if the reservation system were not enough to render CEDAW virtually meaningless in point of fact, in addition practically every Party State has taken exception to Article 29, which requires binding arbitration by a third party, when conflicts arise between Party States.

Small wonder, then, that legions of women's rights activists worldwide have expressed profound skepticism about the ability to effect change, CEDAW-fashion, legislatively from the top down. Their answer has been the proliferation of Non-governmental Organizations (NGO's), whose primary work is to organize at the grassroots level (although under the auspices of and in partnership with the UN), to push for social and legal change from the bottom up. The high point, in terms of galvanizing this global women's rights movement, came at the Fourth United Nations World Conference on Women, in Beijing in 1995. The question of women's rights as human rights was a predominating theme in Beijing, proclaimed most ringingly in a keynote speech by then-First Lady Hillary Rodham Clinton, who included among a litany of rights assertions:

> It is a violation of *human* rights when individual women are raped in their own communities and when thousands of women are subjected to rape as a tactic or prize of war.
>
> It is a violation of *human* rights when a leading cause of death worldwide among women ages 14 to 44 is the violence they are subjected to in their own homes.
>
> . . .

---

[40] Among these Party States are Egypt, Saudi Arabia, Nigeria, Iraq, Mali, Bangladesh, Morocco, Afghanistan and the United Arab Emirates. Afghanistan ratified the Convention in 2003, apparently (and ironically) at the urging of the U.S. Muslim reservations in some contexts have to do with other than Shari'a law surrounding gender relations in marriage. Saudi Arabia stated a reservation regarding women's right to vote, as did the United Arab Emirates. In the latter case, neither men nor women have the right to vote.

> If there is one message that echoes forth from this conference, it is that human rights are women's rights . . . And women's rights are human rights.[41]

Conspicuously lacking, however, among the various messages that subsequently "echoed forth" from the conference, was any articulation of women's right to self-defense against violence, as a human right.

What did issue forth was a stream of literature—some of it originating in the UN, much of it from NGO's—setting the abuse of women and girls in the context of broader conflict situations. This is surely appropriate, and important: as many as seventy percent of civilian war casualties are female; women and children bear the primary brunt of displacement in war time; rape is an increasingly conspicuous tactic used against populations under siege; and in post-conflict situations (as also in the wake of natural disasters), rape and domestic violence spike sharply upward. Given these facts, many feminists rightly hailed it as a significant advance when, in 2000, the UN Security Council unanimously passed Resolution 1325 on Women, Peace and Security. The resolution, acknowledging that women are the primary victims of war, called for women's active involvement in all aspects of peacemaking, and for the incorporation of gender perspectives in the development of policy. This, in "UN-speak," is called "gender mainstreaming."[42]

While Resolution 1325 calls for women's perspectives to be "mainstreamed" into every aspect of policy making, in point of fact the primary emphasis has been on the role women can play in disarmament.[43] The arms in question are small arms and light weapons (SALW), which may in UN parlance mean anything from a pistol to a shoulder-mounted grenade-launcher, but in the literature most commonly refers to handguns and those semi-automatic weapons that fall under the loose category of "assault rifles." In the wake of Resolution 1325, numerous studies have been pub-

---

41 Hillary Rodham Clinton, Remarks for the United Nations Fourth World Conference on Women (Sept. 5, 1995) (transcript available at http://www.feminist.com/resources/artspeech/inter/hill.htm). Five years later, speaking at the U.N. in New York, Clinton reaffirmed women's human right "to live without fear of violence at the hands of loved ones or strangers." Hillary Rodham Clinton, Remarks at Women 2000-Beijing+5 (June 5, 2000) (transcript available at http://www.un.int./usa/00_072.htm).

42 *See, e.g.*, Emily Schroeder & Lauren Newhouse, *Gender and Small Arms: Moving Into the Mainstream*, INST. FOR SECURITY STUD. Monograph No. 104 (2004); U.N. Dep't for Disarmament Aff., *Gender Mainstreaming Action Plan*, Public Version (April 2003), http://disarmament2.un.org/ gender/gmap.pdf (last visited Mar. 23, 2006). Both documents originated in the UN. The Department for Disarmament Affairs document takes explicit care to distinguish between "gender mainstreaming" and "gender balance"—the latter being, apparently, a goal that is a long way off yet. U.N. Dep't for Disarmament Aff., *supra*, at 7-8.

43 This, of course, relates to a much larger initiative within the U.N., having to do with the cessation in the civilian trade in arms. For an excellent, concise overview, *see* Joyce Lee Malcolm, *The UN's Global Effort to Disarm Civilians: Wisdom or Folly?* 14 BREAKTHROUGHS (Mass. Inst. of Tech. Security Stud. Program, Cambridge, Mass.), Spring 2005, no. 1, at 22-30.

lished by the UN and by various NGO's on the question of gender-mainstreaming in this area. Every one of them has worked from the central assumption that, while the relationship between women and guns is sometimes complicated (women, after all, are involved in their manufacture and use in a variety of settings; women sometimes use guns for self-protection; there are female soldiers, freedom fighters and terrorists), guns—even when apparently good for some individual women—are decidedly bad for them in the aggregate.[44]

As one study puts the case:

> [A]lthough available data supports the widespread assumption that most direct casualties of gun violence are men, particularly young men, women suffer disproportionately from firearms violence, given that they are almost never the buyers, owners, or users of such weapons.

The same study, issued by Control Arms (a program within Amnesty International) establishes a link between violence against women, "whether . . . with boots or fists or weapons," on the micro and macro levels:

> Violence against women in the family and community, and violence against women as a result of state repression or armed conflict, are part of the same continuum: much of the violence that is targeted against women in militarized societies and during armed conflict is an extreme manifestation of the discrimination and abuse that women face in peacetime.

This is a vitally important point. Yet it is immediately followed by a non sequitur: "Whatever the context or immediate cause of the violence, the presence of guns invariably has the same effect: more guns mean more danger for women."[45]

"Whatever the context or immediate cause . . . ?" But surely context and cause do matter, in each individual case. The Control Arms report, like others of this genre (to use that term loosely, and somewhat generously), acknowledges in the most glancing of fashions the fact that there are cases where women have averted harm to themselves or others through the use of firearms, but sees those cases as at best aberrant exceptions that prove the

---

[44] Among the most recent studies along these lines are Schroeder & Newhouse, *supra* note 42; Emily Schroeder, Vanessa Farr & Albrecht Schnabel, *Gender Awareness in Research on Small Arms and Light Weapons: A Preliminary Report* (Swisspeace, Working Paper No. 1, 2005); CONTROL ARMS, THE IMPACT OF GUNS ON WOMEN'S LIVES (Amnesty International, IANSA, & Oxfam International 2005); NICOLA JOHNSTON ET. AL., PUTTING A HUMAN FACE TO THE PROBLEM OF SMALL ARMS PROLIFERATION: GENDER IMPLICATIONS OF THE EFFECTIVE IMPLEMENTATION OF THE UN PROGRAMME OF ACTION TO PREVENT, COMBAT AND ERADICATE THE ILLICIT TRADE IN SMALL ARMS AND LIGHT WEAPONS IN ALL ITS ASPECTS (International Alert 2005).

