Chapter 22

Arms Rights, Arms Duties, and Arms Control in the United Kingdom

This is online Chapter 22 of the third edition of the law school textbook Firearms Law and the Second Amendment: Regulation, Rights, and Policy *(3d ed. 2021), by Nicholas J. Johnson, David B. Kopel, George A. Mocsary, E. Gregory Wallace, and Donald Kilmer.*

All of the online chapters are available at no charge from either https://www.AspenPublishing.com/Johnson-SecondAmendment3 or from the book's separate website, firearmsregulation.org. These chapters are:

17. *Firearms Policy and Status. Including race, gender, age, disability, and sexual orientation.*

18. *International Law. Global and regional treaties, self-defense in classical international law, modern human rights issues.*

19. *Comparative Law. National constitutions, comparative studies of arms issues, and case studies of individual nations.*

20. *In-Depth Explanation of Firearms and Ammunition. The different types of firearms and ammunition. How they work. Intended to be helpful for readers who have little or no prior experience, and to provide a brief overview of more complicated topics.*

21. *Antecedents of the Second Amendment. Self-defense and arms in global historical context. Confucianism, Taoism, Greece, Rome, Judaism, Christianity, European political philosophy.*

22. *This chapter.*

23. *The Evolution of Firearms Technology from the Sixteenth Century to the Twenty-First Century.*

This Chapter provides detailed coverage of arms rights and arms control in the United Kingdom from the ninth century to the early twentieth century. In the printed textbook, Chapter 2 covers some of the same topics, but more briefly. Many sections in Chapter 2 provide brief summaries of matters that are more fully addressed in this online chapter. In particular, this Chapter provides much more detailed coverage of arms control under the Tudors, the political crisis caused by abuses of the Stuart monarchs, the British Civil Wars, the Restoration, Scotland, Ireland, and English history after the Glorious Revolution.

To Americans, Great Britain's history was their own history. The American Revolution began with Americans demanding respect for their "rights of Englishmen"—including the right to arms under the British constitution.

The right to arms was never the same in England and America. Like many Americans, Supreme Court Justice Joseph Story scorned the English right as more nominal than real. Even so, the history of the British Isles is the most important ancestor of the American right to arms, and it is relevant today. In the U.S. Supreme Court's leading decision on the Second Amendment, Justice Scalia's majority and Justice Stevens's dissent argue at length about English law. *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Ch. 11.A). In modern cases about the right to bear arms, the parties argue about the meaning of the 1328 Statute of Northampton and subsequent interpretation.

This Chapter describes the history of the right to arms in the British Isles from Anglo-Saxon times through the early twentieth century. Great Britain's legal history set a baseline that the Americans rejected in some respects and affirmed in others. As Justice John Marshall Harlan II wrote, American "liberty" includes "the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing." *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Ch. 9.B.1) (Harlan, J., dissenting). *See also Bridges v. California*, 314 U.S. 252, 264 n.7 (1941) ("At the Revolution we separated ourselves from the mother country, and we have established a republican form of government, securing to the citizens of this country other and greater personal rights, than those enjoyed under the British monarchy."); *United States v. Brewster*, 408 U.S. 501, 508 (1972) ("Even if a constitutional right's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system.").

All history, including legal history, studies continuity and change. This Chapter examines continuity and changes in arms rights and duties over the centuries in England, and then in America. Nothing in America is exactly like England in 900 A.D., but some things are surprisingly similar. Other things reflect a break from English tradition. Some of those breaks were immediate, and others gradual.

The development of firearms technology in the United Kingdom is briefly summarized in this Chapter and described in depth in online Chapter 23, which covers technological history from the sixteenth century through the twenty-first century. Arms control in the United Kingdom in the past 100 years is detailed in online Chapter 19.C.1.

Parts A through C of this Chapter survey the various purposes for which the English were required to possess and use arms. They describe how arms were integral to community defense. Part D is on the Magna Carta of 1215, which codified the right of forcible resistance to tyranny. Part E covers the Castle Doctrine and

the right to defend the home. Part F covers laws about arms carrying. Part G summarizes the reign of the Tudor monarchs and their efforts to limit handguns and crossbows. Part H presents the story of the despotic Stuart kings, whose efforts to create a government monopoly of force led to two revolutions—and how the second revolution led to formal legal recognition of a right to arms. To Americans, the story of repression and resistance was a vivid and instructive example. Part I examines changes in arms technology, and previews some of the developments in America that are addressed in Chapters 3 through 7. Part J covers Scotland and Ireland, the infamous London riots of 1780, and British arms laws through 1921. Part K is on the English ideology of armed resistance to tyranny, as it would be embraced by Americans.

For some quotes, we have modernized spelling. Other quotes we have left intact, because being able to read old materials is a legal skill. As the older quotes show, English spelling was unstandardized for many centuries.

Regarding the names of the nations, in the British Isles, there are two large islands, and many small ones. On the larger, eastern island, the southern and larger part is England. Wales is a relatively mountainous peninsula to the west of England. In 1282, England and Wales were politically united, and this union has never been undone. Precisely speaking, "Britain" is England plus Wales.

North of England is Scotland. "Great Britain" is Britain plus Scotland. "British" usually means all the people of the eastern island: English, Welsh, and Scottish. When Scotland and Britain were politically unified in 1707, the new entity was called the "United Kingdom."

The western island is Ireland. In 1167, the English invaded and took over an area around Dublin. More than four centuries later, the English achieved control of the whole island. In 1801, Ireland was brought into the "United Kingdom" of Great Britain and Ireland. Then in 1922, most of Ireland won a war of independence. Six counties in the northeast (Ulster) voted to remain part of the United Kingdom of Great Britain and Northern Ireland.

In the United States, people rarely recognize the difference between "English" and "British" (the latter term including Welsh and Scots). In the United Kingdom in the twenty-first century, there are now many people who, like Americans, make no distinction between the words "British" and "English."

Arms control laws were different for the four nations. The English disarmed the Welsh during the period when the Welsh were rebellious. The English did the same to the Scots who lived in the Highlands (the mountainous northwest). The Irish were generally rebellious, and so were legally disarmed by English statutes. Yet many Irish remained covertly armed.

Much of this Chapter is about kings, queens, and nobles, and about military uses of firearms. The arms-bearing practices of commoners are often inferred from what the aristocracy said or wrote about them. The focus is the necessary consequence of the fact that most surviving historical records, including legal records, were by and for the social elite.

In the course of examining the right to arms, this Chapter provides some general British legal and political history, which is always part of the background of the U.S. Constitution. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Guantanamo Bay detentions in light of the Habeas Corpus Act of 1679). The citations in this Chapter are broader than the typical textbook collection of cases, statutes, and law

review articles; they are starting points for readers to understand the different types of English legal history materials. Today's American law students are taught much less than most of their predecessors about understanding and applying historical English materials. In constitutional law, and sometimes in other fields, lawyers who know how to use English legal history have an advantage over those who do not.

A. *ANGLO-SAXONS, THE MILITIA, AND THE* POSSE COMITATUS

Two thousand years ago, the inhabitants of the British Isles were Celtic tribes related to the Gauls of France, the Irish, the Scots, and many other continental tribes.[1] Roman general Julius Caesar first invaded England in 55 B.C. Eventually, Roman rule encompassed all of Britain, up to Hadrian's Wall—approximately at the modern border between Britain and Scotland.[2]

Summarizing Roman and Greek descriptions of the early Britons, historian and political philosopher David Hume wrote:

> The Britons were divided into many small nations or tribes; and being a military people, whose sole property was their arms and their cattle, it was impossible, after they had acquired a relish of liberty, for their princes or chieftains to establish any despotic authority over them. Their governments, though monarchical, were free, as well as those of all the Celtic nations; and the common people seem even to have enjoyed more liberty among them, than among the nations of Gaul, from whom they were descended. Each state was divided into factions within itself. It was agitated with jealousy or animosity against the neighbouring states: And while the arts of peace were yet unknown, wars were the chief occupation, and formed the chief object of ambition, among the people.

David Hume, 1 History of England 5 (Liberty Fund 1983) (1778).[3]

The Western Roman Empire collapsed in the fifth century A.D., leaving Roman Britain to fend for itself against invasions from the northern tribes. Soon, waves of seaborne invaders arrived. Germanic tribes—Angles, Saxons, and Jutes—conquered Britain. England eventually became a heptarchy, with seven distinct kingdoms.

In the ninth century A.D., the Danes, a Viking people, threatened. The English lived in near-constant fear of Danish invasion and pillage. They were oppressed by Danes who had conquered parts of England and extorted massive tribute payments

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1. This Part includes material from on David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. Crim. L. & Criminology 671 (2015).

2. At times, Roman rule extended up to the Antonine Wall, well within Scotland.

3. Citing Diodorus Siculus, Bibliotheca historica, book 4 (c.a. 60 B.C.); Pomponius Mela, De situ orbis, book 3, ch. 6 (ca. 43 A.D.); Strabo, Geographica book 4 (23 A.D); Dion (or Dio) Cassius, Historia Romana, book 75 (211-233 A.D.); Julius Caesar, Commentarii de Bello Gallico, book 6 (52-51 B.C.); Tacitus, Agricola (ca. 98 A.D.).

known as the Danegeld. The divided English kingdoms sometimes defeated the Danes in battle, but generally they were outmatched.

King Alfred the Great ascended the throne of West Saxony during a war with the Danes in which his older brother was killed. In 878 A.D., the Danes triumphed completely. In the words of *The Anglo-Saxon Chronicle* (a historical work begun during that time), all the people of England were "subdued to their will;—ALL BUT ALFRED THE KING. He, with a little band, uneasily sought the woods and fastnesses of the moors." The Anglo-Saxon Chronicle 67 (James Ingram ed., James H. Ford trans., 2005).

Starting with a guerilla band hiding in the swamps, Alfred kept alive the principle of English sovereignty and led the English back from the brink of annihilation. Bookish and brilliant, Alfred was one of the greatest military strategists of his century. His growing army expelled the most recent Danish invaders. The Danish settlements in England were brought under Alfred's sovereignty, no longer able to plunder the English at will.

King Alfred recognized that another Danish invasion was inevitable, so he began building England's capacity for self-defense. Collective self-defense was founded on the principle that all freemen should be armed, trained, and ready to fight to defend their local and national communities. Alfred reformed and improved the English militia, consisting of all able-bodied men. In the 1939 case *United States v. Miller*, the U.S. Supreme Court explained that Alfred "first settled a national militia in this kingdom." The Second Amendment militia is a descendant of Alfred's militia. 307 U.S. 174, 179 (1939) (Ch. 8.D.7).

England's militia was based on the old Saxon tradition of the *fyrd*, in which every male aged 16 to 60 bore arms to defend the nation. Charles Hollister, Anglo-Saxon Military Institutions (1962). As people knew from the Bible, the ancient Hebrews had relied on militias during their two centuries as a tribal confederation, and later when they became a monarchy. The classical Roman Republic had been based on the militia. The Republic devolved into military dictatorship by Julius Caesar and his nephew Octavian partly because the Roman militia had been replaced by a standing army, which decided who would rule.[4]

King Alfred read as widely as he could about world history. Based on global learning, he reformed England's militia. Militias were organized by shires—what we now call "counties." In each shire, the militiamen were divided into two parts; only one part had to serve at a given time. The practical benefit was enormous. The men who were not serving in a particular campaign could work the farms, keep the economy functioning, and protect the women and children. Meanwhile, the men who were actively serving in the militia could campaign longer, knowing that the community was taking care of planting, cultivating, harvesting, and family defense. When the Danes tried invading again, they were routed.

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4. The English knew something about the Romans, but nearly nothing about the ancient Chinese, who also had militias. Confucian philosophers such as Mencius and Taoist scriptures such as the *Huainanzi* contrasted militias (which fight energetically on behalf of benevolent governments) with standing armies (which fight to oppress others). For more on these matters, see online Chapter 21.A; David B. Kopel, The Morality of Self-Defense and Military Action: The Judeo-Christian Tradition (2017) (discussing the Hebrews); David B. Kopel, *Self-Defense in Asian Religions*, 2 Liberty L. Rev. 79 (2007) (discussing China).

A second security reform of Alfred the Great was improving the office of sheriff. The oldest title in the Anglo-American system of government is "king" and the second oldest is "sheriff." William Alfred Morris, The Medieval English Sheriff 1 (1927). The word is a compound of "seyre" (meaning "shire") and "reve" (meaning "bailiff" or "guardian").

During the period of Danish oppression, the English had devolved into lawlessness and robbery. King Alfred fixed England's county boundaries with greater precision and used the counties to organize national and community self-defense. The sheriff was the pillar of this self-defense system and often the leader of the county militia. The sheriff exercised the authority to summon and command the armed body of the people. The armed populace would embody as the militia, the *posse comitatus*, the "hue and cry," and the "watch and ward." Each is discussed below.

According to medieval historian Frank Barlow, "[i]t is not unlikely that every freeman had the duty, and right, to bear arms" in Anglo-Saxon times. Frank Barlow, Edward the Confessor 172 (1970). When bearing (carrying) for collective defense, Englishmen most often would be under the sheriff's command. As the county leader of the armed people, "the reeve became the guarantor of the survival of the group." Thus, "[t]he people maintained law and order among themselves" because the king's central government was unable to do so. David R. Struckhoff, The American Sheriff 3-4 (1994).

A millennium later, Alfred was still revered by English and Americans of all political persuasions. He brought peace and security to England. He believed in freedom. Alfred "preserved the most sacred regard to the liberty of his people; and it is a memorable sentiment preserved in his will, that it was just the English should for ever remain as free as their own thoughts." Hume, 1 History of England at 79.

There is uncertainty about whether sheriffs were elected, appointed, or mixed during the Anglo-Saxon period. The American Founders thought that the sheriffs were elected, because Blackstone wrote that in Anglo-Saxon times, "sheriffs were elected: following still that old fundamental maxim of the Saxon constitution, that where any officer was entrusted with such power, as if abused might tend to the oppression of the people, that power was delegated to him by the vote of the people themselves." 1 William Blackstone, Commentaries of the Laws of England *409 (1765-69).

