

OF HOLOCAUSTS AND GUN CONTROL

DANIEL D. POLSBY
DON B. KATES, JR.*

This essay seeks to reclaim a serious argument from the lunatic fringe. We argue a connection exists between the restrictiveness of a country's civilian weapons policy and its liability to commit genocide¹ upon its own people. This notion has received a good deal of disdainful public attention over the past several years because of the Oklahoma City bombing, the "Republic of Texas" siege, and the inflamed subculture from which the defendants in those incidents emerged. Some Americans, it appears, believe that their country is on the verge—if not in the grip—of a virtual coup by a sinister international directorate of Jews, one-worlders, and Trilateralists. For them, acting on this belief means arming oneself and confronting representatives of government with distrust, if not open hostility. By now it is widely appreciated that people with this particular fixation can be extremely dangerous. Yet their delusions take a special bitterness from the fact that

* Kirkland & Ellis Professor of Law, Northwestern University; attorney and criminologist, Novato, California. Thanks for constructive comments on earlier drafts to Robert Cottrol, Rutgers University School of Law; Ted Robert Gurr, University of Maryland Political Science Department; Barbara Harff, U.S. Naval Academy Political Science Department; C.B. Kates, F.A.C.S., Novato, CA; Marilyn King, Novato, CA; Gary Lawson, Northwestern University School of Law; Rudolf J. Rummel, University of Hawaii Political Science Department. Grateful acknowledgement is also due to the Julius Rosenthal Fund and the Kirkland & Ellis Research Fund of Northwestern University for subsidizing this essay. The usual disclaimers apply.

1. By "genocide" we mean attempts to exterminate not only gene pools but also masses of political opponents. The complexities of defining genocide and distinguishing it from other varieties of murder and oppression are addressed in Barbara Harff, *Recognizing Genocides and Politicides*, in *GENOCIDE WATCH 27* (Helen Fein ed., 1992) [hereinafter Harff, *Recognizing Genocides*]; see also Barbara Harff & Ted Robert Gurr, *Victims of the State: Genocides, Politicides and Group Repression Since 1945*, 1 INT'L REV. VICTIMOLOGY 23 (1989).

It would probably be more accurate to adopt the term "geno/politicide," defined as follows: the promotion and execution of policies by a state or its agents that result in the deaths of a substantial portion of a group. In genocides the victimized groups are defined primarily in terms of their communal characteristics. In politicides, by contrast, groups are defined primarily in terms of their political opposition to the regime and dominant group.

Harff, *Recognizing Genocides*, *supra*, at 27-38. For stylistic reasons, we prefer "genocide" to describe both phenomena. In addition, we follow Harff's distinction between genocides and "pogroms," which she describes as "short-lived outbursts by mobs, which, although often condoned by authorities, rarely persist." *Id.* at 38. If the violence persists for long enough, however, Harff argues, the distinction between condonation and complicity collapses. See *id.* at 37; see also Harff & Gurr, *supra*, at 24 (defining genocide to include instances in which state agents "assist or knowingly acquiesce in the killing of undesirable groups by vigilantes, 'death squads,' or private militia," and also instances in which "governments simply ignore their obligations to protect vulnerable minorities attacked by murderous mobs or profiteers"); see generally examples discussed *infra* notes 111, 113-14, and 118 and accompanying text.

something real and terrifying, the problem of genocide, lies in the general direction of their paranoia.

The question of genocide is one of manifest importance in the closing years of a century that has been extraordinary for the quality and quantity of its bloodshed. As Elie Wiesel has rightly pointed out, "This century is the most violent in recorded history. Never have so many people participated in the killing of so many people."² Recent events in the former Yugoslavia, Rwanda, and many other parts of the world make it clear that the book has not yet been closed on the evil of official mass murder. Contemporary scholars have little explored the preconditions of genocide. Still less have they asked whether a society's weapons policy might be one of the institutional arrangements that contributes to the probability of its government engaging in some of the more extreme varieties of outrage. Though it is a long step between being disarmed and being murdered—one does not usually lead to the other—but it is nevertheless an arresting reality that not one of the principal genocides of the twentieth century, and there have been dozens, has been inflicted on a population that was armed.

Nor should this be altogether surprising. An armed population is simply more difficult to exterminate than one that is defenseless. This is not to say that the plans of a government resolved to eradicate an ethnic or political minority would necessarily be precluded by armed resistance. As elsewhere in life, raising the cost of a behavior, whether genocide, smoking cigarettes or anything in between, merely makes that behavior more unusual than it would otherwise be, not impossible for those willing and able to pay the price. No specific form of social organization will ever make genocide or any other evil literally impossible. Nevertheless, because most important questions are matters of degree, it is still worth inquiring into the connection between the virulence of a government and the degree of its effective monopoly on deadly force. And it is especially timely to do so now, in the wake of Oklahoma City, the "Republic of Texas" incident, and the increased public attention these have brought to the enigmatic civic denominations from which these plots evidently emerged, because now the philosophical and historical context that links genocide with the state of civilian arms has tended to become obscured.

Barry Bruce-Briggs pointed out a generation ago that public controversy surrounding weapons control laws degenerates into the venting of raw antagonisms between various factions more often than it matures into

2. Pete Wittenberg, *Fanaticism to be Top Threat in 21st Century*, HOUSTON POST, Feb. 24, 1995, at A-24 (quoting Elie Wiesel).

creditable public policy research.³ What gets lost in the contest is a sense of those points that are actually in dispute and those that are not. Virtually every gun control partisan in this country is, like the typical gun owner,⁴ a peaceable, educated member of the middle class who wants to put a stop to the mindless violence that has engulfed the streets of American cities.

However, the convictions of gun controllers do differ from those of gun owners in several important ways. First, they make different estimates about the usefulness of firearms for defensive and deterrent purposes. Second, they

3. See B. Bruce-Briggs, *The Great American Gun War*, 45 PUB. INTEREST 37, 37 (1976) ("the gun-control debate has been conducted at a level of propaganda more appropriate to social warfare than to democratic discourse").

4. The demographic attributes of firearms owners are discussed in JAMES D. WRIGHT ET AL., *UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA* 107 (1983). According to a Metro Chicago Information Center Study, residents of suburban low-crime communities are more likely to own handguns than those living in the city. See *A Summary of neighborhood Crime Perceptions from the 1991-1995 MCIC Metro Survey* 6 fig. 9 (1995). As the Survey makes clear, handgun ownership and income are strongly correlated. See *id.* fig. 10.

A National Institute of Justice-funded review of all available national and local data concludes that

[while] the "typical" private weapons owner is often depicted as a virtual psychopath—unstable, violent, dangerous[,t]he empirical research reviewed in this chapter leads to a sharply different portrait. . . .

Most private weaponry is possessed for reasons of sport and recreation. . . . Relative to nonowners, gun owners are disproportionately [sic] rural, Southern, male, Protestant, affluent, and middle class. . . . There is no evidence suggesting them to be an especially unstable or violent or maladapted lot; their "personality profiles" are largely indistinct from those of the rest of the population.

WRIGHT ET AL., *supra*, at 122 (emphasis added). In a subsequent study, also funded by the National Institute of Justice, the same sociologists emphasized the difference between the great majority of gun owners and the small, highly aberrant minority of criminal misusers: "It is . . . clear that only a very small fraction of . . . privately owned firearms are ever involved in crime or [interpersonal] violence, the vast bulk of them being owned and used more or less exclusively for sport and recreational purposes, or for self-protection." JAMES D. WRIGHT & PETER H. ROSSI, *ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS* 4 (1986).

Gun owners do differ from non-owners in some respects. For instance, a study of citizens who rescued crime victims or arrested violent criminals found that 81% of these Good Samaritans were gun owners. See Ted L. Huston et al., *The Angry Samaritans*, PSYCHOL. TODAY, June 1976, at 61, 64. Gun owners are also more likely to condone "defensive" force, i.e. force used to repel attackers; while in contrast those exhibiting "violent attitudes" (approval of violence against social deviants or dissenters) are no more likely to own guns than others. In a comprehensive study, Gary Kleck concluded:

Gun ownership is higher among middle-aged people than in other age groups, presumably reflecting higher income levels and the sheer accumulation of property over time. . . . Middle and upper income people are significantly more likely to own than lower income people. . . . Gun owners are not, as a group, psychologically abnormal, nor [do attitude surveys show them to be] . . . more racist, sexist, or violence-prone than nonowners. . . . Probably fewer than 2% of handguns and well under 1% of all guns will ever be involved in even a single violent crime. Thus, the problem of criminal gun violence is concentrated within a very small subset of gun owners. These criminal gun owners most commonly get their guns by buying them from friends and other nonretail sources, or by theft.

GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 22, 47-48 (1991).

often differ in how they appraise the morality of using violence against violence. Third and perhaps most important, they are inclined to make very different guesses about how much potential for evil to ascribe to the government of the United States. Few if any of those who are hostile to the institution of an armed civilian populace consider the possibility that our government, with its Constitution, its checks and balances, and its traditions of free speech, civility, and respect for the individual, could ever degenerate into the sort of pitiless totalitarian instrument that has, at one time or another, afflicted most of the peoples of the Old and Third Worlds. The question is whether to label this attitude serenity or insouciance. Whichever it is, the fact remains that from time to time, genocides and other extreme forms of tyranny do occur, even in the midst of high civilization.

In our view, the failure to acknowledge the prospect of rogue government represents a serious failure of imagination. Trusting in the free press and the right to petition government to redress grievances, firearms abolitionists do not envision a world in which satanic rather than benevolent bureaucrats possess the effective monopoly of the means of force. Their gaze is not on more-or-less probable future worlds in which civil atrocities could become just one more idiom of political discourse, but on the world here and now, where criminals and lunatics find it all too easy to acquire powerful weapons and reasons to use them.

We argue that there is a great deal more to weapons policy than some sort of cost-benefit calculation of firearms' crime control benefits versus public health costs. The larger point, that no one who has lived through the greater part of the twentieth century may conscientiously disregard, is that sometimes people in power behave like Stalin, Hitler, Pol Pot, or Mao Zedong rather than like President Clinton. Of course public policy must acknowledge that exceptional brutality is indeed exceptional rather than commonplace. But it is senseless to pretend that what has happened many times before cannot possibly happen again. Sound policy makes allowances for even remote contingencies when they are grave enough, and denies opportunity to predators whenever it can.

Hence, notwithstanding that it is hindsight, one may well reproach the liberal, democratic Weimar Republic and its successors for disarming the German people in the hope of taking back the streets from the right- and left-wing brawlers of the 1920s and 1930s. National Socialists had nothing to do with these firearms confiscations, but once in office, it suited them that Germany's laws left decisions concerning gun ownership to the administrative discretion of police or military authorities. The Nazis made only two important changes to the Weapons Law that was in place when they came to power. First, they forbade Jews from owning guns or any other

weapon. Second, they exempted members of the Sturmabteilung (SA) and many Nazi party officials from the law's strictures.⁵

GUN CONTROL AND GENOCIDE

In contrast to most other weaponry, firearms are preeminently defensive in effect. Combat carried on barehanded or with swords, pikes, clubs and the like, generally results in the weaker, less numerous party surrendering whatever their adversary demands, what Spencer called the "ceaseless devouring of the weak by the strong."⁶ However, defenders armed with guns can often repulse a numerically stronger aggressor who possess only lesser weapons.⁷ When all parties have guns, the defensive advantage of firearms diminishes but does not give way altogether. Firearms, even in the hands of the weak, pose a credible threat of death if fired. Consequently there remains a deterrent effect against aggression which is far greater than that of manual weapons only. And even if both aggressor and defender have guns, an attack carries a far greater risk of death than if both were armed with weapons other than firearms. Of course it is easy to imagine circumstances in which the prospective cost of aggression may be very low despite the fact that the victim has a gun—for example, attack by ambush. On the other hand, the presence of firearms on both sides of a contest often allows weaker victims to overcome aggressors without significant loss to themselves. For instance, marauders attacking a house or town have often been defeated by a far outnumbered party of defenders armed with guns, whereas hand-to-hand combat invariably favors the stronger company.