[45] CONTROL ARMS, *supra* note 44, at 2. To its credit, the Control Arms report does include a section elaborating the fact that women are as likely to be at risk from violence at the hands of law enforcement officers as in domestic contexts. *Id.* at 22-25.

rule that guns are bad for women. In similar spirit, the World Health Organization (WHO), even while saying that "one of the most important risk factors for women—in terms of their vulnerability to sexual assault—is being married or cohabiting with a partner,"[46] in a study on preventing domestic violence (de-gendered as "intimate partner violence") warns against such "ineffective prevention approaches" as "training young people in the 'safe' use of guns."[47]

Summing up the logic of these and similar studies, Wendy Cukier, President of the Coalition for Gun Control, Canada, observes:

> The gender lens provides a unique perspective, which crosses traditional boundaries that encourage dichotomies such as crime/conflict, licit/illicit, north/south, domestic/international . . . The regrettable truth is that women are often as much at risk of violence from small arms in contexts described as peaceful as they are in conflicts. Women are as much at risk from licit arms as from illicit arms.

She cites no sources for these remarkable claims, nor for her astounding assertion that "Virtually every illegal small arm began as a legal small arm." Note the shift of blame from perpetrator to weapon here: People don't kill people. Guns do.[48] In the same spirit, a recent trend in the literature about the proliferation of SALW and weapons of mass destruction (WMD) simply conflates the two.

Since these NGO-generated reports feed off the same sources, as well as one another (and are written by the same coterie of authors), it is not surprising that certain anecdotes appear in various guises—indeed, an attentive overview of the literature suggests that it relies on at most perhaps two dozen documented case studies of women's active and organized involvement in UN-sponsored disarmament related to SALW. One of the most frequently cited is Brazil's "Choose Gun-Free! It's Your Gun or Me!" program, urging women to prevail on the men in their lives to turn in their guns to authorities, on the grounds that a man is sexier without a gun. According to one report, "Combined with other initiatives to collect and destroy guns, improve police capacity to store confiscated weapons and restrict com-

---

[46] *Id.* at 10.

[47] *Preventing Violence: A Guide To Implementing The Recommendations Of The World Report On Violence And Health* (World Health Organization, Switz.), 2004 at 35. The quotation marks of course imply that there is no safe use of guns.

[48] Wendy Cukier, *Global Effects of Small Arm: A Gendered Perspective*, *in* IN THE LINE OF FIRE: A GENDER PERSPECTIVE ON SMALL ARMS PROLIFERATION, PEACE BUILDING AND CONFLICT RESOLUTION (Women's International League for Peace and Freedom, Geneva) March 7-8,2001, at 15. Not surprisingly, the NGO-generated literature is replete with references to factoids derived from the Kellermann studies and from reports generated by various anti-gun organizations, like the Violence Policy Center's "Female Persuasion: A Study of How the Firearms Industry Markets to Women and the Reality of Women and Guns." For a critique of the ways feminists have used these studies, *see* MARY ZEISS STRANGE & CAROL OYSTER, GUN WOMEN: FIREARMS & FEMINISM IN CONTEMPORARY AMERICA (NYU Press, 2000), Chs. 1 and 2.

merce this campaign has been very effective."[49] However "effective" the police may have found this enlisting of female aid in the disarming of Brazilian males (and there s no way of gauging this from the report), it is at least understandable that in a nation where men have traditionally had the legal ability to kill their wives if they caught them in adultery (their lovers, too),[50] some women may have had motivations other than "peacemaking" for getting firearms out of the house.

Several frequently noted "success stories" in the literature arise from the UN Development Program's "Weapons for Development" initiative, in which communities receive various forms of developmental assistance in exchange for turning in guns and ammunition. One project under this program, "Tools for Arms" in Mozambique, yielded probably the most striking image to date, that of a woman bringing in to project workers a handgun, which was hidden—along with the baby—in her infant's traditional carrying sling. The remarkable thing, to those who recount the tale, was the woman's refusal to take anything in return (that, after all, being the point of the program). For some, this was a form of altruism: the woman simply wanted the gun and all it symbolized removed from her home, that being recompense enough. Others more pragmatically point out that her refusal of a reward likely had less to do with inborn pacifism than with safety concerns: "Security for women might not only mean being safe from the threat of conflict or criminals, but also from the risk of violence and accidents in the household."[51] Since, in this case, when asked how she came into possession of the gun, the woman explained that she had seen a male relative bury it in the garden of their extended household, and she went out to dig it up under cover of darkness, a household accident seems not to have been her primary concern. Whatever she thought the man might eventually do with the gun (she had seen him several times dig it up, leave home with it, then return and re-bury it), her desire to conceal her role in removing it

---

[49] Nicola Johnston, William Godnick, Charlotte Watson & Micahe von Tangen Page, *Putting a Human Face on the Problem of Small Arms Proliferation: Gender Implications for the Effective Implementation of the UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects*, INTERNATIONAL ALERT, Feb. 2004, at 16. The report cites neither any figure regarding the number of guns turned in, nor any other indication of how the "effectiveness" of the program was gauged.

[50] To be clear here, it is sometimes erroneously reported that Brazilian men have a legal "right" to kill adulterous wives. Strictly speaking, they do not; that was only the case until Brazil won independence from Portugal. But Brazilian courts have nonetheless conventionally accepted defenses based both on the idea of a "crime of passion" committed in the heat of the moment, and of "honor killing," interpreting a wife's adultery as an act of aggression against her husband's good name. His murder of her amounts, in the latter case, to a twisted form of "self-defense." The Brazilian situation is in flux: women were granted full equality in 1998, but portions of the legal code have yet to be re-written. As it stands, it is a particularly egregious example of laws acknowledging the legitimacy of "honor killing" worldwide.

[51] *Id.* at 17.

from the premises clearly derived from her immediate fear for her own, or her infant's, safety. Ironically, this precise point is unwittingly made by Emilie Schroeder and Vanessa Farr (who approvingly tell the story of this woman), in another context, when they remark that

> Sexual and gender-based violence against women is an everyday feature of life in Mozambique. However, unlike neighboring South Africa, the country is not characterized by an overt gun culture—violence is far more likely to come from fists, feet, or machetes.[52]

It does not require a "gun culture" to set the stage for pervasive violence against women and girls. While firearms are sometimes the weapon of choice men use against women, even in "gun cultures" like the United States, they are far more likely to use fists, feet, or knives. Given that fact, it is nothing short of mystifying that the majority of feminists and women's rights advocates persist in refusing to entertain seriously the question of whether, and when, it makes sense for women to take up arms in defense of themselves and of others close to them. This is equally true on both the micro level of domestic violence/terrorism, and on the macro level of armed insurgency, not simply because there is a structural similarity between the two, but also—and more to the point of this paper—because women themselves are making these connections.

Another case study from Schroeder and Farr, tracing the history of the Communist Party of Nepal-Maoist (CPN-Maoist) insurgency in Nepal, helps to illustrate this point. They note that, historically, guns are relatively new to Nepalese culture, having arrived with the British, and having been until recently mostly "owned by the elite level of society for hunting purposes only." There is evidence that by the 1990s, "guns started to become connected to the illegal drug trade." This infusion of guns into the broader Nepalese society had detrimental consequences for women, they argue, because women were already in generally dire straits, owing to social inequality determined equally by law and by caste, the particular oppression of indigenous women, and "a lack of gender mainstreaming."