After declaring independence, the American Continental Congress had to determine the public symbols of the new nation. On July 6, 1776, a committee discussed the design of the Great Seal of the United States. Thomas Jefferson urged that the reverse of the seal depict "Hengist and Horsa, the Saxon Chiefs, from whom We claim the Honour of being descended and whose Political Principles and Form of Government We have assumed." Letter from John Adams to Abigail Adams (Aug. 14, 1776), *in* 2 Adams Family Correspondence 96 (L.H. Butterfield ed., 1963). Hengist and Horsa were the (perhaps legendary) first Anglo-Saxon rulers in England, from the fifth century A.D.

The American Revolutionaries and their European intellectual ancestors believed that societies of liberty had existed in ancient times. They also believed that one purpose of politics was to recover lost liberty, especially to ensure that the government ruled under the law, rather than above the law. Americans idealized Anglo-Saxon England as a land of law and liberty. *See, e.g.*, Merrill D. Peterson,

Thomas Jefferson and the New Nation 57 (1970). The Americans who admired the free Anglo-Saxons were continuing a tradition of two millennia, dating back to the Roman historian Tacitus. Tacitus, De Origine et Situ Germanorum §§ 11-12 (ca. 98 A.D.) (commonly known as *Germania*) (describing decision-making by consent of the armed people).

Many English and Americans believed that the liberties of the Anglo-Saxons had been destroyed by the Norman Conquest in 1066. *See, e.g.*, Hume at 160-85, 194-98, 208, 226-27 ("[I]t would be difficult to find in all history a revolution more destructive, or attended with a more complete subjection of the antient inhabitants"), 437 (the majority of Anglo-Saxons were reduced "to a state of real slavery"); Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 76-77 (1985) (influence of "the Norman yoke" in American Revolution ideology).

Historians have questioned whether the Anglo-Saxons were really as free, or the Normans really as bad, as the American Founders and their English cousins thought. There is no doubt that the American view of Anglo-Saxon England has influenced American law—for example, the Confrontation Clause in the U.S. Bill of Rights. *See* Charles Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure §§ 6342-43, 6345, 6355 at n.80-107 (summarizing the common view of Americans and of English Whigs[5] about the imposition of "the Norman yoke" in 1066).

The office of sheriff, so important to the Anglo-Saxons, was at least as important to Americans. Thomas Jefferson wrote that "the office of sheriff" was "the most important of all the executive officers of the county." Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* 12 The Works of Thomas Jefferson 3, 6 (Paul Leicester Ford ed., 1905).

In the nineteenth century, the United States grew from a thin population on the Atlantic seaboard into a nation from sea to sea. In the near-constant process of forming new territories and states, Americans modeled the office of county sheriff on what they considered to be the best features of the Anglo-Saxon sheriff. Americans also included improvements from the centuries after the Norman Conquest, such as the requirement that the sheriff take an oath to uphold the law. As one historian observed in 1930, "in America today . . . the sheriff retains many of his Anglo-Saxon and Norman characteristics." Cyrus Harreld Karraker, The Seventeenth-Century Sheriff: A Comparative Study of the Sheriff in England and in the Chesapeake Colonies, 1607-1689, at 159 (1930). The same is true today: The fundamental structure of the American office of sheriff is nearly the same as in the nineteenth century, and very similar to the ninth century. Most important, it is elective.[6] Sheriff elections are among the many ways in which the American system of government aims to keep government use of force under the control of the people.

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5. The Whigs were the British political group in the seventeenth and eighteenth century who were the most ardent supporters of a popular form of government, civil liberties, and the rule of law; their opponents were more willing to let kings rule by personal will.

6. The exceptions are Alaska, which has no counties, and Rhode Island, Hawaii, and Connecticut.

Anglo-Saxon England was conquered by the Norman French in 1066. "The Norman yoke" was imposed. King William I ("the Conqueror") claimed ownership of every acre of land in England, so that all real property possession came from him directly, or from his tenants. Sheriffs were now appointed, not elected, although over time, some jurisdictions, such as London, obtained the right to elect their sheriffs; in some other counties, sheriff elections were allowed if the king was paid a fee.

In accordance with Roman law, Anglo-Saxon England had considered wild animals to be *ferae naturae*—belonging to no one—and thus anyone could hunt them on his own property. But William declared that besides owning all the land, he also owned the wildlife. No one could hunt—not even on one's own farm—unless authorized by the king. 4 Blackstone *410-19; Mark Hathaway, "Poaching," *in* Encyclopedia of Traditional British Rural Sports 213 (Tony Collins, John Martin, & Wray Vamplew eds., 2005). Hunting was thus reserved exclusively to the king, although the nobles thought that they, too, had the right. In America, where anyone could hunt, the hunting restrictions in Great Britain were often denounced as affronts to liberty.[7]

B. THE RESPONSIBILITY TO POSSESS ARMS

In 1181, King Henry II promulgated the Statute of Assize of Arms. It ordered the surrender of coats of mail and breastplates owned by Jews. Christian freemen, on the other hand, were *required* to acquire arms appropriate to their social rank—the higher one's rank, the more extensive and expensive the required arms. Although the Assize said nothing about the lowest classes, the Assize was prescriptive for the classes it covered; subjects had to own the specified quantities of particular arms, no more and no less. Statute of Assize of Arms, 27 Henry II, art. 3 (1181).[8]

The 1181 Assize of Arms was updated in 1285 by Edward I, in The Statute of Winchester. It, too, required arms ownership by all free men, on a sliding scale that demanded wealthier persons own more expensive arms and armor. Unlike the 1181 Assize, the statute only set the minimum requirements for arms possession; subjects could own whatever additional arms they could afford.[9] For centuries afterward, it was common for large landowners to have very large private arsenals.

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7. This textbook uses "hunting" in the American language sense: attempting to take wild game by use of a bow, firearm, etc. In Great Britain, the activity is called "shooting"; the word "hunting" refers to the riding on horseback to follow hounds that are chasing a fox or similar creature.

8. English statutes are cited according to the regnal year (e.g., "5" is the fifth year that the particular king was reigning), then the king's name (e.g., "Henry III"), and then the sequence of lawmaking that year (e.g., "ch. 25," "c. 25," or "art. 25" is the twenty-fifth statute enacted that particular regnal year). After that, the calendar year follows in parentheses. English statutes from 1235 to 1713 are authoritatively collected in the multivolume *Statutes of the Realm*, which is available in Hein Online. Following the British Civil War (Section H.2), Charles II became king in 1660. However, the numbers for his regnal years are calculated starting with 1649 as year 1, because that was the year his father, Charles I, was executed, and Charles II supposedly became the rightful king.

9. The Statute of Winchester was repealed as part of a statutory cleanup in 1624. 21 James I ch. 28, § 11 (1624).

Statute of Winchester

13 Edward I, chs. 4-6 (1285)

(5) It is likewise commanded that every man have in his house arms for keeping the peace in accordance with the ancient assize; namely that every man between fifteen years and sixty be assessed and sworn to arms according to the amount of his lands and, of his chattels; that is to say,

for fifteen pounds of land, and, forty marks worth of chattels, a hauberk [a mail shirt], a helmet of iron, a sword, a knife and a horse;

for ten pounds worth of land and, twenty marks worth of chattels, a haubergeon [a sleeveless hauberk], a helmet, a sword and a knife; for a hundred shillings[10] worth of land, a doublet [a padded defensive jacket], a helmet of iron, a sword and a knife;

for forty shillings worth of land and over, up to a hundred shillings worth, a sword, a bow, arrows and a knife;

and he who has less than forty shillings worth of land shall be sworn to keep gisarmes [a long pole with a two-sided blade], knives and other small weapons;

he who has less than twenty marks in chattels, swords, knives and other small weapons.

And all others who can do so shall have bows and arrows outside the forests and within them bows and bolts [i.e., crossbows and bolts for crossbows].

And that the view of arms be made twice a year. And in each hundred and liberty let two constables be chosen to make the view of arms and the aforesaid constables shall, when the justices assigned to this come to the district, present before them the defaults they have found in arms, in watch-keeping and in highways; and present also people who harbour strangers in upland vills for whom they are not willing to answer. And the justices assigned shall present again to the king in each parliament and the king will provide a remedy therefore. And from henceforth let sheriffs and bailiffs, whether bailiffs of liberties or not, whether of greater or less authority, who have a bailiwick or forester's office, in fee or otherwise, take good care to follow the cry with the district [the hue and cry, discussed below], and, according to their degree, keep horses and arms to do this with; and if there is any who does not do it, let the defaults be presented by the constables to the justices assigned, and then afterwards by them to the king as aforesaid.

C. THE RESPONSIBILITY TO BEAR ARMS: HUE AND CRY, WATCH AND WARD, AND THE POSSE COMITATUS

Under English law originating long before the Norman Conquest of 1066, all able-bodied men between 16 and 60 were obliged to join in the "hue and cry" (*hutesium et clamor*) to pursue fleeing criminals. Pursuing citizens were allowed to

10. [Before English currency was decimalized in 1966-71, 240 pence was equal to, and literally weighed, one pound. A shilling was worth 12 pence, or 1/20th of a pound. During the late medieval period, the "mark" was replaced by the pound.—Eds.]

use deadly force if necessary to prevent escape. *See* Frederick Pollock & Frederic W. Maitland, 2 The History of English Law Before the Time of Edward I 575-81 (1895); 4 Blackstone *290-91 (describing hue and cry as still in operation); Statute of Winchester, 13 Edward I, chs. 4-6 (1285) (formalizing hue and cry system).[11]

The responsibility to find and apprehend criminals was not limited to situations of hot pursuit. Counties (or shires) were divided into smaller units, and each unit was called a *hundred* (or *wapentake*). If a crime victim raised a hue and cry, and the hundred did not apprehend the criminal within a certain number of days, the victim could sue the hundred for compensation. The system continued into the early nineteenth century; victims would sometimes notify the community of the duty to find the criminal by publishing a notice in the newspaper. The legal cause of action against hundreds for nonapprehension was eliminated over the course of the nineteenth century, as England began to move toward creating professional police forces. *See* Philip Rawlings, *From Vigilance to Vigilante: The Rise and Fall of the Action Against the Hundred and the Reshaping of the Community's Role in Policing*, SSRN.com (2021); 7 & 8 Geo. IV ch. 31 (1827) (reducing circumstances in which the cause of action against the hundred was available).

Sheriffs (and later, other officials, such as constables or justices of the peace) had the duty to keep "watch and ward": to arrange town watches and patrols, and to require townsfolk to take turns on guard duty. Michael Dalton, Officium Vicecomitum: The Office and Authoritie of Sherif 6, 40 (Lawbook Exchange 2009) (1623) (sheriff's oath includes supervising the watch and ward, by reference to his oath specifically to uphold the Statute of Winchester); Morris, The Medieval English Sheriff at 150, 228-29, 278; William Lambarde, Eirenarcha 185, 341 (1581); Ferdinando Pulton, De Pace Regis & Regni 153a-153b (Lawbook Exchange 2007) (1609). "Ward" was the daytime activity, and "watch" the nighttime activity. Elizabeth C. Bartels, Volunteer Police in the United States 2 (2014). Starting in 1253, villages were required to provide at least some of the arms to the men serving on watch and ward. Michael Powicke, Military Obligation in Medieval England: A Study in Liberty and Duty 90 (1996) (also examining relationship between subjects' military obligations and subjects' rights to approve or reject entry into particular wars).

Another form of mandatory arms bearing was the *posse comitatus* (often translated as "power of the county"). From before King Alfred the Great, up to the United States today, the county sheriff has possessed the authority to summon the *posse comitatus* to assist him or her in enforcing the law. Nearly every able-bodied male is subject to posse duty. While militia duty usually had an upper age limit and exemptions for certain occupations, posse duty had few if any exceptions, and a much higher age limit, or no limit at all. Typically, posse members would bring their own arms, but service in the posse, and what arms would be used, was always subject to the sheriff's discretion. Posses could be employed for activities as mundane as helping to serve a writ when forcible resistance was reasonably expected. A much larger posse might be assembled to suppress a riot, or to hunt for a fugitive.

Like the office of sheriff, the *posse comitatus* has withered in modern England. In America, government revenues are greater than in the past, so sheriffs have more deputies, and are consequently less reliant on the unpaid services of the *posse*

11. For more on the hue and cry, watch and ward, and posse, see Kopel, *Posse Comitatus*.

comitatus. Still, the *posse comitatus* remains significant in some U.S. jurisdictions. For example, about a third of Colorado sheriffs use posses today. Usually, the county posses consist of up to several dozen volunteers who receive special training. Their duties range from security at county fairs to responding to hostage situations. In emergencies, such as Colorado's 2013 floods, a sheriff might designate other persons for posse duty to deter looting in isolated towns. Kopel, *Posse Comitatus*, at 808-21.

Occasionally, mass posses are needed. A posse helped recapture serial killer Ted Bundy when he escaped from the Pitkin County Courthouse in Aspen, Colorado, during a hearing recess in 1977. Another posse thwarted the escape of two criminals who murdered Hinsdale County, Colorado, Sheriff Roger Coursey during a crime spree in 1994. *Id.* at 812-15. The law of the American sheriffs and their *posse comitatus* is mostly the same as in the days of Alfred the Great, incorporating some refinements in subsequent centuries. Chapters 3 through 7 describe the *posse comitatus* in America, from colonial days through the nineteenth century.

England's medieval and early modern reliance on armed people for law enforcement and national defense was not unique. In the many German states, the legal duty to bear arms to keep the peace was stronger than in England, and so was recognition of the freeman's right to arms. Unlike England, Germany had no wealth-based restrictions on firearms or other weapons. (See Parts G and H for the economic discrimination in England.) By tradition, sword-carrying in Germany was ubiquitous, while carrying loaded guns was disfavored. To keep and bear arms for defense of family and community—and as a deterrent to abusive government—was the embodiment of patriotism.