When victims have guns, the overwhelming advantage otherwise enjoyed by physically superior or more numerous aggressors is diminished. One (usually unintended) consequence of an effective ban on citizen firearms ownership is to weaken the weak and strengthen the strong relative to one another. It is not embellishment to call this effect a "cause" of genocide, because it foreseeably expedites this outcome by lowering the costs of

5. Weapons Law §§ 12, 18 & 19 (Mar. 18, 1938) exempting "[m]embers of the SS-Reserves and the SS Deathshead Units"; numerous Nazi Party officials; officers in the Hitler Youth movement, the S.A., and the SS; and Nazi Party Departments authorized by the Führer's Deputy to carry arms. See JAY SIMKIN ET AL., *LETHAL LAWS* 165, 167 (1995).

6. HERBERT SPENCER, *FIRST PRINCIPLES* (6th ed., Appleton & Co. 1900).

7. In many even fairly recent instances of genocide, the killings were substantially or primarily committed against unarmed victims by the use of such weapons as clubs, edged weapons, and agricultural implements. These genocides occurred in Burundi, Rwanda, India, and even Cambodia, where Khmer Rouge cadres were generally equipped with firearms but often preferred to save ammunition and therefore bayoneted or clubbed victims to death. Private communications with Professors Ted Gurr (Sept. 6, 1994) and Barbara Harff (Sept. 11, 1994).

predation. In practical effect, moreover, the matter is even more stark, because gun bans are never universal. By definition they do not operate on people whom government illegally supplies with guns such as government officials.⁸

To summarize: from the point of view of any aggressor, it is desirable if not essential that intended victims not possess weapons, especially firearms. This principle holds true whether the subject is a gangster premeditating a crime or a government planning a genocide. This is an inherently dangerous incentive structure. It seems to us indefensible to fail to acknowledge its potential for mischief even if at the end of the day one decides that "tyranny" is too remote an evil, and an armed citizenry as a means of avoiding this evil too feeble, to repay its cost in accidental or unjustifiable bloodshed. We discuss these questions presently, but we turn first to a threshold question.

It is a controversial point whether, in the circumstances of modern life, private persons should ever be conceded a privilege to shed blood. As we discuss below, the common law as well as the statutes of every state permit the private use of deadly force when necessary for self-protection. However, it appears to be the considered view of many reputable people that this forbearance is obsolete if not depraved. Furthermore, many gun owners seem to support keeping firearms less as a crime-fighting tool than as a political statement about individual sovereignty and the value of self-rule. It is therefore necessary to elucidate the legal and moral status both of fearful householders and proto-insurrectionists who assert the right to possess firearms.

SELF-DEFENSE AND BARBARISM

A preoccupation with stripping civilians of military weaponry, including even some utterly cosmetic attributes of military arms, is one of the dominant ideological strains in the American gun control movement. The idea is that defensive firearms ownership by laymen is alienating and dangerous, and therefore must be banned as part of what has been called the "civilizing process."⁹ Garry Wills, one of the country's most distinguished historians, has argued

8. For example, in the mid-1960s 500,000 or more Indonesians who were suspected of being Communists were slaughtered, many of them by civilian death squads armed with guns specially provided them for this purpose by the Indonesian government. Other killings by private militias have occurred in the Philippines and El Salvador. See Harff, *Recognizing Genocides*, *supra* note 1, at 37. For similar instances in the Ottoman Empire of the 1890s and Bosnia in the 1990s, see discussion *infra* at notes 108 and 112 and accompanying text.

9. See *Guns and the Civilizing Process*, WASH. POST, Sept. 26, 1972, at A16.

Mutual protection should be the aim of citizens, not individual self-protection. Until we are willing to outlaw the very existence or manufacture of handguns we have no right to call ourselves citizens or consider our behavior even minimally civil. There is something obscene about a person's appeal to our basic social contract to justify [this] anti-social behavior [i.e., defensive gun ownership].¹⁰

It is questionable, however, whether individual and collective defense can be divided so nicely. The idea of general deterrence often assumes that these values are intertwined: "my safety" and "the community's safety" overlap substantially. Vindicating the rights of individuals by force means imposing costs on a wrongdoer; placing oneself in a position to put wrongdoers at risk benefits private citizens by ensuring individual security and the public by making wrongdoing more costly.¹¹ Yet on the commanding heights of our popular culture there remains an abiding reserve of disbelief in the notion that private and public security might be connected. In fact, just the opposite principle is widely accepted. For example, Betty Friedan has called the trend of women buying guns "a horrifying, obscene perversion of feminism."¹² She believes "that lethal violence even in self-defense only engenders more lethal violence and that gun control should override any personal need for safety."¹³

The Board of Church and Society of the United Methodist Church takes the point a step further, stating that women have a Christian duty to submit to rape rather than do anything that might imperil the rapist's life. "Is the Robber My Brother?" the Board's official publication asks rhetorically, to which it rhetorically answers "yes": although the burglary victim or the "woman accosted in the park by a rapist is not likely to consider the violator to be a neighbor whose safety is of immediate concern . . . , [c]riminals are members of the larger community no less than are others. As such they are our neighbors or, as Jesus put it, our brothers. . . ."¹⁴ (Let it be noted that the Board is the founder of the Coalition to Stop Gun violence, formerly known as the National Coalition to Ban Handguns, the country's premier anti-gun

10. Gary Wils, *John Lennon's War*, CHICAGO SUN-TIMES, Dec. 12, 1980, at 56 [hereinafter *John Lennon's War*].

11. See Daniel D. Polsby, *Firearms Costs, Firearms Benefits and the Limits of Knowledge*, 86 J. CRIM. L. & CRIMINOLOGY 207, 209 (1995).

12. Ann Japenga, HEALTH, Mar.-Apr. 1994, 52, 54 (internal quotations omitted) (interviewing Betty Friedan).

13. *Id.*

14. Allen Brockway, *But the Bible Doesn't Mention Pistols*, ENGAGE-SOCIAL ACTION FORUM, May 1977, at 39-40. The language quoted is from pages 39-40 of this issue, which has been published as a separate pamphlet by the Methodist Board of Church and Society under the title HANDGUNS IN THE UNITED STATES. For purely secular arguments to the same effect, see citations given *infra* notes 18-19 and accompanying text, particularly discussion of the views of Garry Wills.

advocacy group, with which it still shares offices.)

If individual and collective security are antithetical, if violence does in fact beget more violence, if the welfare of wrongdoers and innocents occupy the same moral footing, then it follows that firearms, and for that matter weapons of any kind, should not be used for self defense. They should be used, if at all, for recreation, and security concerns should be left in the hands of professionals. As James Brady, the White House Press Secretary shot during John Hinckley's attempt on President Reagan's life, told an interviewer (in response to the question whether any handguns should be considered permissible): "For target shooting, that's okay. . . . Get a license and go to the range. For defense of the home, that's why we have police departments."¹⁵ His wife, Handgun Control, Inc., chairperson Sarah Brady, says "the only reason for guns in civilian hands is for sporting purposes."¹⁶ One of the earliest and most active anti-gun organizers, University of Chicago Pritzker Medical School Professor Robert Replogle, has testified to Congress in a similar manner: "The only legitimate use of a handgun that I can understand is for target shooting."¹⁷

To lawyers steeped in the defense-privileging traditions of common law, these accounts of right conduct seem curious, so lest they be considered mere offhand remarks rather than a thought-out view of the matter, we quote Professor Wills as to why "individual self protection" is in and of itself a form of "anti-social behavior": "Every civilized society must disarm its citizens against each other. Those who do not trust their own people become predators upon their own people. The sick thing is that haters of fellow Americans often think of themselves as patriots."¹⁸

Professor Wills, resonating the views of a large and influential constituency, asserts that not seeking to possess the means of self-defense is a defining element of civilized life. Good citizens should depend instead on the military and police for their physical safety. The mere desire to defend hearth and home counts "among the worst instincts in the human character."¹⁹ The

15. James Brady, quoted in *James Brady*, PARADE MAG., June 26, 1994, at 18.

16. Tom Jackson, *Keeping the Battle Alive*, TAMPA TRIBUNE, Oct 21, 1993, at 6 (interview with Handgun Control chairperson Sarah Brady).

17. Handgun Crime Control Hearings, 191-6 Senate Judiciary Committee [Subcommittee on Juvenile Crime] Oversight of the 1968 Gun Control Act, v. II at 1974. See also the testimony on behalf of the Presbyterian Church (U.S.A.), a member of the National Coalition to Ban Handguns, emphasizing that it does not seek to ban rifles and shotguns, which are used for sport, but only handguns, which are illegitimate because their purpose is personal defense. See *Legislation to Modify the 1968 Gun Control Act: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong. 127-28 (1987) [hereinafter *Legislation to Modify the 1968 Gun Control Act*].

18. Gary Wills, *Worldwide Gun Control*, PHILA. INQUIRER, Mar. 12, 1981, at 8E.

19. *Guns and the Civilizing Process*, *supra* note 9, at A16; see also Marilyn Geewax, *The*

ownership of firearms for defensive purposes is “vigilantism,”²⁰ a usurpation by citizens of what should be the exclusive prerogative of the collective power, “anarchy, not order under law—a jungle where each relies on himself for survival.”²¹ It follows, many gun control activists argue, that there ought to be a national gun licensing program, which would assign to whomever sought to own a gun a burden of explaining the reason. The need or desire to defend oneself or one’s neighbors would not be counted as an acceptable reason to own a firearm.²²

If these views are driven by a pacifist phenomenology (e.g., “violence only begets violence”), one hesitates to offer criticism because they are planted more firmly in faith than in empiricism. In the empirical world, however, what one finds is irregular and more complicated. Defensive violence does sometimes seem to provoke an attacker to commit more violence, but not always and not usually. Quite often violence subdues violence. It is apparent, for example, that when intended victims resist robbers or rapists with firearms, they are only half as likely to be injured as those who submit, and are much less likely to be robbed or raped.²³ There is

Decline of Civilization in America, BALTIMORE SUN, Aug. 25, 1993, at 17A, available in 1993 WL 7382733 (“[T]he crazy gun lobbyists . . . say guns don’t kill people. No, guns are doing something even worse—they are killing civilization.”); Wills, *supra* note 18 and accompanying text; Richard Hofstadter, *America As a Gun Culture*, AM. HERITAGE, Oct. 1970, at 4, 82 (discussing the application of D.H. Lawrence’s denunciation of the American soul as “hard, isolate, stoic, and a killer” against gun owners); cf. Jeanne Shields, *Why Nick?*, NEWSWEEK, May 8, 1978, at 23 (National Council to Control Handguns volunteer Jeanne Shields characterizing NRA members as “macho men who don’t understand the definition of a civilized society”); *Gun Toting: A Fashion Needing Change*, 93 SCI. NEWS 613, 614 (1968) (quoting Dr. Humphrey Osmond, who describes defensive gun ownership as “simply beastly behavior”).

20. See, e.g., June 19, 1975 Press Statement of the Young Christian Women’s Association of the United States; *Legislation to Modify the 1968 Gun Control Act*, *supra* note 17, at 141 (testimony of Harold Massey, Program Coordinator for the General Board of Church and Society, the United Methodist Church, warning of “the vigilante mentality where citizens are encouraged to take into their own hands solutions of conflicts that they have with people, whether they are real or imagined conflicts”).

21. RAMSEY CLARK, *CRIME IN AMERICA: OBSERVATIONS ON ITS NATURE, CAUSES, PREVENTION AND CONTROL* 107 (1970) (also decrying defensive gun ownership as a virtual insult to government). “A state in which a citizen needs a gun to protect himself from crime has failed to perform its first purpose.” *Id.*

22. See Erik Eckholm, *A Little Gun Control, A Lot of Guns*, N.Y. TIMES, Aug. 15, 1993, at E1, E4 (quoting Sarah Brady, chairwoman of Handgun Control Inc., who would allow handgun licensing to hunters, target shooters, and security guards); see also *Taming the Monster: The Guns Among Us*, L.A. TIMES, Dec. 10, 1993, at 6, available in 1993 WL 2243875 (“Under our plan, individuals could own sporting weapons only if they had submitted to a background check and passed a firearm safety course. Other special, closely monitored exceptions could be made, such as for serious collectors.”); *Taming the Gun Monster: How Far to Go?*, L.A. TIMES, Oct. 22, 1993, at 6, available in 1993 WL 2260805 (recommending that federal law limit ordinary citizens to “ownership [only] of sporting and hunting weapons”).