> Policies on small arms do not include a gender perspective. Women and women's organizations are excluded from the policymaking process, as they are not considered to be stakeholders when it comes to military matters. In reality, the conflict between insurgent and local communities has meant that ordinary women are often caught between Maoists and security forces.

Schroeder and Farr go on to detail the devastating effects the ongoing insurgency has had on Nepalese women:

---

52 Schroeder et al., *supra* note 44, at 16.

> According to Jha, et al., 35 percent of women are depressed, sad, and unsure about the future. Men are also depressed and consume increasing amounts of alcohol. However, some gender differences exist, as, for example, 15 percent of the women express psychosomatic symptoms, while only six percent of the men had done so. 38 percent of the women shared that they had increased suicidal feelings while only 16 percent of the male respondents expressed those feelings. 10-20 percent of members of the security force experience aggressive emotions and distress. The phenomenon of depression is alarmingly common.[53]

Conspicuously lacking from Schroeder and Farr's statistical recitation here is the fact that, among those Kalashnikov-toting CPN-Maoist insurgents, one in three is a woman.[54] Clearly these women have decided they *are* "stakeholders when it comes to military matters." It is to these Nepalese women, and others like them, that we now turn.

IV. "NO MORE RAPING"

> The prevalence of small arms that are affordable and easy to carry and use has changed the landscape of warfare, allowing women and children to be recruited as combatants. Women are now recruited as a matter of course by the armed forces of many countries. Women and girls are also abducted into armed groups, or choose to join them, sometimes as a reaction to abuses they have suffered at the hands of state forces. These developments have drawn women and girls ever closer into the violence of conflict, sometimes placing them in the ambiguous position of being simultaneously the perpetrators and victims of violence.[55]

According to one estimate, between 1990 and 2003, women and/or adolescent girls were present in military and/or paramilitary forces armed forces in 54 countries, and participated in armed conflict in 36 of those countries.[56] Granting that in some cases these females are coerced, even abducted, into "service" (often sexual in nature), in others they clearly are active and willing participants. Indeed, in many contexts, the dynamic seems to be such that women move from collateral support roles into armed combat eagerly and effectively. These women exist, if at all, on the periphery of most NGO-generated literature about women and disarmament. Yet, as African women's rights advocate Judy El-Bushra remarks, "Women's involvement in violence should be considered not as an aberration but rather as a component of 'agency,' or ways in which individuals carve out

---

53 *Id.* at 29.

54 They do acknowledge that "Other women are professional fighters who support the Maoist faction." The phrasing suggests, however, that they are not really *part* of that faction, and for that matter leaves ambiguous the question of what a "fighter" is, in terms of arms.

55 CONTROL ARMS, *supra* note 44, at 38.

56 GENDER, CONFLICT AND PEACEKEEPING 2 (Dyan Mazurana, Angela Ravens-Roberts & Jane Parpart, eds., 2005).

an acceptable life for themselves within the constraints imposed by their various and possible conflictual identities."[57]

Back to those Nepalese insurgents, then: The *Nepali Times* quoted one of their leaders, Kamala Roka, on women's participation in the CPN-Maoist army: "The People's War has emboldened us women, it has given us confidence, and we are treated equally. However, once in a while you do see male dominance in our movement."[58] The latter admission is hardly surprising, given the overwhelmingly patriarchal texture of Nepalese society already noted. Another report from the scene, by a pro-Maoist reporter, gives a fuller sense of what these women are fighting for. It notes that women's participation in the People's Liberation Army (PLA) is "surprising and electrifying. Most of the young women prefer joining PLA rather than joining a mass organization or doing government work. Many women fighters believe the real way to resist oppression is by defeating the enemy in battle." The division of labor within the PLA is, by their account, egalitarian in terms of gender: "responsibilities are handled with equal participation, whether it is in the kitchen or fighting." But these women are taking up arms for reasons broader and deeper than getting help with doing the dishes:

> In the base areas and the Maoist-influenced areas, there is now much less discrimination of woman. And these changes are spreading toward urban areas. . . . In the base areas, the discrimination in salary and wages between men and women has been eliminated. Nepal is infamous for women trafficking—young girls sold in Indian cities like Mumbai, Delhi and Calcutta, as well as Arab countries. Now the trafficking of women has been reduced. In the base areas, the bias against girls in education is being eliminated. . . . People's governments prohibit adolescent marriages and parents cannot force their children to marry . . . Women are given the right of family planning . . . The dowry tradition is prohibited . . . A most significant development . . . is the right of women to own property.[59]

Probably very few of the female CPN-Maoist fighters ever heard of CEDAW, but in principle they are working to achieve its major objectives. And to a woman they would surely attest that *dis*armament is not the way to achieve those goals.

Female guerilla fighters for the Kurdistan Worker's Party (PKK) tell stories strikingly similar to those of the CPN-Maoist PLA. Estimates are that while in the early 1980s there were perhaps a dozen women, "mainly intellectuals," who had taken to the Turkish mountains not far from the Iraqi border, "now they come from all walks of life and number almost

---

57 Judy El-Bashra, *Transforming Conflict: Some Thoughts on a Gendered Understanding of Conflict Process*, in STATES OF CONFLICT: GENDER, VIOLENCE AND RESISTANCE 81 (Susie Jacobs, Ruth Jacobson & Jennifer Marchbank, eds. 2000). El-Bashra is a researcher for ACORD, an NGO working in seventeen African nations.

58 CONTROL ARMS, *supra* note 44, at 39.

59 Dipak Sapkota, *Women Fighting for a New Nepal*, JANADESH WKLY., excerpts available at http://rwor.org/a/011/women-fighting-new-nepal.htm (last visited Oct. 3, 2005).

2,000 out of a total of 5,000 to 6,000 combatants." They live austere lives in their high-mountain camps, on equal terms with the men. Questioned as to their motivation for taking up arms, "they practically all tell you virtually the same story. 'We didn't want to stay at home any longer. So we went into the mountains. . . . We are fighting for our emancipation within Turkish society, but also within our own families.'" Kurdish women whose hopes that the European Union would pressure Turkey into acknowledging their rights have been dashed, "are confronted with a situation that is getting worse. Some of them commit suicide, others decide to take part in the armed struggle."

In 1995, the PKK established the Free Women's Movement of Kurdistan, an all-female army. According to one human rights activist who is also a member of the PKK, "Until then, women were treated like slaves. The Movement is a revolution within a revolution. At a political level, it brings guerilla warfare to all Kurdish women." Gradually, women began to take command of some PKK camps. One commander recounts, "At the start, the men under my command were hostile to this set-up. Then they began to realize the efficiency of the female groups during fighting." An eighteen year-old recruit observes, "You see, this guerilla war is not only a military struggle, it gives us schooling in life. For example, I started learning to read and write when I arrived here. This won't necessarily help me find a job, but at least it gives me more freedom."