The tradition ended sooner in Germany, France, and Spain than in England because of military necessity. As an island, Great Britain could rely on a relatively broad-based militia as the first line of land defense, even after improvements in the capabilities of standing, professional armies made militia-only defense too dangerous in most of continental Europe. America, remote from the European powers, enjoyed a similar advantage. B. Ann Tlusty, The Martial Ethic in Early Modern Germany: Civil Duty and the Right of Arms (2011). By the nineteenth century, German governments had redirected patriotism away from daily sword-carrying and into service in a standing army with standardized uniforms and equipment. "While martial identity in America remained linked to civil rights, in Germany it was channeled into a professional military experience." *Id.* at 276. Great Britain eventually developed along German lines, albeit more slowly. Because standing armies "endowed the king with power to enforce his will both in peace and in war, continental sovereigns soon began to dispense with their parliaments." Spain's parliaments "practically disappeared" and France's Estates General were not summoned from 1614 to 1789. J.F.C. Fuller, 2 A Military History of the Western World 76 (1954).

D. THE CODIFIED RIGHT TO RESIST TYRANNY: MAGNA CARTA

Henry II's son John was a terrible king, portrayed unflatteringly in the legends of Robin Hood. The abuses of Robin Hood's nemesis, the Sheriff of Nottingham, reflect the behavior of some of the appointed sheriffs of the time. King John's

harsh, abusive, and autocratic rule sparked a national revolt led by the barons (the top of the noble class). To retain his throne, John was forced to sign "the Great Charter" at Runnymeade on June 15, 1215.

Magna Carta drew on the Coronation Charter that King Henry I in 1100 had accepted as the condition for his being allowed to ascend the throne. Henry's charter had sworn to end the abuses of his predecessor, William Rufus (son of William the Conqueror). But Henry I and his successors often violated the Coronation Charter, eventually causing the revolution that resulted in Magna Carta.

The original sense of the word "revolution" was a return to original conditions. For example, when the Earth completes one revolution, the sun is in the same position in the sky as it was exactly one day previously. The Magna Carta revolution was similar, in that it meant to enforce the Coronation Charter and other long-established rights and customs, including laws that had come from the Anglo-Saxon King Edward the Confessor (reigned 1042-66).

Magna Carta's purpose is to protect life, liberty, and property against arbitrary seizure or control; to prevent interference in families; to require approval of taxes by the nobles (later by parliament, which originated as a council of nobles); and to provide for orderly, nonarbitrary enforcement and creation of law. Even the Magna Carta provisions that were technical revisions of feudalism advanced human rights—such as by negating the king's power to force baronial daughters to marry a husband picked by the king.

The Magna Carta principle is that the king and his government are under the law, not above it. Juries had existed before Magna Carta, but the "lawful judgement of his peers" provision in Magna Carta became the fountainhead of jury rights in Anglo-American law. The "law of the land" provisions were forerunners of the "due process of law" guarantees of the Fifth and Fourteenth Amendments. The barons were required to establish for all their tenants and vassals the same liberties that Magna Carta guaranteed to the barons.

During much of England's history, monarchs attempted to create armed forces independent of the control of the English people. Article 51 addressed King John's use of foreigners to subjugate the English: "As soon as peace is restored, we will banish from the kingdom all foreign born knights, crossbowmen, serjeants, and mercenary soldiers who have come with horses and arms to the kingdom's hurt."

According to Articles 12 and 14, the king could not impose certain taxes without consent of a council. The tax rules drastically changed the course of English history, and therefore global history. So if the king needed money because he wanted to fight a war in France, Parliament could demand concessions on other issues, and the general tendency of the concessions was to constrict arbitrary royal power.

By depriving monarchs of the full power of the purse, Magna Carta, as well as subsequent laws in the same spirit, limited the monarch's power of the sword. On the European continent, where some kings could tax at will, the monarchs could spend freely to pay mercenaries and standing armies. The mercenaries and standing armies were used not only for foreign wars, but for domestic political control. Over the centuries, continental monarchs became more absolute in their power, but English monarchs not so much.

The final article of Magna Carta was the enforcement mechanism, which provided for a structured system for public use of force against a tyrannical king.

Magna Carta

1215[12]

61. Since, moreover, for God and the amendment of our kingdom and for the better allaying of the quarrel that has arisen between us and our barons, we have granted all these concessions, desirous that they should enjoy them in complete and firm endurance for ever, we give and grant to them the underwritten security, namely, that the barons choose five-and-twenty barons of the kingdom, whomsoever they will, who shall be bound with all their might, to observe and hold, and cause to be observed, the peace and liberties we have granted and confirmed to them by this our present Charter, so that if we, or our justiciar, or our bailiffs or any one of our officers, shall in anything be at fault toward any one, or shall have broken any one of the articles of the peace or of this security, and the offense be notified to four barons of the foresaid five-and-twenty, the said four barons shall repair to us (or our justiciar, if we are out of the realm) and, laying the transgression before us, petition to have that transgression redressed without delay. And if we shall not have corrected the transgression (or, in the event of our being out of the realm, if our justiciar shall not have corrected it) within forty days, reckoning from the time it has been intimated to us (or to our justiciar, if we should be out of the realm), the four barons aforesaid shall refer that matter to the rest of the five-and-twenty barons, and those five-and-twenty barons shall, together with the community of the whole land, distrain and distress us in all possible ways, namely, by seizing our castles, lands, possessions, and in any other way they can, until redress has been obtained as they deem fit, saving harmless our own person, and the persons of our queen and children; and when redress has been obtained, they shall resume their old relations toward us. And let whoever in the country desires it, swear to obey the orders of the said five-and-twenty barons for the execution of all the aforesaid matters, and along with them, to molest us to the utmost of his power; and we publicly and freely grant leave to every one who wishes to swear, and we shall never forbid any one to swear. All those, moreover, in the land who of themselves and of their own accord are unwilling to swear to the twenty-five to help them in constraining and molesting us, we shall by our command compel the same to swear to the effect aforesaid. And if any one of the five-and-twenty barons shall have died or departed from the land, or be incapacitated in any other manner which would prevent the foresaid provisions being carried out, those of the said twenty-five barons who are left shall choose another in his place according to their own judgment, and he shall be sworn in the same way as the others. Further, in all matters, the execution of which is intrusted to these twenty-five barons, if perchance these twenty-five are present, that which the majority of those present ordain or command shall be held as fixed and established, exactly as if the whole twenty-five had concurred in this; and the said twenty-five shall swear that they will faithfully observe all that is aforesaid, and cause it to be observed with all their might. And we shall procure nothing from any one, directly or indirectly, whereby any part of these concessions and

12. Like other English statutes of the time, Magna Carta was originally written in Latin. The above translation is from Project Gutenberg.

liberties might be revoked or diminished; and if any such thing has been procured, let it be void and null, and we shall never use it personally or by another.

Article 61 did not specifically mention arms, but it did imply that the barons and the people must have arms. Otherwise, it would be impossible for "the community of the whole land" and the barons to exercise their right to "distrain and distress us [the monarch] in all possible ways, namely, by seizing our castles, lands, possessions, and in any other way they can."

Previously, King John had gotten himself out of self-inflicted trouble by purporting to give England to the pope, thus making the English king the pope's vassal. John sent Magna Carta to Pope Innocent III, who purported to annul Magna Carta on the grounds that it had been coerced, which it was. John made it clear that he had no intention of obeying Magna Carta, and so another rebellion ensued. John died in 1216, making his nine-year-old son Henry III the next king. The barons knew that they would have control of Henry until at least his age of majority. Henry immediately reissued Magna Carta and did so again when he became king in his own right at age 16.

The Henrican reissues, and subsequent reissues by Henry's successors, omitted Articles 12 and 14, on taxes, and Article 61, on forcible resistance. Perhaps the barons thought that since they were in control, they could run things the way they wanted without need for an express rule. In fact, Henry III did comply with both the letter and the spirit of the tax articles. When he wanted to raise taxes, he asked his Council for permission. The Council later became the Parliament, and the custom of asking for parliamentary consent became an iron-clad tradition that monarchs dared not violate. *See* Shepard Ashman Morgan, The History of Parliamentary Taxation in England (1911). That is not to say that the monarchs never tried to raise revenue via means that the monarchs claimed did not require consent. *See, e.g.*, Part H (Stuart monarchs in the seventeenth century).

As for Article 61, it had been a product of the First Barons' War (1215-17).[13] Half a century later, the barons' descendants launched the Second Barons' War (1264-67) after Henry III began trying to reassume some of the absolute powers of his Norman ancestors. Henry III prevailed in the war, but the barons were at least trying to enforce the principles of Article 61. Much later, King Charles II would be overthrown in 1642 for trying to assume dictatorial power, and the same would happen to his son James II in the Glorious Revolution of 1688, for the same reason. Legal reforms enacted after the Glorious Revolution would complete the work of Magna Carta, definitively placing the king under the rule of law, and guaranteeing the general public the right to arms, not only for personal self-defense, but for national self-defense against a tyrant. *See* Part H.

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13. The war lasted until 1217 because the moderate barons (who would control young Henry III), were revolting against John, whereas the more radical barons, mostly from the north, had taken the rebellion a step further, and allied with an invasion of England by the King of France. The moderates prevailed in the end.

Article 61 of Magna Carta was not unique. In Hungary in 1222, the nobles forced King Andrew II to promulgate a "Golden Bull," by which legal process was regularized and the government made subject to law. Taxation without consent was prohibited. A legislature (the Diet) was created. Abusive officials would forfeit their office. Like Magna Carta, the Golden Bull recognized the right to the use of force to enforce the great charter against future kings:

> We also ordain that if We or any of Our Successors shall at any time contravene the terms of this statute, the bishops and the higher and lower nobles of Our realm, one and all, both present and future, shall by virtue thereof have the uncontrolled right in perpetuity of resistance both by word and deed without thereby incurring any charge of treason.

In Castile, a kingdom comprising much of modern Spain, the Pact of 1282 recognized that towns had a right of revolution if the king violated the Pact. R. Altamira, *Magna Carta and Spanish Medieval Jurisprudence, in* Magna Carta Commemoration Essays (E.H. Malden ed., 1917). Aragon, Spain's other major kingdom, also acknowledged the right of nobles to depose a king who violated judicial procedures or other legal rights. *Id.* at 137; Geronimo Zurita, Anales de la Corona de Aragón 323 (1610).

The formula was famously summarized as "*si non, non*" ("if not, not"). That is, if the king obeyed the laws and respected the rights of the people, then the people owed him allegiance; and if not, not. Víctor Balaguer, Instituciones y Reyes de Aragón 128 (1969) (1890).

The above agreements took the form of contracts. As such, they reinforced the principle that the monarch's sovereignty was limited. Antonio Marongiu, *The Contractual Nature of Parliamentary Agreements* (1968), *in* Magna Charta and the Idea of Liberty 139-40 (J.C. Holt ed., 1972). While there is a philosophical notion of a "social contract," Magna Carta and its cousins were actual written contracts.[14] The contractual theory of government became important in Europe and America. It was a counterpoint to the claim that kings enjoyed unlimited power by divine right. In the American colonies, the contractual nature of government was an oft-repeated theme of political sermons. *See* Ch. 3.D.3. The Declaration of Independence (Ch. 4.B.5) would express the contractual theory.

NOTES & QUESTIONS

1. If a ruler agrees to conditions under which he may be forcibly and lawfully overthrown, has he made political conditions more stable or less stable?

2. Do you agree that Article 61 contains an implicit right to arms?

3. Are the Second Amendment and its state analogues modern versions of Article 61?

4. The 1215 Magna Carta had included provisions regarding the Royal Forests, a term for wooded and nonwooded land that covered about a third of

14. Technically, Magna Carta was a unilateral grant. In practice, it was a contract. The barons agreed not to immediately remove King John from the throne, in exchange for John agreeing to rule according to Magna Carta.

England. When Magna Carta was first reissued, the forest provisions were removed, expanded, and put into a separate Charter of the Forest. It allowed the population to make some economic use of forests and eliminated execution and amputation as penalties for killing the king's "venison." The Charter of the Forest was revered along with Magna Carta as a foundation of English liberty. Carta de Foresta, 1 Statutes of the Realm 20 (1800) (Latin); Richard Thomson, An Historical Essay on the Magna Charta of King John 329 (1829) (English translation); Daniel Magraw & Natalie Thomure, *Carta de Foresta: The Charter of the Forest Turns 800*, 47 Enviromental L. Rep. 10934 (Nov. 2017).

E. CASTLE DOCTRINE: SEMAYNE'S CASE

The adage that "a man's house is his castle" comes from a pair of English cases that affirmed the right of home defense. The first case, which has no name, reads in relevant part:

> If one is in his house, and hears that such a one will come to his house to beat him, he may assemble folk of his friends and neighbors to help him, and aid in the safeguard of his person; but if one were threatened that if he should come to such a market, or into such a place, he should there be beaten, in that case he could not assemble persons to help him go there in personal safety, for he need not go there, and he may have a remedy by surety of the peace.[15] But a man's house is his castle and defense, and where he has a peculiar right to stay.

Y.B. Trin. 14 Henry 7 (1499), *reported in* Y.B. 21 Henry 7, fol. 39, Mich., pl. 50 (1506) ("Anonymous." No case name).[16]

The second case is the famous *Semayne's Case*, 77 Eng. Rep. 194, 5 Coke Rep. 91a (K.B. 1604). When George Berisford died, he owed a debt to Peter Semayne. Berisford had lived in a house with Richard Gresham, as joint tenants. Upon Berisford's demise, the house passed fully to Gresham, by survivorship. Berisford had owned various goods and papers that he had kept at home; Gresham retained them. 77 Eng. Rep. at 194-95. Semayne secured a writ for the Sheriff of London to seize Berisford's goods to satisfy the debt. But when the Sheriff came to Gresham's home, Gresham shut the door, and would not let him in.

Semayne sued Gresham for frustrating the execution of the writ. *Id.* The King's Bench ruled against him: Gresham had a right to keep his doors locked, and

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15. [This common law and statutory remedy is discussed in Chapter 5.B.6. Essentially, it allows a troublemaker to be forced to post bond for good behavior. —Eds.]