23. See the sources cited in Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus*

evidence also that the mere prospect of encountering an armed victim deters criminal attack,²⁴ and that criminals who encounter armed victims usually run away without a shot being fired.²⁵ Hence it is overdrawn to say that violence is wrong (or "obscene") without reference to whether violence is lawful or unlawful. Even so, Professor Wills's argument denies that such a distinction is meaningful. Because he sees defense of self and others as a literal contradiction, the choice of "self" comes at the expense of "others," and amounts to barbarism. However, it is far from obvious that any such contradiction exists. When a police officer uses lawful violence to subdue unlawful violence, one does not think of barbarism. Why should it be any different if a civilian does the same?

A more troubling aspect of Wills's position, however, is that it gives little weight to the dark side of the communitarian force of radical whose temperate side Professor Wills has been among our country's foremost champions.²⁶ Time after time in recent history this dark side has materialized to assert that the demands of community, *Volk*, party, state, tribe, race, or some other collective abstraction, should be placed before those of any individual. It does not disparage democratic government to question whether the authentic road to a gentle life is one on which only sworn officers of the state are entitled to arms. The counterexamples to this proposition are too pointed to ignore. Trust of "the law . . . your representatives . . . your fellow citizens," uplifting though it sounds, has furnished scant consolation to tens of millions of victims of official terror. Quite evidently some balancing principle is required. Finding this balance, far from being the hobbyhorse of right-wing lunatics, has actually been one of the central projects of Western political philosophy.²⁷

It is hardly a secret that lawful governments sometimes do grotesque things, quite often to popular acclaim. One thinks, for example, of the *Kristallnacht*. On November 9, 1937, German mobs perpetrated a nationwide "spontaneous uprising" against the Jews, assaulting and killing hundreds of people, smashing shops and homes, burning synagogues, and inflicting losses

on the Second Amendment, 45 EMORY L.J. 1139, 1243-44 nn.476-78(1996).

24. See John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence and the Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997); Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995); Marvin E. Wolfgang, *A Tribute to a View I Have Opposed*, 86 J. CRIM. L. & CRIMINOLOGY 188 (1995).

25. See JAMES D. WRIGHT & PETER H. ROSSI, *THE ARMED CRIMINAL IN AMERICA: A SURVEY OF INCARCERATED FELONS* 27-29 (1985).

26. See, e.g., Wills's celebrated study of Thomas Jefferson and the Declaration of Independence in GARY WILLIS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* (1978).

27. See *The Politics of Restoration*, *ECONOMIST*, Dec. 24, 1994, at 33.

of over one billion Reichmarks.²⁸ The constitutional government of that place—what in some theories would be called the “virtual representatives”²⁹ of the Jews—immediately swung into action. Calculating that one billion Reichmarks of damage claims might prostrate the German insurance industry, the government canceled the Jews’ insurance coverage by decree and then fined them one billion Reichmarks for the nuisance that resulted from the destruction of their property.³⁰ Where were the police? “I refuse the notion that the police are protective troops for Jewish stores,” said Hermann Goering, who was then chief of the German national police. “The police protect whoever comes into Germany legitimately, but not Jewish usurers.”³¹

Though it may be an extreme example, the Holocaust draws into question precisely the problem of relying exclusively and simply on “the law . . . your representatives . . . your fellow citizens.” Professor Robert Burt put the matter poignantly:

[H]ow we can rely on our government, on our fellow citizens, on our neighbors; how we can rely on anyone who today seems at least tolerant, and maybe even friendly, but tomorrow might turn on us with murderous rage just because we are Jews or African Americans or Bosnian Muslims or Irish Protestants or mentally disabled or whatever? [One lesson of the Holocaust may be] . . . that our government, our neighbors, our friends of today, can quickly and easily become our assassins of tomorrow.³²

Professor Burt was not discussing firearms ownership but the movie *Schindler’s List*; however, his statement of the problem is convincing. Here we have a feature of the abiding condition of social human beings. What to do? What did Schindler do when he was finally able to free “his” Jews? “[H]e handed them all semiautomatic firearms so they could fight the Nazis”³³—*their lawful government*. Was this a barbarism?

28. For a standard account, see ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* 151 (1983).

29. Edmund Burke, *Letter to Sir Hercules Langrishe*, in 4 *WORKS OF EDMUND BURKE* 241, 293 (Little, Brown, & Company 1884). For discussion, see HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* ch. 8 (1967).

30. See TUSA & TUSA, *supra* note 28, at 151.

31. John R. Salter, Jr. & Don B. Kates, Jr., *The Necessity of Access to Firearms by Dissenters and Minorities Whom Government is Unwilling or Unable to Protect*, in *RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT* 185, 188 (Don B. Kates, Jr. ed., 1979) [hereinafter *RESTRICTING HANDGUNS*].

32. *Confronting Holocausts: Remarks on Spielberg’s Schindler’s List*, 40 *YALE L. REP.* 13, 14 (1994).

33. William R. Tonso and David B. Kopel, *Gun Bans and “Schindler’s List,”* Independence Institute release, Golden Co., Aug. 24, 1994.

To judge from Professor Wills's appreciation of the problem, one might suppose that the primary axis of disagreement between the argument for popular armament versus popular disarmament is one of social values—a dispute pitting quixotic and not altogether civilized cowboys-postulant (or the sexually anxious or “angry white males” or some other condescending stereotype) against the virtuous forces of orderly social life.

The planted assumption is that an armed society is a violent society, and a disarmed society is a non-violent society. This premise is empirically shaky and philosophically incomplete. It does not in fact pose what is genuinely a contest of norms—martial values versus the values of peace—but a contest between different understandings of social cause and effect. Furthermore, it makes the mistake of assuming that an armed population exemplifies “an implicit declaration of war on one's neighbor.”³⁴

There is no serious argument for conflict-filled life as a social ideal. The argument for a widely armed citizenry holds the opposite ideal: a social equilibrium of nonviolence. “Individualists,” “communitarians” and “none of the above” should all be able to agree at a minimum on this much: it is an empirical question what distribution of firearms does in fact tend to social peace. It is not in fact true that a world without guns must be a world without violence. Nonviolence was not the characteristic state of the world before there were guns,³⁵ and it is not the characteristic state of the world now in places where access to guns is practically or legally restricted.

34. See *supra* note 18 and accompanying text.

35. See, e.g., Ted Robert Gurr, *Historical Trends in Violent Crime: Europe and the United States*, in 1 *VIOLENCE IN AMERICA* 21, 28 (1989):

The first systematic records of English homicide appear in the thirteenth century [based on court and coroners' records] . . . [M]urderous brawls and violent deaths at the hands of robbers were everyday occurrences in medieval England. The average annual homicide rates for five rural counties, studied at scattered intervals between 1202 and 1276, [have been calculated as having] ranged from 9 per 100,000 in Norfolk population to 23 in Kent Knives, axes, cudgels, and other implements found in every agricultural community were the typical instruments of death.

By way of comparison, current U.S. homicide rates vary between 7.5 and 10 per hundred thousand population.

Though we are not necessarily suggesting causality, two interesting observations arise that challenge notions that defensive firearms cause violence and prohibiting them reduces it. First, current European homicide rates are the product of a long-term decline that roughly corresponds with the development and widespread distribution of multi-shot handguns during a period in which Europe had virtually no gun control. Second, the current European trend of increasing homicides and other crime, both political and apolitical, coincides with the post-World War I era in which most European nations adopted firearm controls for the purpose of curbing not ordinary crime, but political violence.

See Barnett & Kates, *supra* note 23, at 1236-42; see generally Gurr, *supra*, especially fig. 1.1; COLIN GREENWOOD, *FIREARMS CONTROL: A STUDY OF ARMED CRIME AND FIREARMS CONTROL IN ENGLAND AND WALES* 7-26 (1972).

The absence of firearms is not inconsistent with orderly public life, nor is it a necessary or a sufficient condition of social peace. It is a condition that can and sometimes does lend itself to catastrophe. Whether one considers the matter abstractly as one of theory or concretely as one of experience, universal disarmament in the municipal sphere is no more an encouraging road to communal amity and concord than universal disarmament in an international sphere is an antidote to war.

It is tendentious, moreover, to insist that “individualist” and “communitarian” ideas are antithetical with respect to civilian armament. The argument for an armed citizenry is not to further the project of making of war on one’s neighbor with arms but to cooperate with one’s neighbor in the use of arms. The Constitution’s Second Amendment, for example, is decidedly of this cast of mind. As the Supreme Court has recognized, the Second Amendment contemplates that the militia—“all males physically capable of *acting in concert* for the *common* defense”—will, when called, “appear bearing arms supplied by themselves and of the kind in common use at the time.”³⁶

The peculiar utility of firearms is to make the weak relatively stronger, to deter attack by raising its potential cost, and to lower the expected cost of altruistic interventions. Curiously, these propositions are completely uncontroversial applied to police, which is why we allow, and often require, police officers to carry guns.³⁷ The question is why the same reasoning

36. *United States v. Miller*, 307 U.S. 174, 179 (1939) (emphasis added).

37. Even the ablest academic students of firearms policy fall prey to the illusion that the “equalizing” effects that guns possess point largely in the direction of their potential for abuse. For example, Professors Zimring and Hawkins have written that possessing a gun facilitates crime because it makes feasible “attacks by persons physically or psychologically unable to overpower their victim through violent physical contact.” FRANKLIN ZIMRING & GORDON HAWKINS, *THE CITIZEN’S GUIDE TO GUN CONTROL* 15 (1987). Yet when they later devote a chapter to self-defense, this equalizing property, which makes it feasible for the weak to defend themselves from the strong, receives no correlative mention. Similarly, Professor Cook, who has supported more stringent gun regulation, has stressed that having a gun is not necessary to attack a “victim who is unarmed, alone, small, frail . . . [But] in the hands of a weak and unskilled assailant a gun can be used . . . without much risk of effective counterattack . . . [and] because everyone knows that a gun has these attributes, the mere display of a gun communicates a highly effective threat.” Philip J. Cook, *The Role of Firearms in Violent Crime: An Interpretive Review of the Literature*, in *CRIMINAL VIOLENCE* 236, 247-48 (Marvin E. Wolfgang & Neil Alan Weiner eds., 1982). However, Professor Cook says nothing about defenders in the same situation. This asymmetrical view is odd, to say the least, because in the real world it is unusual for women, the elderly, or other relatively unformidable actors to engage in acts of predation against men, though it is not at all uncommon for them to be the victims of such acts. See, e.g., Margaret Howard, *Husband-Wife Homicide: An Essay from a Family Law Perspective*, 49 *LAW & CONTEMP. PROBS.* 63, 82-83 (1986) (dismissing the value of gun prohibitions in reducing domestic homicide because “[h]usbands, due to size and strength advantages, do not need weapons to kill”); James D. Wright, *Second Thoughts About Gun Control*, 91 *PUB. INTEREST* 23, 32 (1988) (“Analysis of the family homicide data reveals [that when] women kill men, they often use a gun. When men kill

should not apply to the population generally. The usual answer to this question is that an armed citizenry would mistake every bush for a bear, every stranger's unexplained movement for a threat, and would shoot indiscriminately. The whole world would become a shooting gallery, as in the Wild West of the penny-dreadfuls. We now turn to considering the plausibility of this line of reasoning.

AT AN ACCEPTABLE COST?

Even if an armed populace serves as a deterrent to the most extreme abuses of state power, it would still be rational policy to disarm the people if the benefits of doing so outweighed the costs. Tyranny, after all, though a very great evil, is one that lies dormant in a possible future and does not subsist today. The cost of tyranny must be discounted by the probability of its occurrence. Accidents with firearms and ordinary wrongdoing—murders, suicides, robberies and so on—are lesser evils than genocide, but unlike some atrocity-prone government of the imaginable future, they are not contingent, but with us in the here and now. Accordingly, it is necessary to give some account the role the availability of firearms plays in rendering America, in comparison to many other parts of the world, a wild and woolly place.

In recent years this question has been the central one in gun control debates. The subject is far too involved to allow adequate treatment here, but a few words are necessary.³⁸ The organized American medical profession in particular has sought to establish as a fact beyond serious conversation that guns “cause” high murder and suicide rates in much the same way that cigarettes “cause” lung cancer.³⁹ In this endeavor, they have been abetted by

women, they usually do it in some more degrading or brutalizing way—such as strangulation or knifing.”).