Significantly, these female PKK fighters are seeking equality within Turkish society (with the concomitant changes this could bring to their domestic arrangements). They not seeking an independent Kurdish state: for that, as one commander explains, "we would need to fight against Turkey, Syria, Iraq and Iran all at the same time as there are Kurds in all these countries. This would cause violence to erupt throughout the Middle East and we cannot allow that to happen." [60]

The Tamil rebellion in Sri Lanka represents another instance where women moved from home to guerilla camp, in the process forming an all-woman revolutionary force. As Adele Ann Balasingham recounts their story, the movement "from non-violent politics into armed struggle" was a matter of self-conscious gender rebellion: "Their involvement in Parliamentary politics and non-violent campaigns did not radically change the cultural images of women. Parliamentary politics and non-violent struggle remain within the acceptable domain of women's behavior. The history of women in the armed struggle is a chronicle of a fundamentally different order." In their "metamorphosis from patriotic village girls into revolutionary guerilla fighters," members of the Women's Military Unit of the Tamil Tigers es-

---

[60] Sophie DeViller, *Turkey: The Women Guerilla Fighters*, CAUCAZ.COM, Feb. 5, 2005, *available at* http://www.caucaz.com/home_eng/breve_contenu_imprim.php?id=151 (last visited Oct. 3, 2005). *See also Warrior Woman*, THE AGE, Jan. 30, 2004.

tablished a reputation as fierce fighters, and in so doing created new models for Tamil women:

> Early Tamil literature is full of episodes which glorify the selfless, sacrificing mothers and wives encouraging bravery and heroism in their sons and husbands. But there is a studied silence on women in combat. The Women's Military Unit of Liberation Tigers has changed all that: they have altered the trajectory of Tamil history and introduced a radical new dimension into the history of Tamil women.[61]

This theme of rewriting women's history, along with their social roles, appears to be a characteristic feature of rebel and insurgent women's motivation. Colombia, where thousands of women have over the years enlisted in the Revolutionary Armed Forces of Colombia (FARC), provides yet another example. Approximately 2% of the Colombian Army are women (all of them assigned administrative tasks), as compared with the 30% of FARC's combat forces who are women. In 2001, when Joaquin Gomez, a rebel commander, was queried as to their motivation for joining the rebel forces; he responded, "A woman perceives injustice through every pore in her body; from the moment she is born, she is discriminated against." This discrimination plays out in the usual statistical ways: women earn 70% less than men; illiteracy rates are higher among women; and "more than half the women polled in a government survey said they had been beaten or abused by their partner."[62]

As in other revolutionary forces, women and men in FARC are treated with an eye to gender equality, which in this case extends to sexual relationships between guerilla fighters. Such relationships are allowed, as long as the couple have the permission of their commanding officer, use the contraceptives they are issued, agree not to form a lasting relationship, and do not allow the relationship to interfere with their work. As if to demonstrate how hard it is to legislate *machismo* out of existence, men are allowed to form relationships outside of FARC, while women can only date within the organization. Still, women are protected from abuse: "If the war council finds a man guilty of rape . . . he is executed."[63]

This policy, utopian as it sounds and problematic as it might well be in terms of enforcement, is nonetheless significant, given the fact that female "recruits" to rebel and insurgent groups are frequently pressed into sexual service within the group. As Control Arms reports:

---

61 Adele Ann Balasingham, *Women Fighters of Liberation Tigers*, TAMILNATION.ORG, *available at* http://www.tamilnation.org/women/93adeleann.htm (last visited Mar. 23, 2006).

62 Karl Penhaul, "Colombia's Communist Guerillas Take on Feminine Face," *The Globe* (January 7, 2001), http://archives.econ.utah.edu/archives/m-fem/2001m01/msg00013.htm. (last visited Oct. 2, 2005).

63 Karl Penhaul, *Colombia's Communist Guerillas Take on Feminine Face*, THE GLOBE, Jan. 7, 2001, http://archives.econ.utah.edu/archives/m-fem/2001m01/msg00013.htm (last visited Oct. 3, 2005).

> According to the Coalition to Stop the Use of Child Soldiers, girls are involved in armed conflict in most regions of the world. Hundreds of girls were among the thousands of children recruited as soldiers after conflict resumed in Liberia in 1999. All parties to the conflict—the former government, and the two armed opposition groups, Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL)—abducted children, both girls and boys, and forced them to fight, carry ammunition, prepare food or do other tasks. Girls were raped and forced to provide sexual services, and girls and women actively engaged in fighting.[64]

Control Arms does not, however, tell the entire story here. Along the pattern of other rebel groups we have considered, there emerged within LURD a group called the Women's Artillery Commandos. Under their leader, a woman who went by the pseudonym Black Diamond, they quickly established themselves as an elite fighting force, and were crucial actors in the re-taking of the capital, Monrovia, which led to the ouster of warlord Charles Taylor in 2003. "Women can do something here, and we show they can do it better than men," Black Diamond told a *Wall Street Journal* reporter. Her aide, Marie Teeah, added, "We fight better than men because we are disadvantaged." These young women (Black Diamond herself was 22 year old, and many of her guerilla fighters were teenagers) were disadvantaged in the usual ways that come with war, but most especially by rape: Nearly all of them had been raped, or been forced to witness the rapes of their mothers or sisters, "by soldiers who were high on alcohol or drugs, who often were HIV-positive." [65] Black Diamond's mother was killed in the civil war, under circumstances she would not divulge. As to her own experience:

> "Yes," Black Diamond said when asked if she had suffered at the hands of Taylor's vicious troops.
>
> "No," she said, looking down, when asked to elaborate.
>
> "If I explain all that, I will cry," she growled, her lower lip trembling slightly.
>
> "No more raping," Black Diamond added, in a mumble.[66]

By any means necessary. Recall at this point D. A. Clarke's assertion that, "If women defended themselves violently, the amount of damage they were willing to do to would-be assailants would be the measure of their seriousness about the limits beyond which they would not be pushed."

---

[64] CONTROL ARMS, *supra* note 44, at 40.

[65] Yaroslav Trofimov, *In Liberia's War, Woman Commanded Fear and Followers*, WALL ST. J., Aug. 22, 2003, at A1.

[66] Associated Press Report, "Ferocious Liberian women fight for respect, revenge," *The Billings Gazette* (August 24, 2003). Accessed via Billingsgazette.com (last visited Aug. 24, 2003).

While the idea that one person's freedom fighter is another person's terrorist has achieved the status of a cliché, it is in many instances nonetheless true.[67] True, as well, is the fact that extreme circumstances call for extreme responses. The woman who kills her abuser in self-defense often does so because she has no other option: the law and the system it enshrines, have left her no viable alternatives. She is fighting for the same freedoms as were Black Diamond and her cohort of AK-47-wielding adolescent girls, as are the women of PKK, FARC, and CPN-Maoist.

The structural similarities between domestic violence and political oppression are clear and convincing. So too are the facts that in each case not only must women's lives been seen as worth fighting for, women must also do the fighting. For some, like feminist jurists and legislators on the one hand, international policy-makers and rights activists on the other, this means working—even though it is not, as MacKinnon says, an act of faith—to transform legal and social structures in such a way as to make "woman" a name of a way of being fully human. This means, among other things, making sure that those experiences which women have in common with one another—rooted in reproductive issues and in the pervasiveness of violence against women—not be allowed to drift off the radar screen of any discourse about human rights. It also means appreciating, as proponents of CEDAW generally argue, that change this massive—we are, after all, talking about changing the world—must necessarily be gradual, and incremental.

But in the meantime, and if history is any indicator it promises to be a considerable meantime, every woman at risk should be able to exercise her human right to self-defense, and to count on support from her feminist sisters. The life she is fighting for, after all, is not simply her own. And the force she is fighting against is simultaneously as small as the man whose masculinity depends upon the rape and torture of women and children, and as large as the state that continues to let him get away with it.

