

1999

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Recommended Citation

Stearns, Representative Cliff (1999) "The Heritage of Our Right to Bear Arms," *Saint Louis University Public Law Review*. Vol. 18 : No. 1 , Article 4.

Available at: <https://scholarship.law.slu.edu/plr/vol18/iss1/4>

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THE HERITAGE OF OUR RIGHT TO BEAR ARMS

REPRESENTATIVE CLIFF STEARNS*

There is an old adage that says you need to look where you have been to learn where you are going. I believe that it is helpful, and sometimes necessary, to review the issues of the day through a political and historical perspective – looking where we have been. Such a linear approach adds context to a discussion, providing an understanding as to why a sound policy in the past may or may not remain so today. This is especially applicable to the topic of this paper.

Full comprehension of the gun control debate depends on seeing the origin of the right to bear arms and considering its relevance today. The Founding Fathers did not create the concept sustaining a right to bear arms, they merely incorporated that right into the Constitution of the United States.¹ This right, as with many other rights outlined in the Declaration of Independence and the Constitution, pre-dated colonial America.² Of all the rights held or rejected by man and woman, this right, essential to self defense, may reach back to the dawn of humanity.

There are three points critical to this discussion – that our legitimate right to own firearms are based on the need for self defense, the need for self support such as hunting, and the need for communal defense (militia). Opponents of the private ownership of firearms seize on the last point as the sole reason for the existence of the Second Amendment.³ They argue that the United States of America no longer has a militia system, thus negating the

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1. U.S. CONST. amend. II (“A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.”); *see*, EARL R. KRUSCHKE, *THE RIGHT TO KEEP AND BEAR ARMS: A CONTINUING AMERICAN DILEMMA* 7-12 (1985) (describing the English history of the right to bear arms).

2. *Id.*; DAVID T. HARDY, *ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT* 12-40 (1986) (discussing the right and duty of English citizens to be armed from the time of the Saxon invasion in or near the sixth century through the time of American colonization).

3. *See, e.g.*, DENNIS A. HENIGAN, ET AL., *GUNS AND THE CONSTITUTION: THE MYTH OF SECOND AMENDMENT PROTECTION FOR FIREARMS IN AMERICA* 2-3 (1995) (noting that the National Guard is the only militia force in America and that Private citizens today, unlike in colonial days, are not required to participate in state militias).

right of individuals to own arms. They refuse to see this fundamental right in light of the other needs previously mentioned. In doing so, they ignore the body of historic events that led to the inclusion of the right to bear arms initially in the English Bill of Rights and then the American Bill of Rights a century later.⁴

This and other rights must be openly acknowledged in order to prevent their suppression. These basic rights are not pulled out of thin air. There are specific reasons why such rights are guaranteed to all citizens. Generally, rights are enumerated as inviolable because they have either been denied or they are threatened.

Our Second Amendment right to bear arms has its direct antecedent in the English Bill of Rights which compressed the various reasons for owning a firearm into a right as a result of the government's efforts to disarm its citizens.⁵ Events in English history provided many of the seeds that would become the fruit that we know as our Constitutional rights, among them the right to bear arms.

"The right of citizens to be armed not only is unusual, but evolved in England in an unusual manner: it began as a duty."⁶ Life in Europe of the middle ages revolved around a series of obligations. Military service was a common requirement to a superior, and usually, it was bring your own weapon.⁷ To prevent their troops from skimping on weaponry, laws evolved which described the types of weapons that the underlings would maintain.⁸ Henry II of England did just that through the Assize of Arms of 1181:

Let every holder of a knight's fee have a hauberk, a helmet, a shield and a lance. And let every knight have as many hauberks, helmets, shields and lances, as he has knight's fees in his demesne. Also, let every free layman, who holds chattels of rent to the value of 16 marks, have a hauberk, a helmet, a shield and a lance. Also, let every free layman who holds chattels or rent worth 10 marks have an 'aubergel' and a headpiece of iron, and a lance.⁹

Not only were knights and free laymen required to keep and bear arms, their heirs were entitled to these weapons upon their death.¹⁰ What we have

4. See *infra* notes 1-8 and accompanying text.

5. See, H.C. JOUR., Dec. 26, 1688 to Oct. 26, 1693, 29 (1742) ("[I]t is the right of the subjects to petition the King . . . that the subjects which are protestant may have arms for their defense suitable to their condition and as allowed by law."), cited in, HARDY *supra* note B, at 37-38.

6. JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 1 (1994).

7.

8. See HARDY *supra* note 2, at 13-23 (discussing such early English statutes as the Assize of Arms, the Statute of Winchester and the first militia statute).