38. There is extensive criminology literature dealing with the relationship between firearms and criminal violence. A very abbreviated sampling includes: KLECK, *supra* note 4; DAVID B. KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY (1992); ZIMRING & HAWKINS, *supra* note 37; WRIGHT ET AL., *supra* note 4; GEORGE D. NEWTON, JR. & FRANKLIN E. ZIMRING, FIREARMS AND VIOLENCE IN AMERICAN LIFE: A STAFF REPORT SUBMITTED TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 69 (1969); Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10, 11-12 (1995); Philip J. Cook, *The Influence of Gun Availability on Violent Crime Patterns*, in 4 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 49 (Norval Morris & Michael H. Tonry eds., 1983); Cook, *supra* note 37; David J. Bordua & Alan J. Lizotte, *Patterns of Legal Firearms Ownership: A Cultural and Situational Analysis of Illinois Counties*, 1 LAW & POL'Y Q. 147 (1979); Franklin Zimring, *Is Gun Control Likely to Reduce Violent Killings?*, 35 U. CHI. L. REV. 721 (1968).

39. The medical profession has tried to establish this “causation” through the publication of numerous articles and editorial comments in the profession's leading organs, the Journal of the American Medical Association and the New England Journal of Medicine. Many of these are

the indefatigable sagecraft of most of the nation's principal newspapers, few if any of which have ever acknowledged the legitimacy of civilian firearms possession for other than recreational activities. Nevertheless, despite periodic outbursts of press-release advocacy announcing that the latest science from the scientists at such-and-such university has at last established that firearms are indeed the proximate cause of a horrific public health crisis, the conversation continues.

The causes of crime and suicide are not completely understood. Undeniably, the murder rate in this country (both perpetration and victimization) increased rapidly among teenagers, especially among minorities, from 1983 to 1992.⁴⁰ However, firearms are not "more accessible" to today's adolescents than they were to yesterday's. In fact, until 1968 anyone in this country could readily *mail-order* Army surplus .45 automatic pistols, German Lugers, high-powered semi-automatic rifles, or even trench mortars and bazookas, along with ammunition for all. Munitions of all sorts other than fully automatic weapons (which have been banned since the mid-1930s) could be purchased anonymously by anyone who would check a box on a mailing coupon that said "I am 21 years old or older." Despite this *laissez faire* regime, in the twenty years following the end of World War II, America's crime rates, including its murder rate, were much lower than today.⁴¹

Although firearms are not more "accessible" today than in the past, they are certainly more numerous. The increase in the civilian stock of firearms, and handguns in particular, has been continuous for generations.⁴² Of course a number of countries with tight legal restrictions on civilians' access to firearms, in particular England and Japan, enjoy very low murder rates.⁴³ Yet it is also true that some other countries with similarly exacting restrictions (for example Mexico, South Africa, and Russia) have very high murder rates.⁴⁴ Furthermore, some countries with civilian firearms access comparable to or even greater than that in the United States (such as

discussed in DANIEL D. POLSBY, *FIREARMS AND CRIME* (Independent Institute, 1997); Don B. Kates et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513 (1995).

40. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1995, 360 tbls. 3.133 & 3.134 (1996).

41. See *id.* at 324 tbl. 3.109; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1966, at 148 tbl. 206 (1966) (showing crime rates from 1959-1964).

42. See KLECK, *supra* note 4, at 47-50.

43. See the sources cited in Barnett & Kates, *supra* note 23, at 1237-38.

44. See Barnett & Kates, *supra* note 23, at 1238-39; David C. Stolinsky, *Violence in America*, 165 WESTERN J. MED. 397 tbl. 1 (1996) (reporting homicide rates for Mexico and Russia).

Switzerland, Israel, and New Zealand) have very low murder rates.⁴⁵ Some of the highest suicide rates in the world are found in countries where firearms are hardest to come by, including Japan, Hungary, and Romania,⁴⁶ and some of the lowest suicide rates are found in sub-populations that suffer from some of the highest murder rates, for example, African-Americans males between fourteen and thirty-five years of age, which have relatively easy, though usually unlawful, access to firearms.⁴⁷ It weakens any argument for weapons restrictions if such complexities are not acknowledged and probed to reveal what they might intimate.

A recent batch of state legislation, relaxing the standards for civilians carrying concealed weapons offers yet a further challenge to the Wild West hypothesis. The experience from the field in these places seems to disprove the notion that armed civilians behave like movie cowboys. Thirty-one states have relatively permissive rules regulating the carrying of concealed handguns, and among them over two million residents possess concealed permits. Scholars have sharply disagreed whether these laws have a detectable crime-fighting (that is to say, general deterrent) effect. John Lott and David Mustard, examining a set of nationwide, county-by-county data over a period of fifteen years, found large reductions in confrontational crimes and large increases in non-confrontational crimes associated with the adoption of these laws.⁴⁸ Some other scholars, such as Dan Black and Daniel Nagin, have argued that the Lott-Mustard results are a statistical artifact: the claimed deterrent effect operates unevenly from one place to another so that if one removes the Florida data from the set, the regression equations depicting the experience of the nation as a whole no longer show a convincing crime-fighting effect, at least not an immediate one.⁴⁹ Whatever the merits of the Black-Nagin point, however, there is not an obvious attraction to excerpting from nationwide data the experience of the fourth most populous state. In any case, even Black and Nagin concede that after a lag of four or more years, there is a strong correlation between liberalized carry-concealed laws and declining rates of confrontational crime.⁵⁰ Yet rehearsing the intricacies of this ongoing debate, however, deflects attention from the main point. What is most important for present purposes, after what

45. See Stolinsky, *supra* note 44; Barnett & Kates, *supra* note 23, at 1238-40.

46. Stolinsky, *supra* note 44; Kates et al., *supra* note 39, at 563-66.

47. See BUREAU OF JUSTICE STATISTICS, *supra* note 40, at 365 tbl. 3.142 (suicide rates for black males in this age range lower than those for white males).

48. See Lott & Mustard, *supra* note 24.

49. See Dan A. Black & Daniel S. Nagin, Do "Right-to-Carry" Laws Deter Violent Crime?, (Oct. 16, 1996) (unpublished manuscript on file with authors).

50. See *id.* at p.8.

must have been millions of additional person-hours of public gun-toting, is that there has been not a single reported instance of an "O.K. Corral" scenario involving a lawfully carried concealed handgun. In fact, jurisdictions with more relaxed concealed-carry laws have experienced falling murder rates.⁵¹

This deluge of anomalies in the firearms-violence causation story bears witness to the complexity of the problem of violence, but it is safe to say that the problem with firearms in our society is not a supply-led but rather a demand-led phenomenon. The abuse of firearms by private citizens is rare except in certain sub-populations and, among the American population as a whole, is actually declining.⁵²

Falling crime rates and increasingly widespread civilian gun ownership are not only theoretically compatible, but are currently being seen. In short, the collateral costs associated with having an armed populace are not necessarily large, and are by no means obviously greater than the deterrent benefits.

REVOLUTION AND RESISTANCE TO TYRANNY

Locke called tyranny "the exercise of Power beyond Right,"⁵³ and thought that in some circumstances it gave rise to a right of revolution.⁵⁴ The rendition of this precept into policy is fraught with difficulty, especially since the Oklahoma City bombing has drawn public attention to the existence of a number of individuals who possess a stunning sense of grievance toward the federal government and are content to act out their fury by shedding the blood of innocents. When one speaks of a generally armed population making tyranny less probable by making it more costly, what one has in mind is a credible threat of armed resistance to agents of the government. This lethal contingency is in fact the very substance of the deterrence principle.

51. "I'm detecting that I'm eating a lot of crow on this issue," Harris County, Texas, District Attorney John Holmes recently told *Texas Lawyer*. See Richard Connelly, *Handgun Law's First Year Belies Fears of "Blood in the Streets"*, TEX. LAW., Dec. 9, 1996, at 2, 2, available in LEXIS, Legal News Library. Harris County includes Houston and is the third most populous county in the United States. Holmes was one of many who feared that if Texas legalized the carrying of concealed handguns, there would be "blood in the streets." *Id.* The state now has issued 111,408 new concealed carry permits, but in 14 months following enactment recorded only 57 irregular "incidents," all minor, with legally carried handguns. See *id.* at 2-3. Eating crow is "not something I necessarily like to do," Holmes told *Texas Lawyer*, "but I'm doing it on this."

52. Barnett & Kates, *supra* note 23, at 1203 & 1247-52.

53. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 416 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

54. *Id.* at 416-23.

Reasoning from the deterrence of tyrants, therefore, one inescapably encounters the norm that, at least under some circumstances, it must be permissible to kill soldiers or police officers who are simply following orders—something like a right of revolution. This entailment of the argument deservedly poses the highest hurdle to dispassionate argument about civilian weapons policy. People arming themselves in order to rebel against the *government*? We have been down that road before with the Weather Underground and Symbionese Liberation Army of yesteryear and the unhinged survivalists and racial supremacists of the present day. Americans do not need to be reminded that paramilitary shtick is no passing fad, but the accustomed fashion statement of the profoundly alienated. There appears to be a constant supply of people at the margins of society who consider themselves to be soldiers and patriots who regard their country's government as tyrannical, its residents expendable, and its institutions of democracy contemptible. Legislators can hardly be expected to ignore the existence of these individuals when establishing rules to govern firearms possession and use in society, because in the contemplation of law, sturdy Jeffersonian yeomen and fey skinheads stand essentially in the same shoes until they differentiate themselves by behavior—by which time some life or lives will be beyond saving.

At the same time, however, the question of what rights people have against a *de facto* government (even including a right to revolution) ought not to be resolved, and in any event cannot practically be resolved, by reference to the proclivities of three-standard-deviation wackos. The challenge is to articulate some defensible middle ground that makes sense of an armed population as a deterrent to tyranny without tacitly shaking hands with domestic terrorists.

It is too much to ask that a constitutional order be indifferent to armed rebellion. But some recognition must be given to the possibility that the offices and power of the state are capable of being used in ways beyond the corrupt or distasteful, ways extreme and completely at odds with the natural rights the Constitution has always been thought to secure. Thinking of an armed populace as a deterrent to tyranny should not lead one to regard violent right- (or left-) wing desperados as patriots rather than criminals. One should rather think of the problem of lawful government itself falling to a coup or virtual coup at the hands of the same sort of extremists, as has happened so often in other places, for example by disaffected military officers or civilian demagogues with contempt for the substance or even the forms of democratic conversation.

As we discuss at length below, when such apprehensions are broached, the usual retort is, "It can't happen here."⁵⁵ We ask, why can't it? One reason why such a risk is low in the American context is our latticework of institutional stops, which has always included an armed civilian population as one of its elements, that would make it very difficult for anything like such a project to succeed. Plans with an obviously poor chance of success are less likely to be laid in the first place, and will be less likely to attract the collaboration of conspirators.

The essence of deterrence is not, after all, to deal with trouble once it starts, but to keep it from starting in the first place. Fair enough to criticize the lout on the next barstool (or for that matter the teacher in the next classroom) for tirades—common enough in recent years—against the President, Congress, or the entire political order. But one cannot reason that an American tyranny is *impossible* simply from the fact that overwrought judgments on this subject are commonly and casually made, often by people who should know enough to weigh their words before speaking. The principle that justifies armed resistance to tyranny does not equally justify armed resistance to a government for which one feels mere or even profound disgust.

Common law recognizes the right of an innocent to defend himself or others with force, lethal if necessary, even against officers of the state. It goes without saying that this right is narrowly bounded. The common law never considers an amount of force reasonable when a defender could reasonably use less,⁵⁶ nor does it permit the use of deadly force except when the person seeks to protect himself or someone else from being killed or subjected to a forcible felony such as rape, robbery or kidnapping. There is also no privilege to resist a lawful arrest by lethal force or even by non-violent means such as flight. If an officer possesses a warrant (even if the warrant should

55. Not everyone is so sanguine. Air Force Col. Charles J. Dunlap, Jr., a Judge Advocate in the United States Central Command, wrote a provocative scenario of how such a thing could unfold in the not-too-distant future. See Charles J. Dunlap, Jr., *The Origins of the American Military Coup of 2012*, 22 *PARAMETERS* 2 (1992-93); see also Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 *WAKE FOREST L. REV.* 341 (1994); Richard H. Kohn, *Out of Control: The Crisis in Civil-Military Relations*, 35 *NAT'L INTEREST* 3 (1994) (discussing erosion of civilian control of the military); Russell F. Weigley, *The American Military and the Principle of Civilian Control from McClellan to Powell*, 57 *J. MIL. HIST.* 27, 58 (1993) ("[t]he principle of civil control in the military faces an uncertain future"). Dunlap's cautionary thesis, which oddly has received little popular attention, does not look for a takeover by a "man on a horse," but through the gradual erosion of the once-stark line between military and civilian activities as the armed forces are increasingly diverted from their traditional functions and tasked with new burdens such as the "War on Drugs," "nationbuilding" in Somalia, or otherwise fulfilling America's "global responsibilities."