---

67 The Council on Foreign Relations regards PKK, the Tamil Tigers and FARC as terrorist groups.

BOOK REVIEW

Saul Cornell, *A Well Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (2006).

Despite the immense volume of literature on the Second Amendment, the right to bear arms has received comparatively little attention from academic historians. With most writing on the subject coming from lawyers, perhaps it should not be surprising that balanced treatment of the historical record on gun rights in America is in short supply. Lawyers have their place, even in the academy, but their training tends to make them better as advocates arguing a case rather than scholars providing nuanced insight.

That is why, "A Well Regulated Militia: The Founding Fathers and the Origins of Gun Control in America" is such an important work. Its author, Saul Cornell, is a scholar by temperament and training, not an advocate or ideologue. Cornell has his biases, like anyone else, which he acknowledges up front: he supports stronger regulation of firearms. As a scholar, however, Cornell successfully shows that the historical evidence does not support either side in today's gun control debate.

Cornell rejects the contention of many gun control supporters that the Second Amendment protects only the right of the states to maintain militias free of federal interference; but he also rebuts the view that the amendment formalizes or extends a natural right of individuals to own and use guns independent of service in a militia organized by the state or federal governments. Instead, he concludes that the Second Amendment is best understood as a civic right that forbids the arbitrary exclusion of individuals from service in the militia.

A quick review of the current state of the debate over the meaning of the Second Amendment may help illuminate the significance of Cornell's contribution. The Second Amendment states that "A well regulated Militia, being necessary for the security of a free state, the right of the people to keep and bear arms, shall not be infringed."[1] Advocates for an expansive view of gun rights contend that the Second Amendment is a barrier to most gun control laws. The courts have largely rejected this view; a number of prolific lawyers have been busily pumping out law review articles arguing that the lower federal courts have been incorrectly upholding the constitutionality of gun control laws.[2]

---

[1] U.S. CONST. amend. II.

[2] Nelson Lund, *The Past and Future of the Individuals Right to Arms*, 31 GA. L. Rev. 1, 58 (1996).

A few circuits have adopted what is known as the collective rights model, which holds that the Second Amendment is concerned with a balance between federal and state power and protects the ability of the states to arm their own militias free from federal interference.[3] One circuit has embraced the view that the Second Amendment protects an individual's right to own guns (while declining to strike down the challenged statute), holding that the preamble only defines the purpose of the right but does not limit the right to those that serve in the militia.[4] An intermediate position, accepted by most circuits, is that the Second Amendment protects individuals only to the extent that their possession of a weapon is related to service in a state-sponsored militia, such as the National Guard.[5]

Cornell rejects each of these interpretations, arguing that the Second Amendment guarantees an individual right of participation in state-sponsored militias. He demonstrates that the founders understood the distinction between a natural right to common defense and the much more restrictive common law right to self-defense. Cornell uses a close reading of Blackstone to argue that as for common defense, "[t]his ancient right was not exercised by individuals acting unilaterally or in isolation, but rather required that citizens act together in concert as part of a well regulated militia. Without legal authority, a group of armed citizens acting on their own was little more than a riotous mob."[6] Cornell convincingly shows that the founders also made Blackstone's distinction when, for example, Jefferson's attempt to include protection for an individual right to carry guns outside of the militia in Virginia's Declaration of Rights was rebuffed.

In Cornell's view, since the founders clearly understood the difference between the rights of individual and common defense, they could have drafted both state and federal constitutional provisions to expressly include the former, yet they did not do so. Therefore, he argues, the Second Amendment should be read to protect the right to common defense and not individual defense. "The Second Amendment did not alter the legal distinction between bearing a gun for self-defense and bearing arms for public defense . . . . [T]he civic purpose of the amendment was unmistakable," he says.[7]

Cornell draws a useful comparison when he describes the Second Amendment as a civic right akin to voting. Unlike the rights of speech or assembly, a citizen is not entitled to pick the time and place when an elec-

---

[3] Silveira v. Lockyer, 312 F.3d 1052, 1086-87 (9th Cir. 2002); Hickman v. Block, 81 F.3d 98, 102 (9th Cir. 1996); United States v. Warin, 530 F.2d 103, 106 (6th Cir. 1976).

[4] United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001).

[5] Stuart Banner, *The Second Amendment, So Far*, 117 Harv. L. Rev. 898, 903-904 (2004) (reviewing DAVID C. WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC (2003)).

[6] SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 14 (2006).

[7] *Id.* at 70.

tion will be held, but when an election is held, all adult citizens are entitled to participate. "The dominant view of the Second Amendment reflected its origins in the various state arms bearing provisions," he says. "According to this view, the right to keep and bear arms was a civic right inextricably linked to the public responsibility to participate in a well-regulated militia."[8]

Unlike other authors who have written articles discussing the Second Amendment, Cornell's training as a historian enables him to trace the complex events that produced the collective and individual rights models that have come to dominate our legal and popular discussion of gun rights. This insight allows the reader to understand the evidence in support of each model and form an opinion without the overblown and repetitive partisanship of many of the law review articles that have examined the meaning of the Second Amendment. Cornell notes that the diminished role of the militia in American life does not change the original meaning of the Second Amendment, no matter how much gun rights enthusiasts would like to appropriate it in service of their political goals.

Of course, Cornell's case for a civic right undercuts some basic assumptions of gun control advocates as well. For instance, Cornell points out that liberals, who generally support a collective rights view of the Second Amendment, are endorsing an anti-federalist view of states' rights that was originally explicitly hostile toward—and arguably remains inconsistent with support for—a strong central government.[9] After all, the original collective rights view assumed that the states can and should retain the right to resist federal encroachment—by force, if necessary. Taken to its extreme, this logic is the same line of reasoning that was used to justify secession and the Civil War.[10]

On balance, Cornell's book represents a more fundamental challenge to advocates of a broad interpretation of gun rights, and not simply because it ties the Second Amendment so closely to the role of the militia. Cornell returns often to the idea that the founders, far from being wide-eyed libertarians, understood that liberty must be well-ordered in order to be enjoyed. Government regulation of guns, among other things, was accepted as essential to preserve freedom. Cornell laments that many Americans see regulation as the antithesis of liberty, and he reminds readers that the Second Amendment's preamble reflects not so much a narrow qualification of the right to own guns as a more general recognition that a strong government is vital to the protection of freedom.

Perhaps the most surprising aspect of the book is that it is a great read. Cornell brings the history of the Second Amendment and gun rights to life in a way that will appeal to a wide spectrum of readers. Cornell's will not

---

8 *Id.* at 64.

9 *Id.* at 5.

10 *Id.* at 167.

be the last word on the Second Amendment, but this book sets a new standard for intellectual honesty and scholarly methodology in an area where both have been sorely lacking.

*Joshua Horwitz and Casey Anderson**

* Joshua M. Horwitz, J.D., is the Executive Director of the Educational Fund to Stop Gun Violence and a Visiting Scholar at the Johns Hopkins Bloomberg School of Public Health. Casey Anderson, M.S., J.D., is a member of the board of directors of the Educational Fund and is a litigation consultant at CapAnalysis LLC.

BOOK REVIEW

Joyce Lee Malcolm, *Guns and Violence: The English Experience* (2002).