16. The opinion was written in a combination of Latin, Law French, and English. The old cases were partially translated into English in the nineteenth-century English Reports, created at the order of Parliament. Much old English law is written in Law French. Law French was a result of the 1066 Norman Conquest, when French became the official language of English law. Even for centuries after English was restored as the official language for most government purposes, legal discourse included many French words. *See* J.H. Baker, Manual of Law French (2d ed. 1990).

to exclude anyone who did not knock, announce, and demonstrate lawful authority to enter. *Id.* at 199. As Edward Coke summarized the court's decision:

> That the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favored in law; so that although a man kills another in his defence, or kills one *per infortun'*,[17] without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels, for the great regard which the law has to a man's life; but if thieves come to a man's house to rob him, or murder, and the owner of his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing, and therewith agree . . . every one may assemble his friends and neighbours to defend his house against violence: but he cannot assemble them to go with him to the market, or elsewhere for his safeguard against violence: and the reason of all this is, because *domus sua cuique est tutissimum refugium.*[18]

Id. at 195.

Most of *Semayne's Case* detailed when and how sheriffs could enter homes. The foundational rule was this: "In all cases when the King is party, the sheriff may break the house, either to arrest or to do other execution upon the King's process, if otherwise he cannot enter. But he ought first to signify the cause of his coming, and to make request to open doors." *Id.* at 194.

That "a man's house is his castle" is in twenty-first century America the best-known language from any English case. The Castle Doctrine became a foundation of the Fourth Amendment. In 1761, Great Britain's Parliament authorized writs of assistance, which allowed the British army to conduct warrantless searches to crack down on the widespread import/export smuggling (for customs tax avoidance) taking place in New England.

James Otis was the Advocate-General (like an Attorney General) of Massachusetts. Rather than defend the legality of the writs of assistance, he resigned. He then became the attorney for plaintiffs challenging the writs. Otis's oral argument against the writs, which quoted Castle Doctrine, was widely reprinted, and became the most famous legal speech in colonial America:

> Now, one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court can inquire. Bare suspicion without oath is sufficient.

James Otis, Against Writs of Assistance (Feb. 24, 1761, argument before Superior Court of Massachusetts), *in* Charles Francis Adams, 2 The Works of John Adams 524

17. [*Per infortunium.* By misadventure.—Eds.]
18. ["To everyone his house is his surest refuge."—Eds.]

(1856) (Adams's notes recording Otis's speech). John Adams later recalled, "American independence was then and there born. Every man of an immense, crowded audience appeared to me to go away, as I did, ready to take up arms against writs of assistance." 2 John Stetson Barry, The History of Massachusetts 266 (1856).

The speech's principles were enshrined in the Fourth Amendment. William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 Wm. & Mary Q. 371, 371-72 (1980). Much later, the great progressive and future Supreme Court Justice Louis Brandeis would rely on Castle Doctrine in his seminal article arguing for judicial recognition of the right of privacy. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 220 (1890) ("The common law has always recognized a man's house as his castle, impregnable . . . ").

Semayne's Case provided the standard American rule for the right to use deadly force against home invaders. For example, Francis Wharton's widely cited treatise on criminal law explained: "Where one is assaulted in his home, or the home itself is attacked, he may use such means as are necessary to repel the assailant from the house, or to prevent his forcible entry, or material injury to his home, even to the taking of life. In this sense, and in this sense alone, are we to understand that maxim that, 'Every man's house is his castle.'" Francis Wharton, 1 A Treatise on Criminal Law § 633 (11th ed. 1912) (some internal quotation marks omitted).

The U.S. Supreme Court has invoked *Semayne's Case* repeatedly, recognizing its principle about repelling violent intruders, and examining the opinion closely to discern the meaning of the Fourth Amendment.[19]

Today, many states have passed laws to affirm the common law doctrine that a person who is violently attacked by a home invader has no duty to retreat before using deadly force. These laws are often called the "Castle Doctrine."

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19. There are 14 citations since the Warren Court, including four in the twenty-first century. *Carpenter v. United States*, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting) (cited for the point that "Security in property was a prominent concept in English law."); *Hudson v. Michigan*, 547 U.S. 586, 594 (2006) ("an unannounced entry may provoke violence in supposed self-defense by the surprised resident"); *Georgia v. Randolph*, 547 U.S. 103, 123 (2006) (Stevens, J., concurring); *United States v. Banks*, 540 U.S. 31, 41 (2003); *Wilson v. Layne*, 526 U.S. 603, 609-10 (1999); *id.* at 622 (Stevens, J., dissenting); *Minnesota v. Carter*, 525 U.S. 83, 95 (1998); *id.* at 99-100 (Kennedy, J., concurring) ("The axiom that a man's home is his castle . . . has acquired over time a power and an independent significance justifying a more general assurance of personal security in one's home, an assurance which has become part of our constitutional tradition."); *Wilson v. Arkansas*, 514 U.S. 927, 931, 932 n.2, 935-36 (1995) ("knock and announce" is a factor in determining Fourth Amendment reasonableness of a search; *Semayne* reaffirmed an ancient common law rule); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 488 n.3 (1986) (Stevens, J., concurring in part and concurring in the judgment); *Steagald v. United States*, 451 U.S. 204, 217-19 (1981); *id.* at 228-30 (Rehnquist, J., dissenting); *Payton v. New York*, 445 U.S. 573, 592-93, 596-97, 615 n.11 (1980) ("The zealous and frequent repetition of the adage that a 'man's house is his castle,' made it abundantly clear that both in England and in the Colonies 'the freedom of one's house' was one of the most vital elements of English liberty."); *Id.* at 604-05 (White, J., dissenting); *Ker v. State of Calif.*, 374 U.S. 23, 47, 54 n.8, 57 n.11 (1963) (Brennan, J., concurring in part); *Miller v. United States*, 357 U.S. 301, 308 (1958).

During the first century of the American Bill of Rights, nearly all cases that involved *Semayne*'s common law Castle Doctrine related to when and how sheriffs or other government officers could enter homes. *See When a House Is Not a Castle*, 6 Albany L.J. 379 (1872) (summarizing American doctrine). The right of armed home defense was uncontested in this period, except for slaves and for free people of color in some slave states. *See* Chs. 6-7. The few cases exploring the self-defense contours of Castle Doctrine held that it applied when felons invaded the home, and not to other situations, such as civil trespassers on land.[20]

NOTES & QUESTIONS

1. **CQ:** Castle Doctrine cases and other cases saying "a man's house is his castle" were cited in the U.S. Supreme Court decision holding that, absent special circumstances, a person may not be arrested in his home without a warrant. *Payton v. New York*, 445 U.S. 573, 597 (1980). The Court observed that "in the Colonies 'the freedom of one's house' was one of the most vital elements of English liberty." Does special solicitude for the home still make sense today? Consider this point when you read *District of Columbia v. Heller*, 554 U.S. 570 (Ch. 11.A). Does *Heller* continue the tradition of the Castle Doctrine cases by upholding the right to own, carry, and use guns for self-defense (at minimum) in the home?

2. It has been argued that the Second, Third, and Fourth Amendments all have roots in the Castle Doctrine, as a cluster of home security protections. David I. Caplan & Sue Wimmershoff-Caplan, *Postmodernism and the Model Penal Code v. The Fourth, Fifth, and Fourteenth Amendments—and the Castle Privacy Doctrine in the Twenty-First Century*, 73 UMKC L. Rev. 1073 (2005); David I. Caplan, *The Right to Have Arms and Use Deadly Force Under the Second and Third Amendments*, 2 J. Firearms & Pub. Pol'y 165 (1989) (linking Second Amendment to Third Amendment protection against home intruders). *Cf.* Laurence H. Tribe, The Invisible Constitution 2, 156 (2008) (special regard for the sanctity of the home is part of the "invisible," unwritten understanding of the U.S. Constitution). The Fourth Amendment guards the home against irregular intrusions, or intrusions not supported by probable cause. The Second Amendment ensures that citizens will have the practical means to stop and deter home invasions. Is it fair to understand the Second, Third, and Fourth Amendments as collectively creating a zone of safety and protection in the home? Do any other constitutional provisions protect the home?

3. *Semayne's Case* appears in case reports by Sir Edward Coke (pronounced "cook"), the English Attorney General, Judge, and Member of Parliament who was

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20. *See, e.g.*, *Lee v. State*, 92 Ala. 15 (1891) (no-retreat rule applies in the home and curtilage); *Watkins v. States*, 89 Ala. 82 (1890); *Mitchell v. Commonwealth*, 10 Ky. L. Rptr. 910 (1889) (applies to cellar); *Wright v. Commonwealth*, 85 Ky. 123, 2 S.W. 904, 908 (1887) ("He was not required to flee from his dwelling, but had the right to stand his ground, and use all the force necessary . . . "); *State v. Patterson*, 45 Vt. 308 (1873); *Pierce v. Hicks*, 34 Ga. 259 (1866) (applies to a licensed tippling house, which was also part of defendant's home); *Curtis v. Hubbard*, 4 Hill 437, 439 (N.Y. 1824) ("For a man's house is his castle, not for his own personal protection merely, but also for the protection of his family and his property therein, while it is occupied as his residence.").

much admired as a defender of civil liberty under law, and an opponent of monarchical absolutism. Coke's *Institutes of the Laws of England* was the preeminent English legal treatise prior to Blackstone. Coke wrote that "one is allowed to repel force with force" and "the laws permit the taking up of arms against armed persons." 1 Edward Coke, Institutes of the Laws of England 162a (Johnson & Warner eds., 1812) (1642).

Regarding *Semayne*'s statements about killings outside the home being felonious, a footnote added by a modern annotator of the 1907 Coke edition states: "This position is taken down much too broadly, there are many cases in which the killing another *se defendendo* [in self-defense] or *per infortunium* [an accidental killing while performing a lawful act], will not be considered by the law to be a felony, and it is doubted by Foster, J., whether in case of homicide *per infortunium* or *se defendendo*, a forfeiture of all the party's chattels was ever incurred." 2 Coke Rep. 574 (1907). Legal historians continue to argue about the scope of lawful self-defense outside the home in England during the medieval period and the sixteenth century. Does it make sense for the law to create separate rules for self-defense inside the home versus in public places? What about in one's yard or driveway?

4. In the last quarter-century, many states have enacted Castle Doctrine laws. Such laws eliminate any duty to retreat from an attacker in one's home, and allow deadly force in self-defense against violent felony attacks in the home even when lesser force might suffice. Some of the new laws also apply to special places such as one's automobile or place of business. Some laws apply everywhere. The "everywhere" laws are not Castle Doctrine in the original sense. Rather, they are applications of the American (not English) principle of "stand your ground." *See* Ch. 7.J.5. What are some of the reasons for or against treating self-defense in special private zones differently from self-defense in public places?

F. ARMS CARRYING

Two of the greatest historians of English law report that "before the end of Henry III's reign there were ordinances which commanded the arrest of suspicious persons who went about armed without lawful cause." 2 Frederick Pollock & Frederic William Maitland, The History of English Law before the Time of Edward I, at 583 (2d ed. 1898). The authors cite a pair of ordinances issued by Henry III in 1233. The first states:

> The King to the Sheriff of Herefordshire. We order you that if any armed clan[21] is traveling around through your jurisdiction against the provision

21. [The Latin word is *gens*. Clan or tribe is the classical meaning of "gens." It probably means something like "gang" here. It can be used for animals in the sense of "swarm." The translation of both passages is by Prof. Robert G. Natelson. The reference to the provision "recently made at Gloucester" is unclear. The arms-related provisions in the Close Rolls for earlier times of Henry III's reign contain various arms mandates. 1 Calendar of the Close Roles, Henry III 395 (April 1230) (instruction to Sheriff of Worcester to raise armed men); *id.* at 398-99 (June 1230) (arms mandates); *id.* at 596 (July 1231) (instructions to Sheriff of Gloucestershire for raising armed men); 2 *id.* 60 (May 1232) (ordering all sheriffs to make sure that people are armed for the king's service). The Close Rolls are records issued by the Chancery in the name of the Crown. They are available at www.british-history.ac.uk. —Eds.]

> [of law] recently made at Gloucester by the common council of our baronage and demanded by all our realm for the purpose of preserving the peace and tranquility of our realm; and if you should have the power of arresting that clan; then you should ensure that the bodies of those people as well as their arms and household goods are arrested and taken into careful custody until you shall have informed us and we shall have commanded our will. If on the other hand, should you not have the power to arrest that clan, you should immediately raise the hue and cry regarding that armed clan and follow it from village to village until, by concourse of the country, they shall have been arrested, as aforesaid. And this, just as you love me [are fond of me; care for me], you should not fail to do with diligence. Witnessed by myself at Westminster, 31 July.

Calendar of Close Rolls, 2 Henry III (1231-1234), at 317 (1906) (July 1233).

The second is similar, directed to the sheriffs of Shropshire, Worcestershire, Gloucestershire, and Oxfordshire. "For if some armed clan shall have come into their village, then if they [the sheriffs] can they should arrest them with their horses and arms, and guard them safely until the king shall have ordered something else. And if they shall not have the power to arrest the clan in this way, then they should in no manner permit it to enter the village, but should hold it at bay so that it should not happen that the peace of the king is disturbed by their rebellion [disobedience; bad conduct] . . . " *Id.* at 328-39 (Oct. 1233).

Henry's son Edward I and grandson Edward II went further, with orders that sheriffs arrest anyone going armed without "the license of the King."[22]

The problem of armed gangs had become severe. In 1328, England's government was near collapse. The previous year, King Edward II had been deposed by an invasion led by his wife, Queen Isabella, a French princess. Isabella and her ally Roger Mortimer took over the government, which was nominally led by Edward III, the son of Edward II and Isabella. The monarchy's ability to enforce the law was virtually nonexistent. Anthony Verduyn, *The Politics of Law and Order during the Early Years of Edward III*, 108 Eng. Hist. Rev. 842 (1993).