56. Justice Holmes' maxim, however, applies: "Detached reflection cannot be demanded in the presence of an uplifted knife." *Brown v. United States*, 256 U.S. 335, 343 (1921).

later turn out to be invalid) or if he believes, though mistakenly, that he has observed a subject committing a crime, arrest is lawful and resistance unlawful. The officer may use deadly force if necessary to subdue the suspect and may even shoot a suspect who runs away if there are reasonable (though mistaken) grounds to fear that the suspect may be dangerous.

The American Law Institute's Model Penal Code sets out what is undoubtedly the correct rule in the vast majority of cases: a subject arrested even wrongly by a person whom he knows to be a police officer must simply surrender.⁵⁷ Misunderstandings can be sorted out later with a magistrate or supervisor. No one needs to get hurt, and unlike the case with muggers or street criminals, it will almost always be possible for a wronged suspect at least to identify the officer who supposedly wronged him. The common law is parsimonious with blood. Immediate, deadly solutions to problems are forbidden where eventual, verbal solutions might reasonably be substituted.

The rule is different where a subsequent peaceable solution of a problem is out of the question. If a gang of police officers mistakenly (or maliciously) surrounds a house and tries to shoot rather than arrest a suspect, it is in theory lawful for him to defend himself. Recognizing this proposition involves no more than acknowledging that peace officers may exceed their own privilege to use deadly force, and that when they act without privilege, they may be resisted.⁵⁸ This is not all an exception to the general principle, but merely a recognition that sometimes, albeit rarely, an innocent who does not return fire may be killed before the mistake (or the conspiracy, as it may be) can be corrected.

The problems that attend the use of deadly force in this context are ultimately no different from the general legal problem of defensive force. The privilege arises from necessity and is lawful if used within reason. The rules of common law depend on the particular and specific facts of each case, and the concept of due process of law is a broad commitment to weighing particular and specific facts, in context, before passing judgment on a person's actions.

It is an esoteric question, one that seldom finds facts that make it real, whether it is *unconditionally* the case, as the Model Penal Code holds, that a person is obliged to yield to what he knows to be a good-faith effort to arrest him. The most extreme circumstances in which this question can arise

57. The Code states: "The use of force is not justifiable . . . to resist an arrest that the actor knows is being made by a peace officer, although the arrest is unlawful[.]" MODEL PENAL CODE § 3.04(2)(a)(i) (Official Draft and Revised Comments 1962).

58. *See, e.g.,* *People v. Olguin*, 173 Cal. Rptr. 663 (Cal. Ct. App. 1981) (victim used reasonable force to protect himself against officer's excessive force in making arrest).

implicate the right of revolution. It may seem unintelligible to speak of a “right” of revolution arising under a Constitution meant to establish domestic tranquillity; indeed, revolution is scarcely coherent with the idea of constitutionalism itself. The Constitution provides for how it may be amended, and government thus transfigured. Even if Article V is not the “exclusive” route to amendment that it pretends to be (as some prominent legal scholars have contended),⁵⁹ it would be hard to rationalize “non-peaceable amendment” in the United States, a democratic concern going well into its third century of existence. Moreover, the precedent of the Civil War—the War of the Rebellion as it is officially called—ought to count for something. The legalistic basis of that war was the supposed right of sovereign states to withdraw at will from a “union” into which they had originally entered voluntarily. The war may be argued to have put that claim to rest, so that it might be thought that there is no right under the Constitution of states or citizens to annul the authority of the Constitution by extra-constitutional means.

Yet surely this interpretation goes too far. Our Constitution is, after all, only a second draft (the Articles of Confederation were the first) of an organic document for American political society. It is altogether permissible (if not necessarily wise) to think of a third or subsequent draft more nearly suited to the conditions of third millenium life. There is, in other words, a supraconstitutional entity in which the Constitution is embedded and from which it draws its authority. It is perfectly circular to think that the Constitution legitimates itself, for the authority of a constitution, ours or any, is inevitably extra-constitutional.⁶⁰ The Declaration of Independence supports the principle that at a minimum legitimacy requires the “consent of the governed” (the Constitution’s “We the people”). Other constitutional orders have different legitimating conventions, for example, the will of God, the Mandate of Heaven, or the dictates of prudence, but all share the attribute of extra-constitutionality. If the Constitution itself is legal, there must be some sort of right to establish legal constitutions extra-constitutionally—in short, a right of legal revolution.

Granted a constitutional order cannot at once assert its own lawfulness and yet confess that it might be terminable by means and for reasons other

59. See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994); 1 BRUCE ACKERMAN, *WE THE PEOPLE* (1991); but see John M. Rogers & Robert E. Molzon, *Some Lessons About the Law From Self-Referential Problems in Mathematics*, 90 MICH. L. REV. 992, 1005 (1992); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

60. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1290-91 (1995).

than, and antipathetic to, its own. But peaceable amendment itself assumes a functioning constitutional system. What if the system has broken down or has been destroyed? This has not happened in America, but it is a long way from “has not” to “cannot.” And in the eyes of the Founders, at least, the right to resist tyranny (“the exercise of power beyond right”) entailed nothing like a contradiction of the premise of constitutionalism; to the contrary, it was thought of as a principal mainstay of organized constitutional government.

The Declaration of Independence speaks of, and purports to rest upon, a number of familiar substantive axioms, most of them taken straight from Locke,⁶¹ about the moral nature of human beings and the purposes of government. All men are created equal; they are endowed with inalienable rights by a Creator; governments are instated to protect these rights; governments that become destructive of this end may rightly be supplanted. But there is much more to the Declaration than a manifesto about rights, their origins, and negotiability. If we attach significance to the Founders’ effort to articulate a justification for their political actions, the Declaration also incorporates a nucleus of adjective propositions that suggest what might be thought of as a code of revolutionary procedure. By parsing that argument as a series of interrelated declarative propositions, it becomes evident that the sort of revolution that Locke described as a right—at least as Jefferson and his compatriots seem to have understood Locke—was very remote from anything resembling Nietzsche’s will to power, but was rather meant as a resuscitation of natural law principles that the sovereign no longer would honor, and that had to be restored. This was revolution as a putting back rather than as a casting down. Americans, Gordon Wood wrote of the time of the founding, “sincerely believed they were not creating new rights or new principles prescribed only by what ought to be, but saw themselves claiming ‘only to keep their old privileges,’ the traditional rights and principles of all Englishmen, sanctioned by what they though had always been.”⁶²

Five elements can be drawn from Locke’s writings that distinguish lawful revolutions from mere barbarism. It may be useful to examine these five requirements in detail.

1. A lawful revolution involves decent respect for the opinions of mankind. It is hard to imagine Lenin or Robespierre admitting to any such prerequisite, and indeed it is a good question why a revolutionary party should consider itself to be bound to any form of decency or the need to pay respect to any opinions other than its own. Surely the reasoning goes beyond

61. See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 144-45 (1985).

62. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 13 (1969).

the prudential desirability of enlisting international opinion when striking militarily at an established sovereign. Locke argued that the “testimony of others’ experience” is one of the most important ways we have of ascertaining truth.⁶³ Hence the opinions of others matter because they increase the certainty that causes justifying revolution are in fact present. Steven Shapin argues that to seventeenth-century British intellectuals, “truth” in the scientific and philosophical sense, and “decency” in the sense of “the way in which proper gentlemen behave,” were intricately connected.⁶⁴ It is not inordinate to describe the American Revolution as a revolution of gentlemen, displaying both the manners and epistemology of gentlemen.⁶⁵

2. Revolution is the lawful right, not of “persons” but of “the people.” This carries forward Locke’s argument that self defense as part of the law of nature is good even as against the king, but that it is “the Privilege of the People in general, above what any private person hath; That particular Men are allowed . . . to have no other Remedy but Patience; but the Body of the People may with Respect resist intolerable Tyranny[.]”⁶⁶ For Locke, the troublesome abstract problem of how justifiable individual grievance commutes into a right of revolution was resolved by the practical reality that

[if tyranny] reach no farther than some private Mens cases, though they have a right to defend themselves, and to recover by force, what by unlawful force is taken from them; yet the Right to do so, will not easily engage them in a Contest, wherein they are sure to perish; it being as impossible for one or a few oppressed Men to *disturb the Government*, where the Body of the People do not think themselves concerned in it, as for a raving mad Man, or heady Male-content to overturn a well-settled State; the People being as little apt to follow one, as the other.⁶⁷

3. To be lawful, a revolution must be justified by reasoning. It is not enough simply to have good reasons; those reasons must be declared and defended. This core norm of the common law tradition embodies several values. Most obviously, reasoning informs and persuades others and hence

63. See JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Book IV, chapter 15) 429 (Hayes & Zell, 1860).

64. See generally STEVEN SHAPIN, A SOCIAL HISTORY OF TRUTH: CIVILITY AND SCIENCE IN SEVENTEENTH-CENTURY ENGLAND (1994).

65. See generally JOHN MARSHALL, JOHN LOCKE: RESISTANCE, RELIGION AND RESPONSIBILITY 163 (1994).

66. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 469 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690).

67. *Id.* at 439 (translating William Barclay).

evinces a decent respect for the opinions of mankind. Reasoning also attempts to assure that the decision possesses some sort of regular, impersonal character, thus drawing on “rule-of-law” values such as treating like cases in a like manner, allowing the making of plans, and so on. Beyond those first-order qualities, the process of reasoning also evokes what might be called the spirit of heedfulness, which embraces the perplexity of human judgment and thus acknowledges the need for rational checks on that judgment.

4. A lawful revolution cannot be provoked by some transient cause but must be based on “a long train of abuses, and usurpations” by the established government. This principle is obviously based on Locke’s observation that the oppression of this person or that person might be mere bad government and not tyranny, which would engage the interest of the whole people.⁶⁸ Yet, “a long train of Abuses, Prevarications, and Artifices, all tending the same way” might make the government’s tyrannical design “visible to the People,” so that they “should then rouse themselves, and endeavor to put the rule into such hands, which may secure to them the ends for which Government was at first erected[.]”⁶⁹

5. A lawful revolution requires that adequate notice and opportunity for remonstrance if not reform shall have been given to the established government, and that non-revolutionary means of redressing grievances first shall have been exhausted. This is the notion that force can be justified only in the last resort. With this still-vigorous common law principle Locke strongly agreed:

[W]here the injured Party may be relieved, and his damages repaired by Appeal to the Law, there can be no pretence for Force, which is only to be used, where a Man is intercepted from appealing to the Law. For nothing is to be accounted Hostile Force, but where it leaves not the remedy for such an Appeal. And ‘tis such Force alone, that puts him that uses it into a state of War, and makes it lawful to resist him.⁷⁰

Active and passive hostility toward established government are not the same thing. Jeffrey Snyder has stressed the importance of the Lockean distinction to be drawn between noncompliance (secret or open) with unjust laws and the use of violence as a means of resistance.⁷¹ It is one thing to

68. *Id.* at 422.

69. *Id.* at 433.

70. *Id.* at 421.

71. *Cf.* Jeffrey R. Snyder, *The Line in the Sand*, AM. HANDGUNNER, Mar.-Apr. 1995, at 82.

disobey the Fugitive Slave Act, for example, by running an Underground Railway or to disobey the military conscription laws by burning one's draft card, but violence against others may be used only to prevent violence to oneself, never as a means of coercing a change in the laws or the government. Coercion and consent are mutually exclusive; it is self-contradiction to speak of "coerced consent," and unintelligible to speak of a government deriving just powers by means of consent coerced from the governed.