For the last several decades, the United States and Canada have enjoyed robust scholarly inquiry into the law and policy issues regarding gun control and gun rights. Yet in the United Kingdom, scholarly attention to firearms policy has been almost nil.[1] As a result, the definitive history of the right to arms guarantee in the 1689 English Bill of Rights was written by the American Joyce Lee Malcolm. Her book *To Keep and Bear Arms: The Origins of an Anglo-American Right* focused on the century of political developments leading up to the 1689 Bill of Rights, and on the effect of the 1689 arms rights guarantee during the eighteenth century in Great Britain and the United States.[2] In *Guns and Violence: The English Experience*[3] Malcolm broadens her scope to tell the story of the arms possession, arms control, and violent crime in England from the Middle Ages through the end of the twentieth century.

Malcolm describes the patterns of gun possession and violence, as well as changes in British culture due to war, food shortages, politics, and crime policy. She pays particular attention to changes in the culture of self-defense, both from the viewpoint of the Crown and of the subjects, and to how crime victims are treated by the government. Formerly, Britons happily contrasted their own permissive gun laws with the repressive laws on the Continent, and they considered liberal British laws to exemplify the superior and free character of the British nation. But today, British gun controls are the most severe in the western world.[4]

Malcolm's story is significant for readers interested in comparative criminology or British history. But the story of what happened in Great Britain over the last century is also of worldwide importance, because the

---

[1] Among the very few scholarly contributions to the gun control debate by British authors are PETER SQUIRES, GUN CULTURE OR GUN CONTROL? (2000) and COLIN GREENWOOD, FIREARMS CONTROL (1972).

[2] JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994); David B. Kopel, *It Isn't about Duck Hunting: The British Origins of the Right to Arms* (book review) 93 MICH. L. REV. 1333 (1995); David B. Kopel, *Malcolm in the Middle*, NAT'L REV. ONLINE, Sept. 16, 2002, http://www.nationalreview.com/kopel/kopel091602.asp.

[3] JOYCE LEE MALCOLM, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE (2002). Following American usage, Malcolm uses "English" to connote the entire polity of Great Britain, although some historically-minded Englishmen would point out that Wales, Cornwall, and Scotland are not part of narrowly-defined "England."

[4] There is one micro-state with even more repressive laws; the Grand Duchy of Luxembourg bans citizen ownership of firearms.

modern British government has been aggressively working to export its policies on firearms and self-defense. At the United Nations, the British delegation has been in the forefront of efforts to create a legally binding system of international gun control. The Foreign Office has been extremely active in many other world forums, in regional conferences, and in bilateral relationships, in promoting the broadest gun prohibition policies possible, wherever possible. The British government is also a major financial supporter of international gun prohibition lobbies and organizations. Quite plainly, the British government believes that it has gotten gun control policy just right, and that the British model must be imposed worldwide.

Accordingly, *Guns and Violence: The English Experience* is relevant for every person trying to decide whether to welcome or to resist the imposition of British-model gun controls in his or her own country. In this Article, we present Malcolm's story of British arms policy in the second millennium, and we also extend that story a few more years forward, to the present.

Malcolm's story begins in firearms-free medieval England of the thirteenth and early fourteenth centuries, when the homicide rate was approximately 18-23 annually per 100,000 population.[5] Thereafter, the homicide rate began a six century decline. Even after firearms became generally available in the sixteenth century, homicides rates continued to fall. The right to arms was officially recognized in the 1689 Bill of Rights. For the next two centuries, England had almost no gun control, except for anti-poaching laws, and a two-year period in 1819-1821 when stricter rules were imposed on a few counties due to concerns about working class unrest. Violent crimes continued to decline until the twentieth century.[6]

Various minor and ineffectual gun controls were enacted in the late nineteenth and early twentieth centuries. Proposals for more extensive controls ran into strenuous opposition in Parliament from MPs who still believed in natural rights. The advocacy for gun control was almost always accompanied by a bodyguard of lies, such as when the government, fearful of a workers rebellion, pushed through the Firearms Act of 1920. The government falsely told the public that gun crimes were rapidly increasing, and hid the law's true motive (political control) from the public, presenting the law as a mere anti-crime measure.[7]

In practice, the law eliminated the right of British subjects to be armed, and turned it into a privilege. The Firearms Act also began a decades-long process of eliminating the public's duty to protect their society and their right to protect themselves.

The Firearms Act set the scene for civilian acceptance of further restrictions—not only on gun possession—but on almost any act of self-

---

5 MALCOLM, *supra* note 2, at 21.

6 *Id.* at 20.

7 *Id.* at 141-42.

defense.[8] Malcolm describes a series of confidential memos, the first of which was written in 1937, from the Home Office to local police in charge of the issuance of firearm licenses.[9] The memos were designed to reduce the number of lawfully possessed rifles and handguns as, coincidentally, crime rates began to increase. By 1969, the police were advised to deny all rifle and handgun licenses for self-defense purposes.[10]

Shotguns, previously regulated less severely than rifles and handguns, were brought into the licensing web in the 1960s. Then in the 1980s, the licensing system was changed to make sure that no one could possess a shotgun defensively. "Safe storage" requirements were invented by the police, and they were enforced with such increasing severity that a lawfully-stored gun of any type could never be available for defense in a sudden emergency. Parliament had never voted to outlaw defensive gun ownership; instead, the Home Office, operating through secret memos, had instructed the police how to use their control over the gun licensing process to eliminate the right of every Briton to arm against criminals.

In 1998, after a known pedophile used a handgun to murder kindergarten children in Dunblane, Scotland, the Parliament banned non-government possession of handguns. As a result the Gun Control Network (a prohibition advocacy group) enthused that "present British controls over firearms are regarded as 'the gold standard' in many countries." According to GCN spokesperson Mrs. Gill Marshall-Andrews, "the fact that we have a gold standard is something to be proud of . . . ."[11]

A July 2001 study from King's College London's Centre for Defence Studies found that handgun-related crime increased by nearly 40% in the two years following implementation of the handgun ban.[12] The study also found that there had been "no direct link" between lawful possession of guns by licensed citizens and misuse of guns by criminals.[13] According to the King's College report, although the 1998 handgun ban resulted in over 160,000 licensed handguns being withdrawn from personal possession, "the UK appears not to have succeeded in creating the gun free society for

---

[8] *Id.* at 141-49; *see also* David B. Kopel & Joseph E. Olson, *All the Way Down the Slippery Slope: Gun Prohibition in England, and Some Lessons for America*, 22 HAMLINE L. REV. 399 (1999).

[9] MALCOLM, *supra* note 2, at 155-56.

[10] *Id.* at 171.

[11] House of Commons, Home Affairs, Second Report, Controls over Firearms, Session 1999-2000, Apr. 6, 2000, at ¶22, http://www.publications.parliament.uk/pa/ cm199900/ cmselect/cmhaff/95/9502.htm (visited June 5, 2006).

[12] *Illegal Firearms in the United Kingdom* 12 (King's College London, Centre for Defence Studies, Working Paper No. 4, 2000), *available at* http://www.countryside-alliance.org/images/stories/pdf/cfs_papers4.pdf.