The widespread problem was "the gentry . . . using armed force to defeat the course of justice." W.R. Jones, *Rex et ministri: English Local Government and the Crisis of 1341*, 13 J. Brit. Studs. 1, 19 (1973). Indeed, for decades there had been a problem of "magnates maintaining criminals." Verduyn, at 849. The House of "Commons' complaints about armed noblemen" were congenial to Queen Isabella and her consort Mortimer. Fearful of being overthrown, the Queen did not want armed men coming to Parliament or traveling armed to meet the Queen. *Id.* Isabella and Mortimer found it "politically necessary to check dissent against the increasingly unpopular regime." *Id.* at 856.

In 1330, Edward III seized power from his mother, and faced many of the same problems: "one of the most profound causes of disorder was the continued bond

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22. 4 Calendar of the Close Rolls, Edward I, 1296-1302, at 318 (Sept. 1299); 5 Calendar of The Close Rolls, Edward I, 1302-1307, at 210 (June 1304); 1 Calendar of the Close Rolls, Edward II, 1307-1313, at 52 (Feb. 1308), 257 (Mar. 1310), 553 (Oct. 1312); 4 Calendar of the Close Rolls, Edward II, 1323-1327, at 560 (Apr. 1326).

of many noblemen with malefactors." As Edward III understood, "many offenders were stronger than royal officials, not only because they had the support of the nobility, but also because they were members of the gentry or could draw upon the local criminal fraternity." *Id.* at 860-61.

1. The Statute of Northampton

From the chaos arose the 1328 Statute of Northampton.

Statute of Northampton

2 Edward III ch. 3 (1328)[23]

Item, it is enacted, that no man great nor small, of what condition soever he be, except the king's servants in his presence, and his ministers in executing of the king's precepts, or of their office, and such as be in their company assisting them, and also [upon a cry made for arms to keep the peace, and the same in such places where such acts happen,] be so hardy to come before the King's justices, or other of the King's ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure. And that the King's justices in their presence, sheriffs, and other ministers in their bailiwicks, lords of franchises, and their bailiffs in the same, and mayors and bailiffs of cities and boroughs, within the same cities and boroughs, and borough-holders, constables, and wardens of the peace within their wards, shall have power to execute this act. And that the justices assigned, at their coming down into the country, shall have power to enquire how such officers and lords have exercised their offices in this case, and to punish them whom they find that have not done that which pertained to their office.

Much ink has been spilled over the Statute of Northampton, mostly by modern Americans who argue about what, if any, precedent, it sets for the American constitutional right to bear arms. Chapter 2.F was based on the assumption that the Statute covered the carrying of weapons. Although that assumption has been widely shared in modern scholarship, it may be misguided.

The statute forbade people to "go nor ride armed." According to a recent article, in the fourteenth century, "go armed," "going armed," or "being armed" referred to wearing body armor, such as chain mail or metal helmets. Laws about carrying weapons used terms such as "carry arms" or "bear arms." If a law that meant to restrict both wearing armor and carrying weapons, it mentioned both

23. The brackets in the text have been added by the translators of *Statutes of the Realm.*

activities separately. *See* Richard Gardiner, *The Meaning of "Going Armed" in the 1328 English Statute of Northampton*, SSRN.com (2021).

As discussed below, by the seventeenth century at least some Englishmen had forgotten the specific legal meaning of "go armed," so there were prosecutions under the Statute of Northampton for people who carried weapons. There is no known case of anyone being convicted for violating the statute who was carrying weapons peaceably. All the known cases require bad intent or terrorizing behavior as a necessary element of conviction.

To whom did the Statute of Northampton apply? Based on the text, the statute's primary concern was persons who could threaten the monarch or his ministers or thwart the operation of the courts.[24] While a middle-class person might be able to afford a leather jacket, metal body armor was affordable only to the upper class. Although aimed at predatory criminal members of the upper class, the Statute was written to apply to everyone: "no man great nor small, of what condition soever." One writer asserts that "aristocrats" were "the one group expressly exempted from the Statute of Northampton." Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 L. & Contemp. Probs. 11, 26 (2017). The statute's text indicates otherwise.

Where did the statute apply? The "no part elsewhere" language could be read to make the statute apply everywhere. For general language ("no part elsewhere") that follows a specific list, however, the standard interpretive rule is *noscitur a sociis* (it is known by its associates). For example, a statute that "a license is required to sell grapefruits, oranges, lemons, and other food" would be interpreted to apply to citrus fruits, but not to chickens.[25] Under *noscitur a sociis*, the Statute of Northampton would be read to ban going armed in markets, courts, and in places that are like markets and courts. *Noscitur a sociis* is reinforced by the rule against surplusage; if "no part elsewhere" were read literally, the enumeration of specific prohibited areas would be pointless.[26] Under standard statutory interpretation, the Statute of Northampton would be an early (and very overbroad) version of the "sensitive places" rule announced by the U.S. Supreme Court in *District of Columbia v. Heller*: there is a general right to bear arms, but not in "sensitive places such as schools and government buildings." *District of Columbia v. Heller*, 540 U.S. 571, 626 (2008) (Ch. 11.A). However, the Northampton cases do not seem to have paid much attention to where the activity was taking place. As discussed below, one case was in the king's presence, and the others, to the extent that information is available, were simply on streets or highways, or in one famous case, in a street and then in a church.

Three proclamations in 1337-38 by Edward III ordered enforcement of the Statute of Northampton in particular areas; there were complaints about

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24. *Cf.* Calendar of the Close Rolls, Edward III, 1337-39, at 104-05 (Feb. 20, 1337, Hatfield) (H.C. Maxwell-Lyte ed., 1900) (order to the Sheriff of Berks explaining that men had been plotting "to beat, wound and ill-treat jurors" and that the Sheriff should enforce the law that "no one, except the king's serjeants and ministers, shall go armed or ride with armed power before the justices at the said day and places, nor do anything against the peace.").

25. The formal rule appears to date from 1672. *See Lambert's Lessee v. Paine*, 7 U.S. (3 Cranch) 97, 110 (1805).

26. In Latin, the original rule against surplusage is: *verba cum effectu sunt accipienda*—words should be taken so as to have effect.

underenforcement of breaches of the peace. Each proclamation used the term of art "go armed" or "going armed," and two of them also mentioned "leading an armed force."[27] The orders appear to address Northampton's core concern: armored nobility leading criminal gangs.

The Statute of Northampton was not an upper limit on the restrictions that kings could impose. For example, royal edicts from Edward III and Richard II—both of whom had good cause to worry about being overthrown—forbade or sharply restricted arms carrying in London, the seat of government. The London restrictions, focused on the king's security, could be seen as in the Statute's spirit. Edward III instructed hostelers to tell their guests that the guests must leave their arms at the hostel or inn, and not carry them around London. The instruction assumes that carrying arms while traveling from town to town was an ordinary activity. It also may indicate that the typical English traveler did not know that there was a ban on arms carrying in London. Memorials of London and London Life 192 (Henry Thomas Riley ed. & trans., 1868) (1334; no carrying), 268-69 (1351; no carrying, but earls and barons may carry swords except in the presence of the king or the parliament meeting; mentioning Northampton), 272-73 (1353; instructions to hostelers). Richard II issued similar orders in 1381. *Id.* at 453-54 (repeating carry ban, exemption for peers of the realm, and hosteler instruction).

A nationally applicable statute, enacted in 1350, stated: "And if percase any Man of this Realm ride armed [covertly] or secretly with Men of Arms against any other, to slay him, or rob him, or take him, or retain him till he hath made Fine or Ransom for to have his Deliverance, it is not the mind of the King nor his council, that in such case it shall be judged treason, but shall be judged Felony or Trespass, according to the Laws of the Land of old Times used. . . ." 5 Edw. 3 st. 5, ch. 2 (1350).

The statute did not purport to create a new crime. Rather, the statute declared that the offenses described were not treason (the highest crime), but rather lesser crimes. The "ride armed" language used the term of art for wearing body armor (like Northampton's "go nor ride armed"). The statute specified the punishment for common law crimes (e.g., kidnapping) with aggravated circumstances (concealed armor).

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27. See Membrane 8d, Aug. 21, 1337, 3 Calendar of the Patent Rolls Preserved in the Public Record Office: Edward III, A.D. 1334-38, at 512 (1895) (to the constable of the castle of Montgomery: "on complaints by men of his bailiwick that many breaches of the peace occur there and he does not remedy this, at which the king is much disturbed, to make proclamation in such places in his bailiwick as shall be expedient, and inhibit all persons from going or riding armed or otherwise disturbing the peace, and to imprison until further order those who disregard such inhibition."); Membrane 27d, Jun. 28, 1337, *id.* 510 ("proclamation in the king's name, at such places in the county of Northumberland as shall be required, that no one shall go armed or lead an armed force or do anything whereby the king's peace may be disturbed, and to arrest and imprison until further order any person found opposing them after such proclamation: made because of many complaints of breaches of the statute of Northampton"); Membrane 4d, May 4, 1338, 4 *id.* at 78 ("Mandate, pursuant to the statute of Northampton, to S. bishop of Ely, to cause any persons going armed, leading an armed force, or doing anything else whereby the king's peace may be broken in his liberties in the counties of Essex and Hertford, to be at once arrested and imprisoned.").

2. Developments in Laws About Bearing Arms

Edward III was succeeded in 1377 by Richard II. He had the potential to become a good king, but after he nearly lost his crown in the Peasants Revolt of 1381, he grew paranoid, arbitrary, and despotic. Some scholars believe that he was mentally ill. But just because he was paranoid didn't mean that he had no enemies. He was overthrown by Henry IV in 1399 and executed the next year.

In 1388, a statute prohibited servants and laborers to "bear any [Buckler], Sword, nor Dagger," except when accompanying their masters. 12 Richard II ch. 6 (1388).[28] Because the law applied to carrying weapons, it used the word "bear."

Near the end of Richard's reign, he issued an order that reiterated the Statute of Northampton, with some minor wording changes. He noted that "the said Statute is not holden" and insisted that it "shall be fully holden and kept, and duly executed." He added that no one "shall bear [Sallet] nor Skull of Iron, nor [of] other Armour." 20 Richard II ch. 1 (1396-97).[29]

Richard's restatement of Northampton introduced one novel feature: "Launcegayes shall be clear put out upon the pain contained in said Statute of Northampton." *Id.* A launcegay was a type of spear that was an "offensive weapon," typically used by a horseman. 2 Thomas Edlyne Tomlin, The Law-dictionary: Explaining the Rise, Progress and Present State of the British Law (1820) (unpaginated); George Cameron Stone, A Glossary of the Construction, Decoration and Use of Arms and Armor in All Countries and in All Times 410 (1999). Launcegays were exclusively owned by the wealthy, who would need a powerful and well-trained war horse to use one.

In the early 1500s, a statute of King Henry VII forbade armed groups in public places. 21 Henry VII 39.[30] His son, Henry VIII, forbade riding on a highway with a loaded gun or crossbow. There was an exemption for people who met the minimum income requirements for owning such arms. 33 Henry VIII ch. 6 (1541) (no person below the income threshold shall "carry or have, in his or their journey

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28. The bracketed "[Buckler]" is inserted in the official translation. A buckler is a type of small shield.

29. The bracketed "[Sallet]" is inserted in the official translation. A sallet is a type of a light helmet.

30. The statute does not appear in Statutes of the Realm, whose volume 2 ends in 1504 (the 19th year of Henry VII), and whose volume 3 begins in 1509 (the first year of Henry VIII). Nevertheless, it is cited in *Semayne's Case* (Part E) for the rule that a person may call together an armed group to defend his home, but not to protect him when he does to market.

A 1707 case involved whether several unarmed men who had disturbed a meeting for the election of a local official could be charged with riot. "The books are obscure in the definition of riots," observed the court. The court continued: "If a number of men assemble with arms, in terrorem populi, though no act is done, it is a riot. If three come out of an ale-house and go armed, it is a riot. Though a man may ride with arms, yet he cannot take two with him to defend himself, even though his life is threatened; for he is in the protection of the law, which is sufficient for his defence." *Queen v. Soley*, 88 Eng. Rep. 935, 936-37, 11 Modern 115, 116-17 (K.B. 1707).

going or riding in the King's highway or elsewhere, any Crossbow or Gun charged or furnished with powder, fire or touche for the same." *See* Part G. If the Statute of Northampton were generally recognized as a ban on carrying weapons, the above post-Northampton statutes would have been superfluous.

It was clear that an indictment or presentment for violation of the Statute of Northampton must specify that the arms carrying was *In quorandam de populo terror*— to the terror of the people. 3 Edward Coke, Institutes of the Laws of England 158 (1644). For example, as one case charged: four men "do frequently ride armed with sword and pistols, and do commit reskews and break the peace and threaten the people to do them bodily injury, to the great obstruction of law and justice and to the evill example of others to perpetrate the like." John Christopher Atkinson, 6 Quarter Session Records 23 (n.d.) (case of Oct. 4, 1659).[31] As the case indicates, by the seventeenth century, Northampton was at least sometimes interpreted to apply to carrying weapons, not only to wearing armor.

Did the rule mean that peaceable defensive carry was lawful? Or did it mean that the carrying of arms was inherently terrifying? We know that government-mandated arms carrying was very common, such as when keeping the daily watch and the nightly ward in towns (Part C), or when part of mandatory archery practice (Section G.1). The sight of everyday people carrying arms was, therefore, not terrifying in itself.

But based on context, it would sometimes be easy to discern that a particular arms carrier was not carrying as part of community service or practice. A person who walked into an inn or tavern to order a meal, while wearing a sword, was presumably not keeping watch and ward, and he obviously was not carrying for archery practice. Was that sight terrifying? What if the arms or armor were out of sight?

In a 1350 case, a knight named Thomas Figet wore armor, concealed underneath clothing, in the king's palace and in Westminster Hall, the home of Parliament. He said that he was wearing the armor because earlier in the week he had been attacked by another knight. The earliest surviving account of the case is from a 1584 treatise that stated: "a man will not go armed overtly, even though it be for his defense, but it seems that a man can go armed under his private coat of plate, underneath his coat etc., because this cannot cause any fear among people." Richard Crompton, L'office et Aucthoritie de Iustices de Peace 58 (1584).[32]

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31. The Courts of General Quarter Sessions of the Peace were held quarterly in the counties. The presiding judges were two justices of the peace from the county. Formally, they had general criminal jurisdiction, but rarely heard cases that were more than low-level felonies. 4 Blackstone *268.