The Declaration's procedural criteria for legitimate revolution are arguably more noteworthy than its substantive account of legitimate government and fundamental rights. If the Oklahoma City bombing or the acts of other latter-day revolutionists compels a rethinking of the right of revolution in modern context, it is apropos to consider whether the actions of contemporary domestic insurgent movements could pass the Lockean test of political obligation, by which Jefferson and the others evidently considered themselves bound. The American Revolution involved few acts of what we should call terrorism, and indeed involved nothing like an ordinary civil war.⁷² Loyalists, for the most part, simply fled, to "Hell, Hull or Halifax."⁷³ Those who remained voluntarily abandoned one sovereignty and embraced another. If ever there was meaning to the notion that "the people" could be author of a sovereign transformation, the American revolution illustrates it.⁷⁴

We can hardly compare the behavior of our Founders to that of modern radical insurgents, whose idea of political dialogue consists of bombing government buildings and indiscriminately taking and jeopardizing innocents' lives without warning or remorse. To paraphrase Professor Elaine Scarry, it is as misguided to try to understand the right of revolution by reflecting on the Oklahoma City bombing as to try to come to know the freedom of speech by reflecting on pornography.⁷⁵

IT CAN'T HAPPEN HERE

To many Americans, genocide seems so remote a contingency that the relevance of policies meant to constrain it can simply be dismissed out of hand. This is one aspect of the theory of American exceptionalism—the idea that we Americans are different from and perhaps better than the other

72. Louis Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023, 1026 (1989).

73. I VERNON L. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT: THE COLONIAL MIND, 1620-1800, at 196 (1927).

74. *See id.*

75. *See* Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257, 1268 (1991).

members of the human race. One is entitled to be skeptical whether this self-conceit is sound, especially given that one of the more terrifying aspects of genocide has been its prevalence among civilized, educated, cultured people. A reality check is in order for Americans who reflexively dismiss the relevance of genocide to their lives.

Consider a thought experiment suggested by Professor Robert Cottrol. Let us travel by some means back in time to the year 1900, and there convene a committee of the most exalted thinkers from all over the world. We inform them that within fifty years a great and cultured nation will try to exterminate, with near success, one of its most important ethnic, racial, or religious minorities. We now ask them to forecast who the victim group and the perpetrator nation will be. Would any predict the Holocaust?

It is hard to see why anyone would. Jews as a likely victim group might have been foreseen, though other candidates would surely have ranked higher. As for potential perpetrators, surely the United States would have been high on the list, what with that proverbial culture of guns and violence that Europeans find so quaint, to say nothing of our many minorities—immigrant, indigenous and racial. Germany, the homeland of music, philosophy, mathematics, public sanitation, environmentalism, physical culture, social security, and the rule of law could hardly have figured at all.⁷⁶

We Americans have had, arguably, some close encounters with genocide-like outrages. In the last century, various Indian massacres, such as the

76. Cottrol and Kates (Private Communication Sept. 15, 1994) guessed that, standing in the shoes of the circa-1900 savant, the odds would favor (in descending order of probability):

- | | |
|--------------------------------|-------------------------|
| 1) Perpetrator: Ottoman Empire | Victim Group: Armenians |
| 2) Perpetrator: United States | Victim Group: Blacks |
| 3) Perpetrator: United States | Victim Group: Indians |
| 4) Perpetrator: Russia | Victim Group: Jews |
| 5) Perpetrator: France | Victim Group: Jews |

Out of curiosity, inquiry was made of several leading authorities on genocide. Professor Ted Robert Gurr (Private Communication Sept. 6, 1994), a political scientist at the University of Maryland, agreed with the above choices, emphasizing particularly the United States as perpetrator and American Indians as the victim group. The response of Prof. Rudolf J. Rummel (Private Communication Oct. 24, 1994), a political scientist at the University of Hawaii, differed significantly, in part due to his view that democracies do not commit genocide against their own citizens. Rummel's list was as follows:

- | | |
|--------------------------------|-------------------------|
| 1) Perpetrator: Ottoman Empire | Victim Group: Armenians |
| 2) Perpetrator: China | Victim Group: Moslems |
| 3) Perpetrator: Russia | Victim Group: Jews |
| 2) Perpetrator: Mexico | Victim Group: Indians |

Rummel notes that his list is based on an expectation of only hundreds of thousands of victim deaths in Russia and Mexico, respectively, not millions. He also notes that in their African colonies Belgium, France, Portugal, and particularly Germany could have been expected to continue killing natives by the tens of thousands through forced labor under unendurable conditions and, in the case of the Germans, savage suppression of native opposition.

“battles” of Washita and Sand Creek,⁷⁷ were publicly celebrated as glorious feats of arms. Only in very recent times have official ceremonial markers on these sites been emended to reflect what really happened, a concession not to political correctness but to ordinary devotion to the truths of the past. One hopes the old plaques have been kept in a museum somewhere as a testament to the purlblindness of which public opinion is capable.

A more recent example furnishes at least as ominous an example. On May 15, 1942, a proclamation was issued on the orders of Lieutenant General J.L. DeWitt of the Northern California Sector of the Western Defense Command that required one hundred thousand American citizens of Japanese descent to report to depots for transfer to detention camps. As a result of doing so, they lost, along with their freedom, property with a value in the billions of dollars-- all their businesses, virtually all their personal property of any importance, and much of their realty. American policy was based on wartime fear of a poorly-understood minority group that was deemed disloyal. Fearing sabotage, espionage, and other “Fifth Column” activities elsewhere in the hemisphere, the United States even urged Central and South American governments to round up their own Japanese nationals and ship them to the United States for internment here.⁷⁸

Genocide was neither the intent nor the result of this policy. But what if the terrible defeats suffered by American forces at Pearl Harbor and for half a year thereafter had continued beyond the Battle of Midway?

Midway was meant to be, and in fact was the decisive battle of the Pacific war. There, in June of 1942, thirteen hundred miles northwest of Hawaii, the Imperial Navy marshaled a powerful aircraft carrier task force with the intention of inflicting a terminal calamity on what was left of the United States Pacific Fleet after Pearl Harbor. As it turned out, it was the Japanese who suffered the calamity, from which they never recovered. It could easily have been otherwise and nearly was. If the Japanese had won that battle, Hawaii would certainly have fallen. Admiral Yamamoto, the commander-in-chief of the Imperial Fleet, had already ordered plans to this effect to be prepared as early as 1942, according to the historian Gerhard Weinberg.⁷⁹ The entire West Coast, with thousands of miles of undefended beaches and dozens of coastal cities, would have been laid open to raids and shelling, if not invasion by Japanese soldiers, who had regularly shown themselves to be

77. For the history of these massacres, see *Honey Springs and Stones River National Battlefields: Hearings on H.R. 4821 and H.R. 4266 Before the Subcomm. on National Parks, Forests, and Public Lands*, 103rd Cong. (1994).

78. See SIMKIN ET AL., *supra* note 5, at 23.

79. A WORLD AT ARMS: A GLOBAL HISTORY OF WORLD WAR II 329 (1994).

capable of the most outrageous brutality toward every civilian population that came under their control. The War Ministry in Tokyo in fact had ambitions even greater than Yamamoto's. It wanted to take over all of Alaska and Western Canada as well as Washington State, Central America, Colombia, and the major islands of the Caribbean, along with Australia, New Zealand, and most of the littoral lands of the western Pacific and eastern Indian Oceans.⁸⁰

One should consider the effect had the war unfolded thus instead of the steady diet of success enjoyed by American forces at Midway and after that placated Americans' fury over the Pearl Harbor sneak attack. Situations of this imagined kind are the media in which demagogues thrive. Surely demagogues would not seek to explain Allied reverses by the inadequacies of American manhood or machinery. Surely the onus would have been placed elsewhere, on the friends and relatives of the Emperor, including (one can hardly doubt) Japanese-Americans in Hawaii (who were not interned because they were too numerous), and God alone knows what else. It should not be too hard to imagine what the drift of public opinion would have been the day the Japanese Army descended on Seattle, or the day that Havana capitulated to the Imperial Fleet, or the day of the shelling of Santa Cruz or Oxnard. Demagogues would say: the Japanese all look alike, do they not? Are they not furtive and treacherous by nature? Why not then deal wisely with them, lest they join themselves to our enemies and fight against us?

It is hardly far-fetched to imagine this line of reasoning emerging in a foundering, beleaguered America. Things were bad enough while the war was going well. In 1944, when America's eventual victory in the war seemed assured, a Gallup Poll asked Americans what should be done with the Emperor's subjects after the war. Thirteen percent of the respondents answered: kill them all.⁸¹ Popular support in Germany for the extermination of the Jews may never have been as great.

EXCEPTIONAL AMERICA

Thirteen percent is an alarming statistic, but perhaps one should not dwell on it without also considering the possibility that American institutions do provide some significant insulation from the genocides to which other societies have capitulated. Consider the history of the Second Ku Klux Klan, which initially was much more successful in America than was the Nazi

80. *See id.*

81. Survey #335, Dec. 20, 1994, in GEORGE H. GALLUP, *THE GALLUP POLL: PUBLIC OPINION 1935-1971*, at 477 (1972).

Party in Germany. At its high point in the 1920s, KKK membership exceeded four million, and even outside the deep South the KKK “came to exercise great political power, dominating for a time the states of Oregon, Oklahoma, Texas, Arkansas, Indiana, Ohio, and California,” as well as wielding substantial power in New Jersey and Illinois.⁸² One element in this success was the severe economic downturn of the immediate post-war years, which persisted throughout the 1920s in the nation’s agricultural areas.⁸³ Another was that a “younger generation of blacks—led by soldiers returning from World War I, familiar with guns and willing to fight for the equal treatment they had received in other lands—had to be painfully reintroduced to the forces of social control.”⁸⁴

Those forces of social control included restrictive gun laws directed against African-Americans. Over a period of two centuries gun control laws played an indispensable part in Southern control of slaves and—after the Civil War—of freedmen.⁸⁵ This legacy to the Second KKK from the triumph of the First Klan was enlarged when in 1911 New York followed Southern states by conditioning handgun ownership on obtaining a police license. The purpose of this requirement was to disarm Italians, Jews, and other supposedly criminous immigrant groups.⁸⁶

82. FREDERICK LEWIS ALLEN, *ONLY YESTERDAY: AN INFORMAL HISTORY OF THE NINETEENTWENTIES* 66 (1931); see also JAMES WEST DAVIDSON & MARK HAMILTON LYTTLE, *AFTER THE FACT: THE ART OF HISTORICAL DETECTION* 275 (1982) (noting the Klan’s large chapters in major cities, Oregon, and states of the upper middle west); DAVID M. CHALMERS, *HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN* (1965) (devoting separate chapters to the 1920s Klan in Georgia, Texas, Oklahoma, Arkansas, Louisiana, Mississippi, Alabama, Oregon, North and South Carolina, California, Colorado, Missouri, Kansas, Minnesota, Indiana, Ohio, Illinois, Wisconsin, Michigan, Florida, Virginia, Pennsylvania, New Jersey, and New York).

83. See generally NANCY MACLEAN, *BEHIND THE MASK OF CHIVALRY: THE MAKING OF THE SECOND KU KLUX KLAN* (1994).

84. See Don B. Kates, Jr., *Toward a History of Handgun Prohibition in the United States*, in *RESTRICTING HANDGUNS*, *supra* note 31, at 7, 19 [hereinafter Kates, *Handgun Prohibition*]; see also MACLEAN, *supra* note 83, at 28-29 (describing assertiveness of African-American veterans after experiencing alternative to Southern life).

85. As the Florida Supreme Court justice frankly avowed in denying the application of such a law against a white appellant: “[T]he Act was passed for the purpose of disarming the negro laborers[.] . . . [It was] never intended to be applied to the white population[.]” *Watson v. Stone*, 4 So.2d 700, 703 (1941) (Buford, J., concurring). Southern gun laws from the eighteenth through the early twentieth century are discussed in Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991); Robert J. Cottrol & Raymond T. Diamond, “Never Intended to Be Applied to the White Population”: *Firearms Regulation and Racial Disparity—The Redeemed South’s Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307 (1995); Kates, *Handgun Prohibition*, *supra* note 84.

86. For the history of New York’s Sullivan Law, and its purposes, see Kates, *Handgun Prohibition*, *supra* note 84; see generally also Don B. Kates, Jr., *The Battle Over Gun Control*, 84 PUB. INTEREST 42, 43-44 (1986); LEE KENNETT & JAMES LAVERNE ANDERSON, *THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA* 165-86 (1975).