[13] *Id.* at 3.

which many have wished. Gun related violence continues to rise and the streets of Britain . . . seem no more safe."[14]

A few weeks before the King's College study was released, Home Office figures showed that violent crime in Great Britain was rising at the second fastest rate in the world, well above the U.S. rate, and on par with crime-ridden South Africa.[15] In February 2001, it was reported that twenty-six percent of persons living in England and Wales had been victims of crime in 1999.[16] Home Secretary Jack Straw admitted, "Levels of victimisation are higher than in most comparable countries for most categories of crime."[17] On May 4, 2001, the *Telegraph* disclosed that the risk of a citizen being assaulted was "higher in Britain than almost anywhere else in the industrialized world, including America."[17] The latest U.N. data show that Scotland (which has always kept separate criminal justice statistics from England and Wales) has the highest violent crime rate of any developed nation, and that England and Wales are not much better.[18]

With passage of the Firearms Act of 1997, "it was confidently assumed that the new legislation effectively banning handguns would have the direct effect of reducing certain types of violent crime by reducing access to weapons."[19] The news media promised that the "world's toughest laws will help to keep weapons off the streets."[20]

Yet faster than British gun-owners could surrender their handguns for destruction, guns began flooding into Great Britain from the international black market (especially from Eastern Europe and China), driven by the demands of the country's rapidly developing criminal gun-culture.[21]

Malcolm does not hide her disdain for the creators of the last century of destructive policies in Great Britain, nor for the nineteenth century bureaucrats who began laying the foundation for the twentieth century failures. In less than a hundred years, British policymakers have undone six prior centuries of progress and turned twenty-first century England, like thirteenth century England, into the most violent, crime-ridden nation in Western Europe.

While not claiming to supply a complete explanation for the catastrophic surge in British crime, Malcolm argues that the gun control laws, par-

---

[14] *Id.* at 9. Malcolm estimates 4 million illegally possessed firearms of all types. *See* MALCOLM, *supra* note 2, at 209.

[15] Nick Paton Walsh, *UK Matches Africa in Crime Surge*, THE GUARDIAN, Jun. 3, 2001.

[16] Sean O'Neill, *A Quarter of English are Victims of Crime*, THE TELEGRAPH, Feb. 23, 2001.

[17] Philip Johnston, *Britain Leads the World on Risk of Being Assaulted*, THE TELEGRAPH, May 4, 2001.

[18] *See Scotland Worst for Violence—UN*, BBC NEWS, Sept. 18, 2005 ("Scotland has been named the most violent country in the developed world by a United Nations Report.").

[19] King's College London, *supra* note 12 (Working Paper 1), at 7.

[20] Philip Johnston, *World's Toughest Laws Will Help to Keep Weapons off the Streets*, THE TELEGRAPH, Nov. 2, 1996.

[21] King's College London, *supra* note 12, at 15.

ticularly the anti-self defense components of those laws, deserve part of the blame. Her conclusion is shared by Peter Hitchens, who also argues that extremely repressive gun laws are one of the major causes of Britain's modern crime wave.[22]

Malcolm suggests that many criminals are capable of at least elementary logical thought, and thus can be deterred by the risk of confronting a victim who can fight back effectively. Conversely, criminals can be emboldened by the prospect of attacking a defenseless victim.[23] For example, a major U.S. study of convicted felons in ten U.S. state prison systems found that 60% of prisoners said that they would not attack a victim known to possess a firearm, and 74% of their sample agreed that they would avoid occupied houses on the chance that the owner(s) might possess a firearm.[24]

However, British criminals have little expectation of confronting a victim who possesses a firearm. Even the small percentage of British homes which have a lawfully-owned gun would not be able to unlock the gun from one safe and then unlock the ammunition from another safe in time to use the gun against a home invader.[25] It should hardly be surprising, then, that Britain has a much higher rate of home invasion burglaries than does the United States.[26]

Technically, self-defense is still legal in Great Britain, but in practice, any act of self-defense is subject to a prosecutor's second-guessing of what is "reasonable." For example, Brett Osborn is now serving a 5-year sentence for manslaughter. In order to protect a friend, "[h]e stabbed a blood-covered, drug-crazed intruder . . . ." Osborn was prosecuted because he failed to warn the criminal that he had access to a knife.[27]

In 2004, despite popular demand, the British government refused to reform the laws regarding victim self-defense. Home Office Minister Fiona Mactaggart claimed that self-defense reform would be a "licence to kill with impunity."[28]

Coming to the aid of crime victims is strongly discouraged. British subjects are taught that, if they are attacked by a criminal, they should not yell "Help! Help!" because such cries might encourage a bystander to use physical force against the criminal. Rather, victims are supposed to yell,

---

22 PETER HITCHENS, A BRIEF HISTORY OF CRIME (2003).

23 *See* Patrick Mercer, *Even Burglars Admit It: My Bill Will Stop Them*, THE TELEGRAPH, Jan. 12, 2005, *available at* http://www.telegraph.co.uk/opinion/main.jhtml?xml=/opinion/2004/12/12/do1201.xml.

24 JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS 145 (1986).

25 The current British implementation of the "safe storage" requirements invented by the police, as part of the gun licensing process, requires that the guns and ammunition be kept in separate safes.

26 David B. Kopel, *Lawyers, Guns, and Burglars*, 43 ARIZ. L. REV. 345 (2001); David B. Kopel, Comment, in Jens Ludwig & Philip Cook, eds., EVALUATING GUN POLICY 109-18 (2003).

27 Mercer, *supra* note 23.

28 *'Tony Martin Law' is Blocked*, BBC NEWS, Apr. 30, 2004, http://news.bbc.co.uk/1/hi/uk_politics/ 3672701.stm.

"Call the police." Likewise, the government tells Britons that when they are attacked, they should not fight back, but should instead curl into a ball or take a similar defensive posture.[29]

If a properly-behaved British bystander does "call the police," the response may be lethally slow. Vicky Horgan and her sister Emma Walton were shot by Stuart Horgan on June 6, 2004.[30] A total of sixty calls to 999 (the U.K.'s equivalent to 9-1-1) were made, but help did not arrive for over an hour. *The Express* explained that a major cause of the delay was police reluctance to confront an armed criminal.[31]

Nor are criminals afraid of being jailed, as the authorities cannot afford to incarcerate them. In 2006, business burglary was essentially decriminalized by a new government policy to merely give a "caution" (an official warning) to first time burglars who have been apprehended. Now, a burglary will literally not even result in an arrest for a burglar who is caught for the first time.[32]

BRITAIN'S NEW GUN CULTURE

While tightening the screws on law-abiding gun owners, the British authorities were declaring their determination to prevent the emergence an American-style "gun culture." In that regard, the British government has been very successful.

In previous generations, Britain had a long-standing tradition of sporting gun use, and an unwritten agreement that both the police and the criminals would eschew the use of guns. Everything has now changed. The new criminal gun culture in Britain is one in which, according to the British

---

29 From the Frontlines, http://www.davekopel.com/Corner/Corner-Archive-2003.htm (May 15, 2003, 22:25 EST) (quoting an American exchange student's report of instructions that a British officer delivered to a newly-arrived cadre of American students in London).