32. A "coat of plate" was torso armor riveted within cloth or leather garments. The passage is written in Law French (the language of English courts and lawyers at the time) and translated by David B. Kopel. Later commentary on the case, from the seventeenth century, reported that Figet had been thrown in prison without trial. He petitioned for a writ of mainprise (similar to bail) and was denied. Based on the denial, the latter commentators wrote that there was no concealed carry exception. There is no doubt that unauthorized wearing of arms or armor in the presence of Edward III himself was the core of what Edward III's statute forbade.

In 1613, King James I acted against concealed carry of weapons. He proclaimed "the bearing of Weapons covertly, and specially of short Dagges [heavy handguns], and Pistol . . . had ever beene . . . straitly forbidden." He complained that the practice had "suddenly growen very common." Violators would be brought before the infamous Star Chamber. 1 Stuart Royal Proclamations: Royal Proclamations of King James I, 1603-1625, at 284-85 (James Francis Larkin & Paul L. Hughes eds., 1973) (proclamation of Jan. 16, 1613).

The first known contemporaneous case report discussing the Statute of Northampton was *Chune v. Piott*, 80 Eng. Rep. 1161, 2 Bulstrode 329 (K.B. 1615). Although the plaintiff's suit against a sheriff for false arrest did not involve the Statute of Northampton, one justice mentioned it in his opinion. According to the Ninth Circuit's 2021 *Young v. State of Hawaii*, *Chune* held that "The sheriff could arrest a person carrying arms in public 'notwithstanding he doth not break the peace.'" *Young v. State of Hawaii*, 992 F.3d 765, 790 (2021). Justice Croke's full sentence shows a very different meaning:

> Without all question, the sheriff hath power to commit, est custos, & conservator pacis [being custodian and conservator of the peace], if contrary to the Statute of Northampton, he sees any one to carry weapons in the high-way, *in terrorem populi Regis*; he ought to take him, and arrest him, notwithstanding he doth not break the peace in his presence.

Chune at 1162. Thus, if an arms-carrier broke the peace, the sheriff could arrest him even if the breach had not taken place in the sheriff's presence. Justice Houghton's seriatim opinion agreed that a sheriff may arrest someone, "upon suspition," for breaching the peace outside the sheriff's presence. *Id.* By omitting "in his presence," *Young* attempted to convert *Chune*'s actual rule (sheriffs can arrest even if they did not witness the peace breached) into a completely different rule (sheriffs can arrest when there is no breach). The established common law rule, and the usual rule today, is that law enforcement officials need not personally witness a crime to arrest its perpetrator.

Michael Dalton's 1618 manual for justices of the peace addressed the Statute of Northampton and Henry VIII's law on loaded guns (discussed in Part G), which allowed only the wealthy and certain other people to carry loaded handguns in certain locations. Justices of the Peace should arrest "all such as shall go or ryde armed (offensively) in Fayres, Markets, or elsewhere; or shall weare or carry any Dagges or Pistols charged: or that shall goe appareled with privie Coats or Doublets. . . . [Even] though those persons were so armed or weaponed for their defence; for they might have had the peace against other persons; and besides, it striketh a feare and terror into the Kings subjects." Michael Dalton, The Countrey Justice 129 (1618); *see also id.* at 30. Dalton's statement about carrying loaded handguns in certain locations was based on a statute from Henry VIII. The statements about going armed offensively and wearing concealed armor ("privie Coats or Doublets") came from the Statute of Northampton.

Dalton's 1622 revised manual was narrower. He deleted the language that defensive carry was not allowed. Instead, citing Richard Crompton's 1584 treatise, he wrote that if a group of people went to church wearing "privie" (concealed) armor "to the intent to defend themselves from some adversary, this seemeth not punishable" under the riot statutes, "for there is nothing openly done, *in terrorem populi*." Michael Dalton, The Countrey Justice 204 (Arno Pr. 1972) (1622) ("to the terror of the people"). Dalton reiterated the rules of the Henry VIII statute against carrying loaded handguns and the Richard II statute against servants or laborers carrying swords or daggers. *Id.* at 31.

A person could be required to post surety for good behavior ("surety of the peace") if he were wearing "weapons, more than usually he hath, or more than be meet for his degree." *Id.* at 169. Dalton's 1623 manual for sheriffs included the Statute of Northampton in his list of anti-riot statutes (which the 1622 justice of the peace manual had not). He described the Statute as applying to persons who "goe or ride armed offensively . . . in affray of the kings' people." Richard II's law about servants with daggers and swords was now said to also include "other weapons." Michael Dalton, Officium Vicecomitum: The Office and Authoritie of Sherif 14-15 (Lawbook Exchange 2009) (1623). An affray is "[t]he fighting of two or more persons in a public place to the terror of the people." Black's Law Dictionary (1891).

Edward Coke's very influential four-volume treatise, *Institutes of the Laws of England*, first published 1628-44, said that Thomas Figet [or Figett as Coke spelled it] had been imprisoned for wearing concealed armor in 1350, and that his petition for release had been denied. Coke listed the statute's express exceptions, such as *posse comitatus*. He added that there was also a common law exception for home defense. For the latter, Coke stated that it was even permissible for an armed assembly to defend a friend's house. 3 Coke, Institutes at 160-61. Necessarily, the friends who were coming to a man's house would have to carry their arms while they were on the way to the house.

Whatever the statutes said, the English carried arms. For example, in 1678-81, there were fears of a Catholic coup ("the Popish Plot"), and therefore many people went armed with a "Protestant flail"—a pair of leaded short clubs connected by leather straps. When folded, it was only nine inches long, and easy to carry concealed. H.W. Lewer, *The Flail*, 18 Essex Rev. 177, 184-85 (Oct. 1908). The leading case interpreting the Statute of Northampton, discussed next, acknowledged that arms carrying was common.

3. Sir John Knight's Case

The most famous case involving the carrying of arms was decided not long before the Glorious Revolution of 1688. As detailed in Section H.3, tensions had been rising because King James II (grandson of James I) was trying to disarm the entire English population, except for his political supporters. Sir John Knight was an Anglican and a fierce opponent of the Catholic James II. According to the

government's charges, Knight violated the Statute of Northampton because he allegedly "did walk about the streets armed with guns, and that he went into church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects." *Sir John Knight's Case*, 87 Eng. Rep. 75, 76, 3 Modern 117 (K.B. 1685). Knight was prosecuted, but acquitted by a jury.[33] Two different reporters wrote about the case.[34]

Knight's attorney had pointed to the core purpose of the Statute of Northampton: "Winnington, *pro defendente*. This statute was made to prevent the people's being oppressed by great men; but this is a private matter, and not within the statute." *Rex v. Sir John Knight*, 90 Eng. Rep. 330, 330 (K.B. 1686).

The Chief Justice of the King's Bench[35] stated that to "go armed to terrify the King's subjects" was "a great offence at the *common law*, as if the King were not able or willing to protect his subjects" and that "the Act is but an affirmance of that law." *Sir John Knight's Case*, 87 Eng. Rep. at 76.

The Chief Justice acknowledged that "this statute be almost gone in *desuetudinem*" for "now there be a general connivance to gentlemen to ride armed for their security." 90 Eng. Rep. at 330. *Desuetudinem* and its modern form, "desuetude," refer to a statute that has become obsolete from disuse. Black's Law Dictionary (1891); *Anderson v. Magistrates*, Mor. 1842, 1845 (Ct. Sess. 1749) ("[A] statute can be abrogated . . . by a contrary custom, inconsistent with the statute, consented to by the whole people; . . . When we say, therefore, that a statute is in desuetude, the meaning is, that a contrary universal custom has prevailed over the statute; and so much is implied in the very term desuetude.").

But, continued the court, "where the crime shall appear to be *malo animo* it will come within the act." 90 Eng. Rep. at 330. *Malo animo* is "With evil intent; with malice." Black's Law Dictionary.

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33. Although much smaller than London, Bristol was one of the half-dozen largest English cities at the time.

34. The reporter whose account is published in 90 Eng. Rep. (as opposed to 87 Eng. Rep.) divided the case into two parts. The first part, dealing with the meaning of the Statute of Northampton, is *Rex v. Sir John Knight*, 90 Eng. Rep. 330; Comberbach 38 (1686). The second part is the bond that Knight was required to post, even though he had been acquitted. *Rex v. Sir John Knight*, 90 Eng. Rep. 331, Comberbach 41 (1686). *Sir John Knight's Case* is also called *Rex v. Knight*.

At the time, English judges did not issue written opinions, but instead delivered their opinions orally from the bench. Entrepreneurial reporters attended the courts, wrote down what the judges said, and then collected their reports and sold them. Eventually, many of these reports were combined into the anthology known as "English Reports." Our citations first list the English Reports, and then the citation to the original reporter.

35. The King's Bench was the highest criminal court, other than the House of Lords. It had jurisdiction over all criminal cases, and the most serious cases were usually brought there.

After Knight was acquitted, the Attorney General moved that Knight be required to post a bond for good behavior, and the King's Bench upheld the bond. *Rex v. Sir John Knight*, 90 Eng. Rep. 331, Comberbach 41 (1686).[36]

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36. One scholar previously argued that Knight was acquitted because he was acting in government service, an express exemption to the Statute of Northampton. Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 Clev. St. L. Rev. 373 (2016); Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1 (2012). The interpretation is contrary to the case reports. According to the reports, Knight's legal argument was that Knight was engaged in "a private matter"—the opposite of being in government service. After acquittal, Knight was still forced to post bond for good behavior—an unlikely outcome for a government agent lawfully acting within the scope of his duty. Commendably, Charles withdrew that claim, based on further research. *See* Brief of Amicus Curiae Patrick J. Charles in Support of Neither Party at 23 n.10, *New York State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020) (No. 18-280), 2019 WL 2173982 (" . . . Knight was prosecuted under the Statute of Northampton for a later, separate instance in which government officials were not present.").

In *Peruta v. County of San Diego*, a 7-5 en banc majority of the U.S. Court of Appeals for the Ninth Circuit apparently relied on Charles later-disclaimed theory to interpret *Sir John Knight's Case*. 842 F.3d 919, 931 (9th Cir. 2016) (Ch. 14.A) (en banc).

The government-service theory is contradicted not only by the case reports, but also by contemporary political journals. The most detailed of these is the private political journal of Roger Morrice, a Puritan minister who lived in London, and who collected information from many sources and recorded it in his *Entring Book*. 1-7 Roger Morrice, The Entring Book of Roger Morrice 1677-1691 (Mark Goldie et al eds., 2007) [hereinafter *Entring Book*].

Sir John Knight (died 1718) was the younger cousin of a man of the same name (died 1679). Both Sir John Knights loved to use the law to persecute non-Anglicans. Jason McElligott, *Biographical Dictionary*, *in* 6 *id.* at 121-22. On May 3, 1686, Morrice wrote about an event in April: Knight did "in Bristol disturbe and imprison a Popish Coventicle that was at mass." However, "they were suddenly after sent at liberty." 3 *id.* at 113. Under the 1670 Coventical Act, non-Anglican religious assemblies of five or more people were illegal. Mark Goldie, *Glossary and Chronology*, *in* 6 *id.* at 252. In 1672, the Act had been partially relaxed for Protestant Dissenters, but not Catholics. *Id* at 279.

On May 22, Morrice wrote that the "priest (Mac Don, I thinke) . . . was brought up hither on Habeas Corpus and was discharged upon Monday last" [May 17]. The priest was discharged because the Attorney General told the court, "I have nothing against him." Sir John Knight "has already been once kickt or beaten in the streets since then." 3 *id.* at 126.

Then on June 5, Morrice recorded that Knight, the Mayor of Bristol, and the Aldermen who had helped Knight arrest the priest had been "Committed" and would have "to appeare before the Counsell table at Hampton Court [a royal palace in outer London] this day." In support of Knight and the others, there was an affidavit swearing that the priest when in Ireland had spoken against the government of England. *Id.* at 134.

In the June 5 hearing, the Mayor and Alderman had pleaded ignorance of the law and had been discharged. For Knight, however, a criminal information (similar to an indictment but issued by the Attorney General, not a grand jury), was issued for his prosecution. The Chief Justice set a high bail, saying that Knight was the type of man to lead a rebellion. *Id.* at 136 (entry of June 12). On June 12, Knight appeared pursuant to the information. The case did not involve Knight's breaking up the secret Catholic mass. Rather, as the case report indicates, Knight was prosecuted for bringing a gun when he attended worship in his own faith at the Church of England services at "St. Michael, in Bristol." Catholic churches were illegal at the time. Unlike St. Michael, in Bristol, they could not exist as public buildings.

4. The Right to Carry Arms After 1686

Even after *Knight's Case*, arms bearing for peaceable purposes was not universally lawful. A 1695 statute forbade the carrying and possession of arms and ammunition by Irish Catholics in Ireland. 7 William III ch. 5 (1695). The anti-Irish statute was compliant with the English Bill of Rights (Section H.4), which had recognized an arms right only for Protestants. A legal manual for constables said that constables should search for arms possessed by persons who are "dangerous" or "papists." Robert Gardiner, The Compleat Constable 18 (3d ed. 1708).

As Morrice summarized, the information claimed that Knight was seditious, and that he "had caused Musketts or Armes to be carried before him in the Streets, and into the Church to publick service to the terrour of his Majesties Liege people." Knight pleaded not guilty. According to Knight, there had already been two assassination attempts against him in Bristol. It was pointed out that when Mac Don had been set free under habeas corpus, he had been required to post bond for good behavior. Knight complained to the court that the Attorney General would not receive any information from Knight that Mac Don had assaulted Knight in the streets. The court and the Attorney General told Knight not to tell the Attorney General what to do. *Id.* at 141-43.

