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The Second Amendment and the Ideology of Self-Protection.

Don B. Kates Jr.

THE SECOND AMENDMENT AND THE IDEOLOGY OF SELF-PROTECTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15. Id. at 266-67.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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28. Id. (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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