9. Reprinted in English Historical Documents, c. 1042-1189, at 416 (David C. Douglas & George W. Greenaway, eds., 1953) (paragraph numbers omitted) (footnotes omitted).

10. *Id.* ("If anyone bearing these arms shall have died, let his arms remain for his heirs.").

here are citizen soldiers, the medieval precursor of the militia. This military system was dictated by the fact that lords and monarchs lacked the financial resources to maintain standing armies and by the nature of obligated service common to the era.¹¹ The value of citizen soldiers who viewed their service as a civic duty was recognized by the ancient Greeks and other civilizations.¹² This value would take hold in 16th and 17th century England and later would sink deep roots in America.¹³

The idea of militias had many proponents throughout Europe. Nicolo Machiavelli may be most popularly known as a source of political intrigue, but his writings on behalf of citizen soldiers affected political thinkers for centuries.¹⁴ Machiavelli had formed and led a body of armed citizens in the 1500s¹⁵ and was deeply suspicious of standing armies, which he viewed as the tools of tyrants.¹⁶ Monarchs, especially those in England, found militias to be a cheap alternative to professional armies.¹⁷ English citizens shared the views of Machiavelli, finding the militias to be a guarantee against oppression.¹⁸ Prior to the Civil War, King Charles I of England provoked an armed uprising in 1639 among the Scots over religious issues.¹⁹ The conflict did not enjoy broad support among the English citizen soldiers called up to put down the rebellion.²⁰ Although the military outcome was a checkered success for Charles I, it set in motion a far-reaching chain of events. Primarily, “Charles learned, to his chagrin, that militiamen forced to fight for an unpopular cause were unreliable, local officials were unlikely to enforce unpopular policies, and the militia structure yielded an inefficient and ineffectual field army.”²¹

Losing faith in the citizen army, Charles I sought greater control over the militia and the establishment of a standing army. This set the stage for the

11. See HARDY, *supra* note 2, at 7-9.

12. I. F. STONE, THE TRIAL OF SOCRATES 52-67 (1988).

13. See MALCOLM *supra* note 1, at 3 (noting that each Englishman owed the crown a “. . . civic responsibility to keep the peace [which] stretched beyond his village and even beyond his county. He owed his sovereign service in the militia.”).

14. Machiavelli’s writings in support of armed citizens include *Discourses on the First Ten Books of Titus Livy* (1531), *The Art of War* (1521) and *The Prince* (1532). Machiavelli believed an armed public has “virtú,” while a disarmed public is subject to the whim of “fortuna.”

15. STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED, THE EVOLUTION OF A CONSTITUTIONAL RIGHT, 22 (1984).

16. Robert M. Adams, *The Interior Prince, or Machiavelli Mythologized*, in A NEW TRANSLATION, BACKGROUNDS, INTERPRETATIONS, PERIPHERICA 238, 246-247 (Robert M. Adams ed., W. W. Norton & Company 1977).

17. MALCOLM, *supra* note 1, at 5.

18. *Id.* at 3.

19. DAVID HARRIS WILSON, A HISTORY OF ENGLAND 392 (1967). This war was named the “Bishops War.”

20. *Id.* at 394-95. The soldiers were not only poorly trained for the war, but they also objected to the purposes of the uprising, which resulted in demonstrations and desertions.

21. MALCOLM, *supra* note 1, at 17.

confrontation between the King of England and the English Parliament culminating in the Civil War (1641-1649).²² At its conclusion the forces of Parliament defeated the King's army and Charles I was executed.²³ The victors established a short-lived Republican government, which performed poorly.²⁴ Eventually, the monarchy was restored.²⁵ Naturally, the new King was concerned with the excesses of the Republic, the execution of his father, and his own political future. This led to policies designed to weaken the military capability of the monarchy's political opponents. "[I]n 1662 Charles II passed a militia bill which empowered certain officials 'to search for and seize all arms in the custody. . . of any person. . . [they] shall judge dangerous to the peace of the kingdom' . . ."²⁶

While disarming the public and weakening the militia, Charles II and his successor James II also built up a standing army.²⁷ Deep political and religious divisions between the monarch and the public were the hallmarks of this era, making each deeply suspicious of the other. James II wanted all but his supporters disarmed while much of the public saw this action and the standing army as a threat to their liberties.²⁸ In 1688 James II was forced to abdicate, and he was replaced by monarchs who accepted the primacy of Parliament.²⁹ This bloodless coup called the Glorious Revolution of 1688 led to the drafting of the English Bill of Rights.³⁰

The English Bill of Rights outlined charges against James II and declared the "true, ancient and indubitable rights" of the English people.³¹ Obviously, one of the rights dealt with arms. As originally drafted and approved, the right

22. WILSON, *supra* note 2, at 397-401.

23. *Id.* at 410-411. Charles I was sentenced to death for treason against the nation. Immediately before his execution Charles reaffirmed his opinion stating, "for the people I desire their liberty and freedom consists in having government, in those laws by which their life and goods may be most their own. It is not having a share in government; that is nothing pertaining to them."