Even so, the American tradition of armed self-defense was difficult to eradicate. When attacked by the Klan or other racist groups in the 1910s and 1920s, armed victims defended themselves vigorously; mob members and other attackers were killed or wounded and the Klan defeated by “mass, armed counterattacks so determined that the National Guard was called out on at least one occasion.”⁸⁷ Klan literature abounded with distracted warnings “that Catholics were stockpiling weapons to take over the country”; that “white people must ready themselves for an imminent race war with people of color”;⁸⁸ that America was being inundated with radical alien immigrants like Sacco and Vanzetti (arrested under a Massachusetts gun control law), whom many Americans associated with the bloody revolutions staged by radicals first in Russia and then in Hungary and Germany,⁸⁹ and that the danger of radical uprising was magnified enormously by the machinations of the Catholic Church, an institution allegedly so committed to the violent overthrow of free American government that it was willing to make common cause even with leftists to accomplish that purpose.⁹⁰

87. MACLEAN, *supra* note 83, at 13-14. For other incidents of armed resistance by individuals or groups, and of bearing arms for protection against potential KKK attacks, see CHALMERS, *supra* note 82, at 66, 67, 179, 239, 248, 249, 273, 338, 348.

88. MACLEAN, *supra* note 83, at xi. *See also* CHALMERS, *supra* note 82, at 67 (discussing KKK claims that “[a]rms were being stored in [Catholic] church basements as the Pope got ready to seize the government”). Among Klansmen “[o]ne popular story was that every time a boy was born to a Roman Catholic family, the father added a rifle and ammunition to his local church’s arsenal.” *Id.* at 111. Significantly, the oath which every Klansman took omitted any mention of the Second Amendment right to arms, though it committed him to upholding “the sacred constitutional rights and privileges of free public schools, free speech, free press, separation of church and state, liberty, white supremacy, just laws, and the pursuit of happiness against any encroachment.” *Id.* at 115-16.

89. MACLEAN, *supra* note 83, at 70, 83, 91, 93, 96. Acute fear of imminent, sanguinary revolutionary activity was not confined to the KKK. Southern employers and union leaders alike denounced the “flooding of the South and Georgia with . . . the scum of Europe, a people in nowise in sympathy with the spirit of our institutions and form of government.” *Id.* at 70. Such fears were entertained throughout the nation. *See* ALLEN, *supra* note 82, at 19-20, 45-75; DAVIDSON & LYTTLE, *supra* note 82, at 273-77 (describing nativism).

Nor were such fears entirely groundless. Prior to World War I anarchist assassins had taken the lives not only of a Russian czar, an Austrian empress, a king of Italy, and a Spanish premier, but of President William McKinley. *See* BARBARA TUCHMAN, *THE PROUD TOWER: A PORTRAIT OF THE WORLD BEFORE THE WAR, 1890-1914*, at 63-113, 167 (1962). In the immediate aftermath of the War, anarchists (or communists or syndicalists with whom they were often confused) exploded a bomb in Wall Street, killing 30 and wounding over a hundred. They also attempted to assassinate Oliver Wendell Holmes, the Attorney General, the Postmaster General, the Secretary of Labor, the Commissioner of Immigration, J.P. Morgan, John D. Rockefeller, and a number of other magnates. *See* ALLEN, *supra* note 82, at 49-50, 71-74.

90. *See* MACLEAN, *supra* note 83, at 96; Kates, *Handgun Prohibition*, *supra* note 84, at 17-18. There is ample precedent for the current fringe belief that President Kennedy was killed by a secret cabal. Comparable nineteenth-century literature alleged that the Catholic Church assassinated Lincoln and secretly sponsored secession out of its hostility to the United States. Then, as now, such views were buttressed by a plethora of falsehoods for example, that all the Lincoln assassination conspirators

Concomitantly 1917-27 were watershed years for states to enact firearms licensing requirements which, like those of Weimar Germany, allowed police to grant or deny firearms in their administrative discretion. In both the North and South, states adopting such laws were Klan-influenced if not Klan-controlled.⁹¹ This is not to say that the Klan was the sole, or even the most important, factor in enacting such laws. Many post-Civil War Southern gun laws were enacted after the formal dissolution of the First KKK and before the creation of the Second. It was not the Klan as such, but the outlook for which it spoke, that was the problem. A full six years before the Second Klan was chartered, a Comment in the predecessor to the University of Virginia Law Review argued thus for disarming “the son of Ham”:

It is a matter of common knowledge that in this state and in several others, the more especially in the Southern states where the negro population is so large, that this cowardly practice of ‘toting’ guns has always been one of the most fruitful sources of crime. . . . Let a negro board a railroad train with a quart of mean whiskey and a pistol in his grip and the chances are that there will be a murder, or at least a row, before he alights.⁹²

In the same spirit, a Congressional ban on cheap handguns, what we refer to today as “Saturday Night Specials,” was proposed by a Tennessee senator for the express purpose of allowing “the dominant race” to prevent “the carrying by colored people of a concealed deadly weapon, most often a pistol.”⁹³

By the end of the 1930s the Klan was in decline, unable to take any advantage of the same Great Depression that had brought the Nazis to power in Germany. One factor in the KKK’s downfall may have been that its victims’ continued to have access to the means of self-defense. (Credit the National Rifle Association and the U.S. Revolver Association, whose efforts

were Catholics. An excellent account is WILLIAM HANCHETT, *THE LINCOLN MURDER CONSPIRACIES* (1983).

91. The states adopting these laws were North Carolina (1917), Missouri (1919), Arkansas (1923), Virginia (1923), New Jersey (1924), and Oregon (1924). See Kates, *Handgun Prohibition*, *supra* note 84, at 15, 19-20.

92. Comment, *Carrying Concealed Weapons*, 15 VA. L. REG. 391, 391-92 (1909).

93. 65 CONG REC. 3945, 3946 (daily ed. Mar. 11, 1924) (statement of Sen. Shields). The proposal mirrored a law Tennessee had adopted as soon as whites regained control of its legislature in 1870. Similar laws designed to raise price barriers to handgun ownership and thereby exclude the impecunious African-American population were a common feature in the late nineteenth- and early twentieth-century South. See Kates, *Handgun Prohibition*, *supra* note 84, at 14-15. Such laws are commonly denominated “Saturday Night Special” laws, the derivation, evidently, being from “nigger-town Saturday night.” See Bruce-Briggs, *supra* note 3, at 50.

caused laws restricting such access to be defeated, repealed, or held unconstitutional across the nation.)⁹⁴ It would be incorrect to claim that America's rejection of the Second Klan was primarily attributable to the tradition of firearms ownership and armed self-defense. Nevertheless, the American tradition of armed self-defense conferred at least three important benefits on Klan victims and targets.

First, armed self-defense brought police intervention which martyrdom would not have done. African-Americans, Catholics, Jews, immigrants, and radicals were neither popular nor powerful in the areas in which the KKK thrived. Public authorities and influential private citizens might well have been content to see unarmed victims brutalized or slain, if the violence could have been so confined.⁹⁵ When victims arm themselves, however, authorities are compelled to act lest incidents lead to widespread bloodshed and disorder.⁹⁶ Florida's Governor Martin "spoke out forcefully," stating that such a situation in which "mobs formed at night to terrorize the community and citizens had to carry concealed weapons" for their own protection could not continue.⁹⁷ In the words of the author of the law in another state, which broke the thitherto-increasing power of the Klan, "We don't want conditions in North Dakota to become such that a man must carry a pistol to be safe."⁹⁸

Second, gun ownership gave victim groups both the courage and the means to sustain themselves in the face of the KKK threat and police indifference or hostility.⁹⁹ In fact, victim perseverance was essential to eventually discrediting the KKK. By defeating its initial attacks, maintaining themselves, and asserting their rights, victims encouraged decent citizens in

94. See KENNETT & ANDERSON, *supra* note 86, at 165-215; Kates, *Handgun Prohibition*, *supra* note 84, at 24-25. The Uniform Revolver Act, which was drafted and promoted by gun owner organizations as a more moderate alternative to licensing and prohibitory legislation, was adopted in virtually every state. See Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 209-10 (1993). Arkansas and Oregon adopted the Uniform Revolver Act and repealed their handgun license requirements.

95. A central aim of the KKK was to infiltrate government and the police because "the backing of politicians [could] protect it from hostile legislation or prosecution." MACLEAN, *supra* note 83, at 16. Chalmers emphasizes the Klan's success in infiltrating and controlling police agencies in every state or locality in which the KKK operated; in several instances in which shoot-outs resulted in the death of masked Klan attackers, the deceased turned out to be (off-duty?) policemen. See CHALMERS, *supra* note 82, at 41, 144, 196, 311, and 336.

96. See, e.g., CHALMERS, *supra* note 82, at 59-65 (describing the defeat of the KKK in Louisiana).

97. *Id.* at 228.

98. *Id.* at 141 (quoting senator's statement in support of law against appearing in public masked).

99. Compare *id.* at 66-69 (armed self-defense by family of Mississippi U.S. Senator opposed to the KKK) with KLECK, *supra* note 4, at 29 (reporting "results from a number of national surveys have all indicated that most protection gun owners feel safer because they have a gun in their home."); *id.* at 119-20 (saying that many persons who own guns do so for other reasons).

the majority community to come to their aid.

Third, because decent citizens were themselves armed, they were able to speak out, thereby engendering, nurturing, and enlarging overall community support that eventually ostracized the Second KKK and consigned it to oblivion.¹⁰⁰ These advantages were not enjoyed during the 1920s and 1930s by decent people in Germany. There can be little doubt that these institutional differences insulate Americans from at least some of the horrors through which others have passed.

It is not some sort of human instinct for bloodthirstiness but rather an indwelling desire for peace that is the true parent of the "natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."¹⁰¹ The American Constitution, founded on the desire to promote domestic tranquility, has as its most basic structure the diffusion of power, a concept to which federalism, "checks and balances," and indeed the whole Bill of Rights¹⁰² are corollary. An armed population which denies the state a monopoly of effective force is a part of that project.¹⁰³ "Arms like laws," said Thomas Paine, "discourage and keep the invader and plunderer in awe and preserve order in the world Horrid mischief would ensue were [victims] deprived of the use of them . . . the weak will become a prey to the strong."¹⁰⁴ When victims are

100. Eighty-one percent of "Good Samaritans" who rescued crime victims or arrested criminals "own guns, and some carry them in their cars. They are familiar with violence, feel competent to handle it, and don't believe they will be hurt if they get involved." Huston et al., *supra* note 4, at 64 (internal quotations omitted).

101. 3 WILLIAM BLACKSTONE, COMMENTARIES *4. Compare MONTESQUIEU, 2 SPIRIT OF THE LAWS 60 ("Who does not see that self-protection is a duty superior to every precept?"); THOMAS HOBBS, LEVIATHAN 199 (C.B. MacPherson ed., Penguin Books 1981) (1651) ("A Covenant not to defend my self from force, by force, is always void."); ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 340 (1698). (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. . . .); *id.* at 343 ("[H]e is a fool who knows not that swords were given to men, that none might be slaves, but such as know not how to use them.").

102. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

103. The Founders "believed that the perpetuation of a republican spirit and character within their society depended upon the freeman's possession of arms as well as his ability and willingness to defend both himself and his society." Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125, 138 (1986). See also Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87, 94 (1992): "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."

104. 1 WRITINGS OF THOMAS PAINE 56 (M. Conway ed., 1894). In a much earlier criticism of pacifism, Paine wrote: "I am thus far a Quaker, that I would gladly argue with all the world to lay aside the use of arms, and settle matters by negotiation, but unless the whole will, the matter ends, and I take up my musket and thank heaven he has put it in my power." A.J. AYER, THOMAS PAINE 8 (1988) (internal quotations omitted). Note that Paine's point is not that one needs guns because others

disarmed and weak it “allures the ruffian”,¹⁰⁵ conversely, when they are armed and defend themselves from oppression, they are less likely to become victims in the first place, and less likely to be isolated by tyranny. The English liberal Francis Place explained how hatred and violence against Jews were eradicated in 18th 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.¹⁰⁶

WHETHER SELF-DEFENSE AGAINST GENOCIDE IS PRACTICAL

Governments have exterminated or cooperated in the extermination of something like one hundred and seventy million of their own people in the twentieth century.¹⁰⁷ This stark fact makes it reasonable to distrust the state and to fear the terrible crimes it may occasionally commit. However, this is only half an argument for an armed populace. The other half of the argument must meet the question whether, arrayed against the order of battle of a modern military, armed civilians could possibly do any good. What can a man with a gun do against a formation of tanks? How could irregulars, even if armed with modern repeating rifles, confront the rockets and Gatling guns of helicopter gunships? Does anyone seriously believe that had the German Jews only been armed, they might have successfully resisted the troops who crushed the largest armies in Europe between 1939 and 1941?