Knight's trial took place on Nov. 23. It was clear that Knight had made many enemies by "suppressing Protestant Coventicles" (religious assemblies by dissenting, non-Anglican Protestants). According to the testimony, "soone after" the priest was released under habeas corpus, "two Irish men" lurked around Knight's house for days, found him near the Bristol town hall (the "talbooth") and "did fall upon" him. They probably would have killed him if bystanders had not come to his aid. According to a poor woman who testified, the two Irish men later demanded that she reveal Knight's location, and when she did not, they beat her. The news got back to Sir John Knight.

"[T]hereupon," he "retired to a house in the Countrey very neare the Town." When he came into town, he rode with a sword and gun, but left them at the edge of town. He "did one Lords day go to a Church in Bristol with his Sword and Gun when the two Irishmen were thought to looke for him, and left his gun in the Church Porch with his man, to stand upon the Watch &c." During the proceedings, Knight's loyalty to the (Catholic) King James II was questioned, and Knight insisted that he was loyal. *Id.* at 307-08 (entry of Nov. 27).

With the above evidence, "It seemed to be doubted by the Court whether this came within the equity and true meaning of the Statute of Northampton. . . ." The Chief Justice "seemed not be seveare upon Sir John," and Morrice was unsure whether the leniency was "because the matter would not beare it, Or for any reason of State or Composition. . . ." The Chief Justice "fell foule upon the Attorney Generall," and said "if there be any blinde side of the Kings business you will always lay your finger upon it." The jury acquitted Knight. *Id.* at 308.

Another political diary similarly reports Knight "being tried by a jury of his own city, that knew him well, he was acquitted, not thinking he did it with any ill design." 1 Narcissus Luttrell, A Brief Historical Relation of State Affairs from September 1678 to April 1714, at 389 (1857). All the details from the diaries are consistent with the case report that arms carrying was illegal only when *in malo animo*.

Knight appeared before the King's bench again on November 27. His bail for appearing for trial was lifted, but his surety for good behavior would be held until the end of the next term of court. 3 *Entring Book* at 311 (entry of Dec. 4, 1686). The Attorney General's bill for prosecuting Knight was "very high . . . and counted the higher because it had such ill success." *Id.* at 312. It took another court appearance, on Jan. 24, 1687, for Knight to get his bail money back. The court called Knight "a very dangerous man," and said that he had

Further, the right to carry was only for individuals, and not groups. "Though a man may ride with arms, yet he cannot take two with him to defend himself, even though his life is threatened; for he is in the protection of the law, which is sufficient for his defence." *Queen v. Soley*, 88 Eng. Rep. 935, 937 (1707).

For peaceable individuals not subject to special disabilities (e.g., being Irish Catholic), the general rules were stated with the most detail and precision in William Hawkins's *A Treatise on the Pleas of the Crown*. He explained the application of the common law offense of affray, and the influence of the Statute of Northampton. An "affray" was "a publick Offense, to the Terror of the People." So an assault perpetrated in private would not be an affray. Mere words could not be an affray.

> Sect. 4. But granting that no bare Word, in the Judgement of Law, carry in them so much terror as to amount to an Affray; yet it seems certain, that in some Cases there may be an Affray where there is no actual violence; as where a Man arms himself with dangerous and unusual Weapons, in such a manner as will naturally cause a Terror to the People, which is said to have always been an Offence at Common Law, and is strictly prohibited by many Statutes: [quoting the Statute of Northampton (Section F.1), and then citing re-issuance by Richard II (Section F.2)].
>
> Sects. 5-7: [Enforcement procedures for Justice of the Peace, Sheriffs, and others.]
>
> Sect. 8. That a Man cannot excuse the wearing of such Armour in Publick, by alledging that such a one threatened him, and that he wears it for the Safety of his person from his Assault; but it hath been resolved, That no one shall incur the Penalty of the said Statute for assembling his Neighbours and Friends in his own House, against those who threaten to do him any Violence therein, because a Man's House is as his Castle.
>
> Sect. 9. That no Wearing of Arms is within the Meaning of this Statute, unless it be accompanied with such Circumstances as are apt to terrify the People; from whence it seems clearly to follow, that Persons of Quality are in no Danger of offending against this Statute by wearing common Weapons,[37] or having their usual Number of Attendants with them, for their Ornament or Defence, in such Places, and upon such occasions, in

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encouraged grand juries in Bristol not to indict for murder. But in light of the acquittal, the bail bond was released. *Id.* at 349 (entry of Jan. 29, 1687). The threats against Knight apparently continued. In November 1689, Knight asked to be excused from Parliament early, because of peril to his life. According to Knight, three members of Parliament had made threats against him. Another member had recently "thrust himself into" Knight's coach that was leaving Parliament in the evening, and accompanied Knight home, because he said Knight's life was in danger. 5 *Entring Book* at 234-35.

In sum, Knight's defense at trial was that he was acting in self-defense. He affirmed his loyalty to the king but did not claim that his gun toting was on behalf of the king.

37. ["Persons of Quality" was a common term for the upper classes. Hawkins's cautious language was appropriate because, separate from the Statute of Northampton (Section F.1), there was a prohibition against servants and laborers carrying swords and daggers, except when in service of their masters. 12 Richard II ch. 6 (1388). So it was possibly illegal for lower class people to carry these particular common arms.—Eds.]

> which it is the common Fashion to make use of them, without causing the least Suspicion to commit any Act of Violence or Disturbance of the Peace. And from the same Ground it also follows, That Persons armed with privy [concealed] Coats of Mail to the Intent to defend themselves against their Adversaries, are not within the Meaning of this Statute, because they do nothing *in terrorem populi*.

William Hawkins, 1 A Treatise of the Pleas of the Crown 136-37, ch. 63 (1724). In short, carrying "dangerous and unusual weapons" in public was illegal because "such Armour" was inherently terrifying, even if done with defensive intent. Imagine a person today carrying a flamethrower. Carrying "common weapons" was an offense only when done in a manner "apt to terrify." As support for section 9—that peaceably carrying ordinary arms is lawful—Hawkins cited one of the reports on *Knight's Case*, 3 Modern 117 (K.B. 1685).[38]

The U.S. Supreme Court, in *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (Ch. 11.A), would later turn the rule against carrying "dangerous and unusual" weapons into a general rule allowing for prohibition of such arms.

Four decades after Hawkins, Blackstone treated the topic more tersely:

> The offense of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the Statute of Northampton, upon pain of forfeiture of the arms, and imprisonment during the king's pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour.

4 Blackstone *148-49. Blackstone's reference to the ancient Athenian laws seems to reflect the original meaning of the Statute of Northampton, as a restriction on wearing armor. The Athens sentence cites John Potter, The Antiquities of Greece (1697), which cites Xenophon, Hellenica, book 1, which says nothing about wearing armor or carrying arms.

Consistent with Hawkins's detailed treatment of the subject, case law held that peaceable carry was lawful. *Rex v. Dewhurst*, 1 State Trials, N.S. 529, 601-02 (1820) ("A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is travelling or going for the ordinary purposes of business. But I have no difficulty in saying you have no right to carry arms to a public meeting, if the number of arms which are so carried are calculated to produce terror and alarm. . . .") (discussing constitutionality of a temporary law against arms possession by rebels in several counties, detailed in Section J.4).

The Statute of Northampton appears in, perhaps, one known case from the eighteenth century and none from the nineteenth.[39] It reappeared for a pair of

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38. Hawkins was first published in 1716, and went through eight editions, the last in 1824.

39. In a 1751 case, the defendant was convicted of "going Armed with a Cutlass Contrary to the Statute," although the case report does not say which "Statute." The defendant was also convicted of "making an Assault upon one John Jew," so the cutlass carrying was plainly *in malo animo*. *Rex v. Mullins* (1st conviction in Court of Oyer & Terminer, Middlesex, 1751; second in Quarter Sessions, Middlesex, 1751), *in* Middlesex Sessions: Sessions Papers—Justices Working Documents.

prosecutions in the early twentieth century. In a 1903 case a man got drunk, argued with his brother, and then fired a shot into his brother's house; the prosecution could not identify any other offense, so he was charged with violating the Statute of Northampton. The judge instructed the jury that "the offense charged against the prisoner" was "under the Statute of Edward III, but also under the common law, by which he was liable to punishment for making himself a public nuisance by firing a revolver in a public place, with the result that the public were frightened or terrorized." The public should "know that people could not fire revolvers in the public streets with impunity." *Rex v. Meade*, 19 L. Times Rep. 540, 541 (1903); Stephen P. Halbrook, The Right to Bear Arms: A Constitutional Right of the People or a Privilege of the Ruling Class? 107-09 (2021). In a 1914 case, the defendant shot at a victim and tried to provoke a fight. The conviction of violating Northampton was reversed because the indictment had omitted "two essential elements of the offence—(1) That the going armed was without lawful occasion; and (2) that the act was *in terrorem populi*." *Rex v. Smith*, 2 Ir. Rep. 190, 204 (K.B. 1914). The second element would be superfluous if merely carrying a revolver was inherently terrifying.

The Court of Criminal Appeals in 1957 relied on Hawkins and his elucidation of the Statute of Northampton to define "affray":

> Just as the mere wearing of a sword in the days when this was a common accoutrement of the nobility and gentry would be no evidence of an affray, while the carrying in public of a studded mace or battle axe might be, so, if two lads indulge in a fight with fists, no one would dignify that as an affray, whereas, if they used broken bottles or knuckle dusters and drew blood, a jury might well find it was, as a passer-by might be upset and frightened by such conduct.

Regina. v. Sharp, 41 Cr. App. R. 86, 91-92 (1957).

The Statute of Northampton was repealed in 1967. Criminal Law Act 1967, Schedule 3, Part I—Repeals of Obsolete or Unnecessary Enactments ("2 Edw. 3. c.3. The Statute of Northampton. The whole Chapter."). A few years later, in 1973, the Law Lords of Appeal in Ordinary ("Law Lords," the highest court, later reconstituted as the "Supreme Court"), had to decide "whether there was a common law offence of affray consisting in the brandishing of unusual weapons to the terror of the public and, if there was, whether this had survived the repeal of the Statute of Northampton." The court said there was such a common law offense for "the brandishing of a fearful weapon." There could be no offense—under the common law or the Statute of Northampton—without "the element of terror." "From the very earliest days the offence of affray has required this element, and all the early textbooks stress the derivation of the word from the French 'effrayer,' to put in terror." In the Lord Chancellor's opinion for the court, "The violence must be such as to be calculated to terrify (that is, might reasonably be expected to terrify), not simply such as might terrify, a person of the requisite degree of firmness." *Taylor v. Director of Public Prosecutions*, 57 Cr. App. R. 915 (Lords 1973).

The most recent analysis of the Statute of Northampton by the United Kingdom's highest court came in a 2001 case about an East London gang that was carrying petrol bombs—glass bottles filled with gasoline—for use as improvised

explosive grenades.[40] The Law Lords quoted Hawkins's description of the Statute of Northampton to support the holding that "the carrying of dangerous weapons such as petrol bombs by a group of persons can constitute a threat of violence." On the other hand, "mere possession of a weapon, without threatening circumstances . . . is not enough to constitute a threat of unlawful violence. So, for example, the mere carrying of a concealed weapon could not itself be such a threat." Nobody except the police had seen the gangsters carrying the petrol bombs, so there was no affray. An affrayer, the court said, "uses or threatens unlawful violence towards another person actually present at the scene and his conduct is such as would cause fear to a notional bystander of reasonable firmness." *I v. Director of Public Prosecutions*, 2 Cr. App. R. 14, 216 (Lords 2001).[41]

From the first reported case on the Statute of Northampton, in 1615, through the latest in 2001, courts of the United Kingdom have interpreted the Statute of Northampton and its common law foundation consistently: peaceable carry of ordinary arms is lawful.

Legislatures may override the common law, and Parliament did so in the twentieth century by enacting licensing laws that greatly restricted arms carrying. Section J.4; online Ch. 19.C.1.

5. American Application of English Law on Carrying

William Hawkins's *Treatise of the Pleas of the Crown* was a leading criminal law treatise of the eighteenth century, and widely used in America.[42] It affirmed the lawfulness of peaceable carry of common arms, citing *Knight's Case* for the principle. Section F.4. In America, Hawkins's statement about lawful carry was cited by Justice of the Peace manuals.[43]

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40. In the United States, these improvised explosive devices are known as Molotov cocktails, after Finns used them to resist a Soviet Union invasion in 1939-40. The Soviet Foreign Minister was Vyacheslav Molotov.

41. The court's decision fits with the traditional definition of affray. There was no affray because there was no fighting, because there was no verbal threat, and because nobody in the public was terrorized because nobody in the public was present. The gangsters might have been subject to arrest for violation of arms control statutes that applied to possessing or carrying petrol bombs, but not for affray.

42. A survey of 21 colonial law libraries found Hawkins in 11. It tied with Matthew Hale's book as the most common English criminal law treatise in America. Owners included Thomas Jefferson, John Adams, Francis Dana (Mass. Chief Justice, Congressman, Continental Congress delegate, signer of Articles of Confederation), Robert Treat Paine (Mass. Justice, Declaration of Independence signer), Jasper Yeates (Penn. Justice, delegate to Penn. ratifying convention), and Theophilus Parsons (Mass. Chief Justice). Herbert Johnson, Imported Eighteenth-Century Law Treatises in American Libraries 1700-1799, at 29-30, 62 (1978).

43. William Waller Hening, The New Virginia Justice 17-18 (1795); James Parker, Conductor Generalis; Or the Office, Duty and Authority of Justices of the Peace 11 (1st Ed. 1764). Parker was one of the three colonial law books written by an American. W. Hamilton Bryson, *Law Books in the Libraries of Colonial Virginians*, *in* "Esteemed Bookes of Lawe" and the Legal Culture of Early Virginia 27, 32 (Warren M. Billings & Brent Tarter eds., 2017). Hening "replaced English texts" with "homegrown . . . republican law." R. Neil Hening, *A Handbook for All: William Walter Hening's* The New Virginia Justice, in *Id.* 179, 190.