24. *Id.* at 411, 415. Parliament abolished the office of King and the House of Lords, and declared England as a "Commonwealth." The Commonwealth appointed a Council of State, which was given administrative power.

25. *Id.* at 427. The Restoration of 1660 was a return to a government run by the office of the King and the Parliament.

26. HALBROOK, *supra* note 15 at 43 (quoting from the Militia Act of 1662).

27. *Id.* at 43-44.

28. *Id.* at 44. During a debate in the House of Commons on January 28, 1689, Sergeant Maynard described the standing army and the disarming of the citizenry as an "abominable thing." *Id.* Mr. Sacheverel further stated, "No man knows what he can call his own . . . Disarmed and imprisoned without cause." *Id.*

29. *Id.* at 43-44. James was replaced by William and Mary, who had cooperated with parliament in removing James from the throne.

30. MALCOLM, *supra* note 1, at 128.

31. HALBROOK, *supra* note 15, at 44-45. The charges against James included the unlawful maintenance of a standing army and the unlawful disarming of the English people.

read this way: "It is necessary for the publick Safety, that the Subjects, which are Protestants, should provide and keep Arms for their common Defence: And that the Arms which have been seized, and taken from them, be restored."³² Only a few days later the Bill of Rights was redrafted to read: "That the subjects which are Protestants, may have arms for their defence suitable to their conditions and as allowed by law."³³

What did this change mean? "The original version implied that there was a positive duty to acquire arms for the public good, whereas the amended version made having arms a legal right."³⁴ Any English citizen in good standing, meaning a loyal Protestant, now had the right to be armed. Over some 500 years the requirement that citizens be armed evolved into a right, not just for public service in the militia, but also as a matter of individual choice. At the same time the principle purpose of owning a weapon changed from defending against foreign aggression to one of preventing domestic tyranny and individual repression. The right to own a gun did not depend on participation in any military body, it became an individual prerogative for personal defense.

All the events unfolding in England touched the colonists in America. As loyal subjects, most 17th-century colonists embraced the laws and traditions of the Mother Country. For many colonists, gun ownership as a right may have been less important than gun ownership as a necessity of life.

The rights enjoyed by the men and women of England were shared by the American colonists, as were the concerns and suspicions over the presence of a standing army. This of course led to the development of militias throughout the colonies.³⁵ Various factors contributed to the dissatisfaction that the colonists developed toward the Mother Country, especially feelings of oppression. The colonists realized that they had become a new people who needed their own sovereign country. Though embracing the laws, rights, and traditions of England, many colonists yearned for independence.

As the desire for freedom expanded in America, the British government responded with greater oppression.³⁶ The mounting tension led to violence, including the Boston Massacre of 1770.³⁷ While providing legal representation to the British soldiers who fired upon the American colonists in this

32. H.C. JOUR., Dec. 26, 1688 to Oct. 26, 1693, 17 (1742), *cited in* MALCOLM, *supra* note 1, at 117.

33. THE BILL OF RIGHTS, 1689, 1 W. & M., ch. 2, sess. 2.

34. MALCOLM, *supra* note 1, at 118.

35. *See generally*, 1 GUN CONTROL AND THE CONSTITUTION, SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT: THE COURTS, CONGRESS AND THE SECOND AMENDMENT XV (Robert J. Cottrol ed., Garland Publishing, 1993). An armed population was a necessity for the American colonists as protection from the Indians whose territory they were taking over, as well as from the large slave population. *Id.*

36. WAYNE R. LAPIERRE, GUNS, CRIME AND FREEDOM 4 (1994).

37. *Id.*

confrontation, John Adams addressed the right to bear arms. “Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defence. . . .”³⁸

A few years later the American Revolution would sweep across America as colonists took up arms against the British army. The “shot heard round the world” was fired against a British column sent out to impound weapons.³⁹ Following the attempts to seize arms and ammunition in Boston and Lexington, the British seized ammunition at Williamsburg, Virginia.⁴⁰ The British policy of disarming the colonists acted as an accelerant in the conflict because the Americans would not be disarmed.⁴¹ Several former colonies plainly recognized the individual right to bear arms when passing their declarations of rights during the Revolution.⁴² The American pantheon of the late 18th century echoed the sentiment that the individual citizen had the right to be armed.