The claim of futility is of course well-taken if what one has in mind is a showdown on Front Street between a man with a revolver and a crew with a

have guns. Rather he is saying that one needs guns because others will not give up violence in favor of peaceful resolution of disputes.

105. See WRITINGS OF THOMAS PAINE, *supra* note 104, at 56.

106. R.K. WEBB, MODERN ENGLAND: FROM THE EIGHTEENTH CENTURY TO THE PRESENT 115 n.14 (1968) (quoting FRANCIS PLACE, IMPROVEMENT OF THE WORKING CLASSES (1834)).

107. Professor Rummel estimates the total at 169,198,000. See R.J. RUMMEL, DEATH BY GOVERNMENT 1-28 (1994).

tank. But depicting the problem in this way trivializes an important point and is seriously misleading. An armed citizenry is not an insuperable bar to genocide any more than an armed policeman is an insuperable bar to crime or a strong army an insuperable bar to aggression. The real question is whether a generally armed citizenry is capable of raising the expected cost of genocide (or for that matter ordinary crime) to a potential predator enough to make such disasters less likely to occur than would otherwise be the case, or if the disaster should befall, to make possible the escape of some victims and the resistance of others.

In grappling with these questions, one probably should not consider the Holocaust as the prototype, for it is probably best thought of as an aberrant example in which it might not have made much difference had the victim population been armed. The Holocaust is atypical because Jews were only one half percent or so of an indifferent and sometimes actively hostile continental population. Rounding them up and killing them was relatively easy. Had they been armed, no doubt they would have imposed rankling losses on their tormentors,¹⁰⁸ but without changing the strategic situation appreciably or, in the end, saving themselves.¹⁰⁹

Nevertheless, virtually all the other recent examples point quite in the other direction. For example, had the Cambodian civilians of the 1970s been as well-armed as American civilians are, it is far from obvious that the Khmer Rouges, whose army numbered less than one hundred thousand troops, could have murdered as many of them as they did. Indeed, the Khmer Rouges behaved as though they agreed with this assessment. The Cambodian people were already largely disarmed because guns had been prohibited from the time of the French occupation. Even so, the Khmer Rouge leadership wanted to make sure and took the extraordinary precaution of a nationwide house-to-house, hut-to-hut search to confirm that the country was indeed defenseless. Once it was sure, the army clubbed and bayoneted to death two

108. David Caplan notes that the initial Nazi attempt to liquidate the Warsaw ghetto was repelled by resisters armed "with only 'ten pistols.' Nevertheless, the shock of encountering even this relatively small resistance forced the German war machine to retreat and 'discontinue their work in order to make more thorough preparations.' For three months thereafter, the German Nazi soldiers did not dare to venture into the ghetto." David I. Caplan, *Weapons Control Laws: Gateways to Victim Oppression and Genocide*, in *TO BE A VICTIM: ENCOUNTERS WITH CRIME AND INJUSTICE* 295, 310 (1991) (citations omitted). "This just shows what you can expect from Jews if they lay hands on weapons," commented the Nazi Propaganda Minister, Joseph Goebbels, according to Elliot C. Rothenberg, *Jewish History Refutes Gun Control Activists*, *AM. RIFLEMAN*, Feb. 1988, at 30, 30. For the whole story of the Warsaw ghetto battle, see YITZHAK ZUCKERMAN, *A SURPLUS OF MEMORY: CHRONICLE OF THE WARSAW GHETTO UPRISING* (1993).

109. JOHN KEEGAN, *THE SECOND WORLD WAR 483-85* (1989) (attributing resistance movement's failure to Hitler's ruthlessness).

or more million people, which amounted to almost a third of the country's population.

The Khmer Rouge search parties did not advertise their objectives beforehand (supposing that they even knew them). They placed a good communitarian face on their actions, which might almost have been conned from Garry Wills. One witness reported they would

knock on the doors and ask the people who answered if they had any weapons. "*We are here now to protect you,*" the soldiers said, "*and no one has a need for a weapon anymore.*" People who said that they kept no weapons were forced to stand aside and allow the soldiers to look for themselves . . . [This all] took nine or ten days, and once the soldiers had concluded the villagers were no longer armed they dropped their pretense of friendliness.¹¹⁰

In contrast consider the story that some Armenians lived to tell about the Turkish genocide of the early 1900s. Having systematically disarmed Armenians through a series of decrees over a twenty-five year period, the Turkish army and police were able to round up and kill over one million Armenians by a combination of overt murders and forced marches over hundreds of miles without food or water. However, thousands of Armenians from Aleppo province (modern Syria), who had secreted guns, took to the hills. Having defeated the first Turkish army units sent against them, they retreated from stronger forces in good order, until they reached the sea where the British, who were at war with the Turks, evacuated them.¹¹¹

In some cases, civilians have to contend not with well-trained armed forces, but a uniformed rabble. In Uganda in the mid-1970s, for example, five hundred thousand victims were slain by Idi Amin's army which numbered only about twenty-five thousand and secret police force (the "State Research Bureau"—a nice Orwellian touch) only three thousand strong. The army, as it turned out, was hardly worthy of the name; undisciplined and ill-equipped, it collapsed not long after Amin declared war on Tanzania in late 1978.¹¹² It is not hard to believe that an armed population could have held its own against such forces.

Or consider Indonesia, where a half-million suspected Communists were

110. Alec Wilkinson, *A Changed Vision of God*, NEW YORKER, Jan. 24, 1994, at 52, 54-55 (emphasis added).

111. See SIMKIN ET AL., *supra* note 5, at 82-83.

112. See Barbara Harff, *The Etiology of Genocides*, in GENOCIDE AND THE MODERN AGE: ETIOLOGY AND CASE STUDIES OF MASS DEATH 41, 55 (Isidor Wallimann & Michael N. Dobkowski eds., 1987). Compare SIMKIN ET AL., *supra* note 5, at 280, describing Amin's army and estimating the Ugandan genocide toll at the more conservative figure of 300,000.

slaughtered in the mid-1960s by fellow civilians armed, among other ways, with firearms lent to them for the express purpose by the Indonesian government.¹¹³ The entire undertaking would have been complicated beyond calculation, and perhaps would have been if not abandoned at least carried out on a more modest scale, had the population been more heavily armed.

The cases of Uganda and Indonesia also show that the alternative to genocide may be civil war if a genocide target is sufficiently well-armed to fight back. One might well consider such an outcome equally as unappealing as genocide (although probably not if one were a member of the victim group). But civil war is not necessarily the result. The first Turkish atrocities against the Armenians occurred in the 1890s and largely involved civilian proxies specially armed by the government to kill Armenians, who were slaughtered by the tens of thousands. Where Armenians were armed they fought back, and in fact were quite successful not only against civilian irregulars but against regular army troops as well. Perhaps out of fear that civil war or prolonged disorders might provoke foreign intervention, the army recalled the arms from its proxies and ended the attacks (though the government also confiscated the Armenians' arms, facilitating the second genocide twenty years later).¹¹⁴ Something similar seems to have occurred in the American South during the early 1960s. Southern police officers were in many cases content to see blacks and civil rights workers brutalized, and in a few cases even killed, so long as the violence was one-sided. However, when blacks displayed arms for self-defense, the police intervened to halt KKK outrages lest they lead to gun battles in the streets and other disorders.¹¹⁵

Nor is the choice always one between genocide and civil war. There is a third option: peace. An illustration can be drawn from the Balkans, where there is a tense lull in an ancient civil war. Josip Broz Tito, who ruled that part of the world for thirty five years until his death in 1980, was an enthusiastic practitioner of Max Weber's idea of the state as a "community

113. As in most genocides, the precise number of victims will never be known. The estimates run from 500,000 to 1.2 million. The perpetrators include elements of the army and individual and ad hoc groups of civilians armed by the military or with their own knives and agricultural implements. Victims include not only "Communists" (i.e., leftist oppositionals), but those suspected of being such, including vast numbers who were suspected just because they were ethnic Chinese. Predictably, using mass murder against the targeted groups resulted in many cases in which the perpetrators took the opportunity to indiscriminately massacre people on the basis of feud, ancient enmity, or personal dislike, without any connection to the overall program of political or ethnic murder. Personal Communications with Professors Barbara Harff (Sept. 11, 1994) and Rudolf J. Rummel (Oct. 24, 1994).

114. See SIMKIN ET AL., *supra* note 5, at 80-81.

115. See Don B. Kates, Jr., *Why a Civil Libertarian Opposes Gun Control*, 3 CIV. LIBERTIES REV. 24, 25-26 (1976). See also the discussion of armed resistance to the KKK in the 1920s *supra* notes 87 and 95-99 and accompanying text.

that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory.”¹¹⁶ Disarming the Yugoslavians lowered the cost of maintaining himself in power, which Tito did by having tens of thousands of his countrymen shot during his reign.¹¹⁷ When old Yugoslavia came unstuck in the late 1980s, its armies and equipment—the most formidable in the region—devolved to the former nation’s ethnic constituents. Because the Yugoslavian army had been mostly Serbian, the Serbians inherited enough munitions to face down the United States, NATO, the United Nations, and finally even ex-President Jimmy Carter’s freelance diplomacy, and to continue the conquest of Bosnia. Muslims (Bosnians) had never figured much in the Yugoslavian army, and thanks to a very well-intentioned international arms embargo whose purpose was to assure that gasoline not be splashed on an already raging fire,¹¹⁸ they remained largely disarmed. Such ethnic cleansing has largely ceased today, thanks to both United Nations intervention and to the surreptitious arming of the Muslim population with the tacit approval, welcome though many years late, of the United States.

It was a different story entirely in Croatia. There was substantial Croatian representation in the old Yugoslavian army—Tito himself was a Croat. Though not nearly as formidable as the Serbs, the Croats did have arms. Not strong enough to conquer territory, they were nevertheless strong enough to concentrate the minds of Serbian diplomatists on the advantages of peace as compared to the rewards to be had from even an ultimately successful war of conquest. After some initial fighting, the Serbs and Croats split the difference and made peace—the stablest, if this says much, in the region.

CONCLUSION

It is often pointed out how different the contemporary world is from the one in which Madison and Jefferson lived. In those days what passed for tyranny was “send[ing] hither swarms of Officers to harass our people and eat out their substance,”¹¹⁹ “cutting off our Trade with all Parts of the World,”¹²⁰ and calling “together Legislative bodies at places unusual,

116. H.H. GERTH & C. WRIGHT MILLS, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78 (1946).

117. See, e.g., MILOVAN DJILAS, TITO: THE STORY FROM INSIDE (1980); Nikolai Tolstoy, *Bare Bones: The Massacres at Kocevje*, NEW REPUBLIC, Dec. 24, 1990, at 16; Chuck Sudetic, *Piles of Bones in Yugoslavia Point to Partisan Massacres*, N.Y. TIMES, July 9, 1990, at A-6.

118. Comment of David Clark, MP (UK Labor Party Shadow Defense Minister), April 14, 1993 MacNeil/Lehrer Newshour.

119. THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776).

120. *Id.* para. 18.

uncomfortable, and distant,”¹²¹ and other such complaints. Even with the example of the French Revolution before them, Madison and Jefferson could hardly have imagined in detail the characteristic perils of the twentieth century. But they certainly understood the crux of the problem. After all, more than two thousand years earlier, in 416 B.C., the Athenians put the population of Melos to the sword, exempting only those deemed suitable for sale as slaves.¹²² The lesson Thucydides drew from this incident remains persuasive today: “The strong do what they will, the weak endure what they must.”¹²³ The Founders of American democracy saw the persistence of this Thucydidean reality. They rejected the concept of a state monopoly of armed power—“the most dangerous of all monopolies,” according to Madison—in favor of “the advantage of being armed, which the Americans possess over the people of almost every other nation.”¹²⁴

121. *Id.* para. 6.

122. THUCYDIDES, *THE PELOPONNESIAN WAR* bk. V 351 (T.E. Wick & Richard Crawley trans., Modern Library 1982).

123. *Id.*

124. *THE FEDERALIST* NO. 46, at 299 (James Madison) (Clinton Rossiter ed. 1961).