30 *Mother Angry at Shooting Response*, BBC NEWS, Feb. 21, 2006. http://news.bbc.co.uk/1/hi/england/oxfordshire/4734398.stm ("But police did not enter the house until more than an hour after the first 999 call was made."). *See also Police Criticised over Gun Deaths*, BBC NEWS, Sept. 29, 2004, http://news.bbc.co.uk/1/hi/england/berkshire/3700684.stm (reporting that in the death of Julia Pemberton, the police received a call at 7:11 P.M., but did not arrive until nearly 2 A.M. the following day. The coroner stated, "The only way Julia Pemberton's life could have been saved is if she had an armed escort throughout the 15 months before she died." The coroner's report did not consider the much cheaper, and potentially more effective, option of permitting Julia to arm herself).

31 *See* Anna Pukas, *This Week's Scathing Report on How Police Dealt With a Killing Spree at a Family Party has Brought New Anguish and Anger for Roy and Georgie Gibson; Torment of Couple Haunted by the Barbeque Murders*, THE EXPRESS, Oct. 9, 2004.

32 Jon Silverman, *How Police Cautions Work*, BBC NEWS, Jan. 13, 2006, http://news.bbc.co.uk/1/hi/uk/4610072.stm.

government, there is "the perception of firearms as a means of resolving differences through violence."[33]

British gun laws have transformed the way children are introduced to firearms. In the past, the many parents who participated in the shooting sports taught their children safe and responsible firearm handling practices. Now, the gun control laws are deliberately operated to impose bureaucratic barriers that encourage law-abiding shooters to give up their sport; many have done so.

Never introduced into a law-abiding, responsible gun culture of adults, Britain's modern youth are creating their own "gun culture," a sort of non-fiction version of *Lord of the Flies*. Children in gangs, some as young as nine, roam the streets uncontrolled, victimizing the aged and the infirm.[34] Today, one third of all British criminals under the age of 25 admit to owning or having access to a firearm.[35]

In contrast, firearm ownership in the United States continues, for the most part, to be kept in the family, handed down from parent to child. What happens when parents teach children about shooting? The most detailed empirical data come from the Rochester (N.Y.) Study on *Urban Delinquency and Substance Abuse*.[36]

Funded by the U.S. Department of Justice, the study tracked 7th- and 8th-graders for 4-1/2 years until 11th or 12th grade, providing "quite a thorough picture of adolescent development during the junior and senior high school years." The researchers explain that "To maximize the number of serious, chronic offenders available for the study, the sample includes more youth from high-crime areas and fewer from low-crime areas." For the same reason, the study focused exclusively on males.

One of the topics of the Rochester Study was adolescent behavior with firearms. Of the group of boys who owned guns legally by the time they were in 9th or 10th grade, not one of them committed any crime or delinquent act with a gun.

Of the boys who did not, by 9th or 10th grade, already own a legal gun, one percent would commit a firearms crime in the next few years. As for the boys who already *illegally* owned guns, twenty-four percent would eventually use a gun in a crime.

As for the overall rate of street crimes (remember, the study deliberately oversampled at-risk males), of the boys who lawfully owned guns,

---

[33] House of Commons, *supra* note 11, at ¶50, *available at* http://www.publications.parliament.uk/pa/cm199900/cmselect/cmhaff/95/9502.htm (visited June 9, 2006) (follow "Gun Culture" hyperlink).

[34] Gillian Harris, *'Terrible ten' Children Terrorising Edinburgh*, THE TIMES, Jul. 18, 2001; Philip Nettleton, *Curfew on 'Reign of Terror' Boy*, THIS IS LONDON, Nov. 2, 2001.

[35] Tony Thompson, *One in Three Young Criminals is Armed*, THE GUARDIAN, Sep. 3, 2000.

[36] Urban Delinquency and Substance Abuse, Technical Report, U.S. Department of Justice, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPARTMENT OF JUSTICE, URBAN DELINQUENCY AND SUBSTANCE ABUSE (1993).

fourteen percent eventually committed at least one street crime. Of the non-gun owners, twenty-four percent committed a street crime. Of the illegal gun owners, seventy-four percent committed a street crime.

Thus, it appears that there is something about the culture of law-abiding gun ownership which is associated with lower rates of gun crime and general crime. The researchers observed: "Parents who own legal guns socialize their children into the legitimate gun culture. Those parents who do not own guns are unlikely to socialize their children in that manner." Simply put, the Rochester youths who were given lethal weapons by their parents, and who were instructed in how to use those weapons by their parents (usually, by the father), behaved more responsibly than did their peers.

Today, Great Britain is generally a more dangerous place than the United States.[37] Great Britain is also a place which has successfully crushed the spread of a large American-style gun culture. While America's gun culture is still composed, overwhelmingly, of law-abiding, hard-working, family-oriented people, Great Britain's new gun culture consists of armed criminals and armed police.[38] One fact is undeniable: the Firearms Act "did not stop the use of guns, it prevented their use by honest citizens—and created a monopoly, with the ownership and use of guns confined to two classes: professional criminals and the police."[39]

Guns and Violence tells a remarkable story of a society's self-destruction, of how a government in a few decades managed to reverse six hundred years of social progress in violence reduction. The book is also a testament to the amazing self-confidence of British governments; Labour and Conservative alike have proceeded with an extreme anti-self-defense agenda, although the agenda has never had much supporting evidence beyond the government's own platitudes. Whether the rest of the world should follow that bipartisan British agenda is an essential question in the current United Nations debate over international gun control.

---

37 The one major criminal justice statistic in which Great Britain appears to be doing better than the U.S. is the homicide rate, with the U.S. rate at 4.3, and the England and Wales rate at 1.4. However, the U.S. rate is based on initial reports of homicides, and includes lawful self-defense killings (about 10-15% of the total); the England and Wales rate is based only on final dispositions, so that an unsolved murder, or a murder which is pleaded down to a lesser offense, is not counted a homicide. In addition, multiple murders are counted as only a single homicide for Scottish statistics. *See* Malcolm, at 228-31; Patsy Richards, Homicide Statistics, Research Paper 99/56, House of Commons Library Social and General Statistics Section, May 27, 1999, at 9. *See also* STATISTICS RELEASE, HOMICIDES IN SCOTLAND IN 2001, STATISTICS PUBLISHED, (Nov. 28, 2002), *available at* http://www.scotland.gov.uk/stats/bulletins/00205-00.asp,8 ("A single case of homicide is counted for each act of murder or culpable homicide irrespective of the number of perpetrators or victims.").

38 John Kampfner, *Gun Law*, THE GUARDIAN, (London), Dec. 4, 2000, at 2.

39 Geoffrey Wheatcroft, *Comment & Analysis: Cracked Shots*, THE GUARDIAN (London), July 19, 2001, at 22.

David B. Kopel,[*] *Paul Gallant,*[**] *and Joanne D. Eisen*[***]

[*] Research Director, Independence Institute, Golden, Colorado; Associate Policy Analyst, Cato Institute, Washington, D.C., www.davekopel.org. Author of *The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies?* (1992). Coauthor of *Gun Control and Gun Rights* (2002). Editor-in-Chief of the *Journal on Firearms and Public Policy.*

[**] Senior Fellow, Independence Institute, Golden Colorado. www.independenceinstitute.org.

[***] Senior Fellow, Independence Institute, Golden, Colorado. Coauthor (with Kopel and Gallant) of numerous articles on international gun policy in publications such as the *Notre Dame Law Review, Texas Review of Law and Politics, Engage, UMKC Law Review,* and *Brown Journal of World Affairs.*