“ . . . No free man shall be debarred the use of arms within his own land.”⁴³
Thomas Jefferson.

“A free people ought not only to be armed, but disciplined.”⁴⁴ George Washington.

It is undeniable that the Founding Fathers drew upon their English heritage in defining our legal rights and customs; we have the right of due process from Magna Carta⁴⁵ and the prohibition against quartering soldiers in private homes without the owner’s permission from the English Bill of Rights.⁴⁶ The Constitution of the United States maintains both rights in the Bill of Rights,⁴⁷ as it does the right to bear arms:

38. 3 LEGAL PAPERS OF JOHN ADAMS 248 (L. Kinvin Wroth & Hiller B. Zobel eds., Belknap Press) (1965) (quoting from . . .).

39. HALBROOK, *supra* note 15, at 62.

40. LAPIERRE, *supra* note 5, at 6. The Williamsburg militia, led by Patrick Henry, was unable to recapture the gunpowder from Lord Dunmore, but it was able to force restitution. HALBROOK, *supra* note 15, at 62.

41. *Id.* at 62-64. As described in Henry E. Lee’s *Memoirs of War* (1969), it was “armed citizens” and “undisciplined militia” that defeated the British army. *Noted in*, HALBROOK, *supra* note 15, at 63.

42. *Id.* at 64.

43. 1 THE PAPERS OF THOMAS JEFFERSONS, 344 (J. Boyd ed. 1950) (quoting from the proposed Virginia Constitution of 1776).

44. 1 Papers of the Presidents 65 (G. Richardson, ed.), *cited in* LAPIERRE, *supra* note 5B, at 7.

45. *See generally*, SAMUEL E. THORNE, ET AL., THE GREAT CHARTER: FOUR ESSAYS ON MAGNA CARTA AND THE HISTORY OF OUR LIBERTY (1966).

46. William S. Fields, *The Third Amendment: Constitutional Protection From the Involuntary Quartering of Soldiers*, 124 MIL. L. REV. 195, 199 (1989).

47. U.S. CONST. amend. V states: “No person shall be . . . deprived of life, liberty, or property, without due process of law. U.S. CONST. amend III states: “No Soldier shall, in time of

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁴⁸

The Second Amendment to the Constitution established the individual’s right to be armed. Yet, even though this right is clearly outlined, gun-control proponents maintain that this right no longer exists because there is no militia. I strongly agree that the affinity of the English citizens for a militia successfully rooted itself in America and that this is reflected in the Constitution. The right to bear arms, however, is not solely based on a participation in the militia.

Remember, the right to bear arms in England and America was derived from the need to defend against external aggression, internal strife, religious and government persecution, and personal assault.⁴⁹ An organized militia certainly would be useful in dealing with external aggression and internal strife less so for persecution, and it is almost useless against personal assault. Thus, participation in an organized militia is only one source of the right to be armed. Equally valid are the needs to defend against civil strife, despotism, and persecution.

Personal protection, the right to defend oneself and others, is another source of the right to be armed.⁵⁰ I see this as the most fundamental right. Any creature, from insect to human, has the natural drive for self preservation. No individual should ever be denied the ability to defend his or herself against unwarranted harm. Yes, criminals can be dragged from their homes, held against their will, and punished by the courts. Unwarranted harm, however, is what criminals inflict upon their victims. Safeguarding citizens against such transgressions is an elemental responsibility of societies and the governments they establish. Societies and governments must not deny an individual the means for self defense.

Back to English history, which at one point required individuals to be armed for self defense and to aid others. The Laws of C[a]nut (1020-1023) not only considered armed self-defense a right and duty, but also fined those who failed to follow the hue and cry of another in need.⁵¹ Although it may seem to the contrary, I cannot emphasize enough that the body of English law and precedents are the main progenitors for the American legal and political systems.

The noted British jurist William Blackstone wrote extensively in the 18th century on the origin of legal and moral rights. The U.S. Supreme Court relies

peace be quartered in any house, without consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

48. U.S. CONST. amend. II.

49. *See supra* notes 2-8 and accompanying text.

50. LAPIERRE, *supra* note 5, at 20.

51. Laws of Cnut 1020-1023, 29.1, *reprinted in* ENGLISH HISTORICAL DOCUMENTS, c. 500-1042, at 422 (Dorothy Whitelock ed., 1955).

on Blackstone's "Commentaries" in considering whence our Constitutional rights derive.⁵² This legal scholar, whose work is still a treasured legal resource 300 years later, addressed the private ownership of weapons.⁵³ Blackstone described the use of arms for self-defense as among the 'Auxiliary Rights of Individuals.'⁵⁴

In developing the American Bill of Rights, it was further clarified that the right to bear arms would not be limited to militia members. Although this restriction was proposed, the motion was rejected. And like the convention Parliament in 1689, the senators rejected a motion to add "for the common defense" after to "keep and bear arms."⁵⁵ "The American Bill of Rights, like the English Bill of Rights, recognized the individual's right to have weapons for his own defence rather than for collective defence."⁵⁶

Would I place no restrictions on gun ownership? Of course criminals, children, and the mentally ill should not be armed. Having a weapon is a right unless you have surrendered that right through misdeed or misfortune. For law-abiding citizens of age, gun ownership is an individual decision, and millions have decided to exercise this right.⁵⁷

Many people in this country question the need for individuals to arm themselves for self defense. They believe that it is a job for the police. America is blessed with a professional and committed law enforcement community, but the reality is that we are largely on our own in protecting ourselves. In December 1981, for example, a federal appeals court in Washington, D.C., ruled that police have a duty only to the "public at large and not to individual members of the community." And further, that "a government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen" (D.C. App. 1981).⁵⁸

My home state of Florida recognized the fact that many citizens have no recourse but to deal immediately and directly with a criminal. In 1987, Florida reformed its gun laws to allow law-abiding citizens familiar with firearms to carry concealed weapon.⁵⁹ What are the results of this reform in the Sunshine

52. LAPIERRE, *supra* note 5, at 24.

53. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 144 (1765) ("[T]he right of the subject . . . is that of having arms for their defense.").

54. *Id.* "Auxiliary rights" are those which would safeguard a person's "absolute rights," which were largely rights of personal liberty and property. *Id.* at 18. *See also*, HARDY *supra* note 2, at 50.

55. HARDY, *supra* note 2, at 76-77.

56. MALCOM, *supra* note 1, at 161.

57. In 1996, 35% of Americans reported they personally owned a gun. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1996, 169 (1997).

58. LAPIERRE, *supra* note 5B, at 31.

59. FLA. STAT. 790.06 (1998).

State? The homicide rate in Florida plunged from 37 percent above the national average to 3 percent below the national average following the state's change in its concealed carry law in 1987.⁶⁰ Across the nation, states that have made it easier for their citizens to be armed have seen their crime rates fall dramatically.⁶¹

John R. Lott, Jr. and David B. Mustard, both of the University of Chicago, examined crime statistics on a county-wide basis to study the impact of increased concealed carry by citizens. They found that "When state concealed handgun laws went into effect in a county, murders fell by 8.5 percent, and rapes and aggravated assaults fell by 5 and 7 percent. In 1992, there were 18,469 murders. . . in counties without shall issue laws. . . if these counties had been subject to state concealed handgun laws, murders in the United States would have declined by 1,570."⁶²

These statistics underscore the moral imperative of allowing concealed carry by law-abiding citizens. Not only is the right to be armed a Constitutional right, it is also a fundamental natural right. Today and throughout history, civilian disarmament is a crucial step toward oppression. Even debarring or limiting the use of arms for hunting is a means of curbing self sufficiency, further restricting freedom.

Once again we can trace the right to be armed to legal and political events in 17th century English history, this time pertaining to hunting and gaming laws. "The game laws reflected class struggle in the country side between hungry peasants, who never accepted the landlord's right to the wild game, and landlords and their agents. . . Despite the oppressive character of the game laws, a series of eighteen-century judicial decisions held that the mere possession of guns created no presumption of an illegal purpose and that, to the contrary, it was a common-law right."⁶³ The right to own a firearm springs from many sources.

As Americans, we are blessed with a rich heritage drawn from all points of the globe. However, our nation's legal and political institutions result from our English roots. Trial by jury, due process, and elected government are the yield of these roots. Among the cherished rights derived from this heritage is the right to be armed. We have this right to combat aggression, to contest oppression, and to provide for our self defense and self sufficiency. Natural rights and the Second Amendment to the Constitution give the law-abiding people of this nation the choice of whether to be armed or not. Opposition to

60. LaPierre, *supra* note 5B, at 33 note 3 (citing FLORIDA DEPARTMENT OF LAW ENFORCEMENT, CRIME IN FLORIDA, ANNUAL REPORT (1993)).

61. John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997).

62. *Id.* at 19.

63. HALBROOK, *supra* note 15, at 51.

privately held arms is opposition to freedom and the antithesis of our American values.