The right to bear arms being universally recognized in America, early nineteenth-century criminal justice officer manuals did not contain instructions to arrest people for peaceably carrying common arms. *See* Isaac Goodwin, New England Sheriff (1830); Charles Hartshorn, New England Sheriff (1844); John Niles, The Connecticut Civil Officer (1823); John Latrobe, The Justices' Practice Under the Laws of Maryland (1826); Henry Potter, The Office and Duty of a Justice of the Peace . . . According to the Laws of North Carolina 39, 291-92 (1816) (no going armed with dangerous and unusual weapons to terrify the people; no hunting by slaves in the woods, except with a certificate bonded by the master and issued by the county).

The sensational 1686 political trial *Sir John Knight's Case* had been reported by two independent reporters. 3 Modern 117 (K.B. 1686) (rereported in the nineteenth century in 87 Eng. Rep. 75); and Comberbach 38 (1686) (90 Eng. Rep. 330). Comberbach followed up with a report about Sir Knight having to post bond for good behavior. Comberbach 41, 90 Eng. Rep. 331 (1686). George Wythe, America's first law professor, owned the complete Modern Law Reports series, including the well-regarded volume 3, with *Knight's Case*. *See Modern Reports*, William & Mary Law Library. Wythe also owned the one volume of reports by Roger Comberbach.[44]

A signer of the Declaration of Independence, Professor Wythe served in the Continental Congress and the Philadelphia Convention. Among his apprentices and students were Chief Justice John Marshall, Justice Bushrod Washington, President Thomas Jefferson, President James Monroe, and St. George Tucker (author of the preeminent constitutional law treatise of the Early Republic, *see Heller*, at 594; Ch. 5.F.2.a). "Close with Jefferson throughout his life, [Wythe] bequeathed Jefferson his book collection, which Jefferson later sold to form the Library of Congress." *George Wythe Collection*, HeinOnline.

A few years after *Knight's Case* (1686) and the English Bill of Rights recognition of subjects' "right to have arms for their defence" (Section H.4), two colonies enacted statutes against carrying arms "offensively." Colonial Massachusetts forbade going armed "Offensively . . . in Fear or Affray of Their Majesties Liege People." Mass. Acts, no. 6, 11-12 (1694). New Hampshire ordered justices of the peace to arrest "affrayers, rioters, disturbers or breakers of the peace, or any other who shall go armed offensively. . . ." N.H. Laws 1 (1699).

Massachusetts in 1795 toughened its statute to include menacing words. Justices of the Peace should arrest "all affrayers, rioters, disturbers, or breakers of the peace, and such as shall ride or go armed offensive, to the fear or terrour of the good citizens of this Commonwealth, or such others may utter any menaces or threatening speeches." Upon conviction, such a person shall be required "to find sureties for his keeping the peace"—that is, to post a bond for good behavior. 2 Laws of the Commonwealth of Massachusetts, from November 28, 1780 to February 28, 1807, at 652-53 (enacted Jan. 27, 1795) (1807).

Even without a colonial statute, the common law covered the problem. A leading 1736 Virginia treatise synthesized American and English law, and explained

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44. *The Report of Several Cases Argued and Adjudged in the Court of King's Bench at Westminster: From the First Year of King James the Second, to the Tenth Year of King William the Third*, William & Mary Law Library.

that a constable "may take away Arms from such who ride, or go, offensively armed, in Terror of the People" and may bring the person and the arms before a Justice of the Peace.[45] Virginia codified the principle in a 1786 statute that no one may "go nor ride armed . . . in terror of the Country." A Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as are Now in Force 30 (enacted Nov. 27, 1786) (Richmond 1803).

The first American decision to cite the Statute of Northampton (Section F.1) was the Tennessee Supreme Court's 1833 *Simpson v. State*. The Tennessee court expressly rejected Hawkins's rule that nonviolent carrying of dangerous and unusual arms could constitute an offense. The common law of such an offense had come from "ancient English statutes, enacted in favor of the king, his ministers and other servants, especially upon the statute of the 2d Edward III" (the Statute of Northampton). "[O]ur ancestors, upon their emigration, brought with them such parts of the common law of England, and the English statutes, as were applicable and suitable to their exchanged and new situation and circumstances, yet most assuredly the common law and statutes, the subject-matter of this fourth section [of Hawkins], formed no part of their selection." Alternatively, if the Statute of Northampton had become part of American common law, "our constitution has completely abrogated it; it says, 'that the freemen of this state have a right to keep and to bear arms for their common defence.'" The indictment did not specify what Simpson had done. Merely saying that he had "made an affray" was too general. The common law crime had to be narrowly construed, and the "affray" had to be described with particularity, so as not to violate the constitutional right to carry arms. Therefore the conviction was reversed and the indictment was quashed. *Simpson v. State*, 13 Tenn. (5 Yer.) 356 (1833) (Ch. 6.B.2 Note 4).

In contrast, an indictment in a North Carolina case did describe how the defendant had carried arms to terrorize the public. Thus, the indictment validly described the elements of the common law crime on which the Statute of Northampton had been based. The North Carolina legislature in 1836 had expressly abrogated "all the statutes of England or Great Britain." Defendant Huntly did not contest the facts of the indictment against him: He had armed himself "with pistols, guns, knives and other dangerous and unusual weapons, and, being so armed, did go forth and exhibit himself openly, both in the day time and in the night," to the citizens of Anson, North Carolina, in town and on the highway, and did "openly and publicly declare a purpose and intent" "to beat, wound, kill and murder" James H. Ratcliff "by which said arming, exposure, exhibition and declarations . . . divers good citizens of the State were terrified, and the peace of the State endangered, to the evil example of all others in like cases offending, to the terror of the people, and against the peace and dignity of the State." Huntley's legal argument was that since the Statute of Northampton was not the law in North Carolina, the indictment did not describe a crime. The court disagreed. Quoting *Knight's Case* (Section F.3),

45. George Webb, The Office and Authority of a Justice of Peace 92 (1736). Webb's treatise was endorsed by Virginia Attorney General John Clayton. *Id.* at ii. Webb was the first Justice of the Peace manual to integrate American and English law. John A. Conley, *Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America*, 6 J. Legal Hist. 257, 273-75 (1985).

the North Carolina court held that the common law prohibited "riding or going about armed with unusual and dangerous weapons, to the terror of the people." The court then described the common law offense:

> It has been remarked, that a double-barrelled gun, or any other gun, cannot in this country come under the description of "unusual weapons," for there is scarcely a man in the community who does not own and occasionally use a gun of some sort. But we do not feel the force of this criticism. A gun is an "unusual weapon," wherewith to be armed and clad. No man amongst us carries it about with him, as one of his every day accoutrements — as a part of his dress — and never we trust will the day come when any deadly weapon will be worn or wielded in our peace loving and law-abiding State, as an appendage of manly equipment. — But although a gun is an "unusual weapon," it is to be remembered that the carrying of a gun per se constitutes no offence. For any lawful purpose — either of business or amusement — the citizen is at perfect liberty to carry his gun. It is the wicked purpose — and the mischievous result — which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people.

State v. Huntley, 25 N.C. (3 Ired.) 418, 422-23 (1843).[46] The decision was consistent with an earlier case that found three men guilty of common law affray when they maliciously fired guns into the home of an elderly widow. *See State v. Langford*, 10 N.C. (3 Hawks) 381 (1824).

The Statute of Northampton (Section F.1) continues to appear in American cases. In striking down Illinois's comprehensive ban on arms carrying in public places, the Seventh Circuit, like Hawkins and Crompton, stated that "Some weapons do not terrify the public (such as well-concealed weapons). . . ." Examining *Sir John Knight's Case* (Section F.3), and the works of William Blackstone and Edward Coke, the court concluded that the Statute of Northampton only banned arms carrying in certain places or by large assemblies. *Moore v. Madigan*, 702 F.3d 933, 936-37 (7th Cir. 2012) (Ch. 14.A).

An earlier federal Court of Appeals case cited the Statute of Northampton for the point that "Weapon bearing was never treated as anything like an absolute right by the common law." *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942) (Ch. 8.D.8), *rev'd on other grounds*, *Tot v. United States*, 319 U.S. 463 (1943). The

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46. "Business or amusement" was a legal term of art, to encompass all activity. *See The Schooner Exchange v. Mcfaddon & Others*, 11 U.S. (7 Cranch) 116 (1812) (Marshall, C.J.) ("[T]he ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement. . . . "); *Johnson v. Tompkins*, 13 F. Cas. 840, No. 741 (Cir. Ct. E.D. Penn. 1833) (Supreme Court Justice Baldwin, acting as Circuit Judge) ("[A]ny traveller who comes into Pennsylvania upon a temporary excursion for business or amusement"); *Baxter v. Taber*, 4 Mass. 361, 367 (1808); ("[H]e may live with his family, and pursue his business, or amusements, at his pleasure, either on land or water . . . "); *Respublica v. Richards*, 2 U.S. (2 Dall.) 224 (Penn. 1795) (same language as *Johnson v. Tompkins*).

court's statement was correct, because it is universally agreed that the Statute forbade arms carrying in certain places, such as courts, and also forbade carrying in a manner calculated to terrify the public.

The Ninth Circuit has made extravagant use of the Statute of Northampton. A 7-4 en banc majority used the Statute to support the holding that there is no constitutional right to concealed carry. *Peruta v. County of San Diego*, 842 F.3d 919, 931 (9th Cir. 2016). Five years later, a 7-4 en banc majority made the Statute of Northampton the centerpiece of its holding that the Second Amendment right to "bear arms" allows the government to forbid all carrying of arms outside one's property, including open carry. According to the majority, the 1328 Statute and its common law analogue were understood in the American colonies, and then in the States in the nineteenth century, as prohibiting all carrying of arms except when in government service. *Young v. State of Hawaii*, 992 F.3d 765, 787 (2021). The Ninth Circuit does not address the text from the leading American case on the subject, *State v. Huntley*, which says the opposite. Indeed, the majority cannot address any case from any jurisdiction that interpreted the Statute or the common law so prohibitively. The majority opinion repeatedly chops quotes to distort their meaning—so the 1350 statute against carrying concealed arms to perpetrate a violent felony is described as a ban on all concealed carry. Likewise, the 1615 English case *Chune v. Piott* said that a sheriff could arrest a person even when the sheriff had not personally witnessed the breach of the peace; *Young* claims that the case said a person could be arrested even when there had not been a breach of the peace. *See* David B. Kopel & George A. Mocsary, *Errors of Omission: Words Missing from the Ninth Circuit's* Young v. State of Hawaii, 2021 U. Ill. L. Rev Online 172; Section F.2.

6. Laws Against Armed Public Assemblies

Although in England carrying common arms in a peaceable manner was clearly lawful after *Knight's Case* and then the 1689 Bill of Rights (Section H.4), armed assemblies were generally considered to be treason. This rule was rejected in the United States. St. George Tucker, author of the first American constitutional law treatise, explained:

> The same author [Matthew Hale] observes elsewhere: "The very use of weapons by such an assembly, without the King's licence, unless in some lawful and special cases, carries a terror with it, and a presumption of warlike force." The bare circumstance of having arms, therefore, of itself, creates a presumption of warlike force in England, and may be given in evidence there to prove *quo animo* [with that motive] the people are assembled. But ought that circumstance of itself to create any such presumption in America, where the right to bear arms is recognised and secured in the Constitution itself? In many parts of the United States, a man no more thinks of going out of his house, on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side.

5 St. George Tucker, Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and

the Commonwealth of Virginia app. 19 (Lawbook Exchange 1996) (1803) (Ch. 5.F.2.a).[47]

G. RESTRICTIVE LICENSING ATTEMPTED: THE TUDORS, CROSSBOWS, AND HANDGUNS

1. Longbows and English Liberty

Eighteenth-century dictionaries show that "bows and arrows" are among the "arms" of the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (Ch. 11.A). For centuries, bows were the most important arms in England.

The English used longbows to win stupendous victories against the French at Crécy in 1346 and Agincourt in 1415. The French had crossbows, which have a shorter range than the longbow. In a crossbow versus longbow battle, it was easy for the English longbowmen to stay out of enemy range while unleashing a hail of longbow arrows onto the French. Crossbows are better suited for close quarters or for firing out of a narrow slit (a *loophole*) inside a fortification.

Why did the English use longbows, while the French and other nations did not? Two historians suggest that the difference was the government's relation with the people. Crossbows are difficult and expensive to make, but relatively easy to use. Longbows are the opposite. At least as tall as the archer, a longbow requires years of practice to master. Strength is important, but expertise more so. *See* Thomas Esper, *The Replacement of the Longbow by Firearms in the English Army*, *in* Technology & the West 116 (Terry S. Reynolds & Stephen H. Cutcliffe eds., 1997).

Because longbows in battle were optimally fired at a distance where taking aim at an individual target was impossible, longbows had to be used en masse. So any nation that wanted to use the longbow as a primary weapon had to promote mass armament among the public, which meant that much of the population would be expert owners of the fastest firing weapon of war. For the French and Scottish monarchs, that was too risky.

Compared to the French or Scots, most British kings in the fourteenth and first half of the fifteenth centuries were relatively secure in power.[48] Accordingly, the

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47. According to one commentator, "Tucker's often quoted observation" was "written in response to the prosecution of Fries's Rebellion in Pennsylvania." Supposedly, "Tucker was commenting on a federal case," and disagreeing with jury instructions that Chief Justice Samuel Chase had given in a Fries's Rebellion trial, while riding circuit. Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 L. & Contemp. Probs. 11, 39 (2017). This is false. As Tucker cited the Chief Justice's jury instructions, they said nothing about arms. They involved whether private violence, such as "pulling down . . . bawdy houses was held to be treason." Tucker, at app. 19. A footnote demarcates the end of Tucker's discussion of the jury instructions and the beginning of a new topic on peaceable armed assemblies.

48. Relatively speaking. Richard II was overthrown in 1399 by a noble rival, Henry Bolingbroke, who invaded from France with a small force. Few English rallied to support the tyrannical Richard, while many joined with Bolingbroke, who quickly deposed Richard II and became Henry IV.

British monarchy promoted the longbow, and thereby gained a military advantage over its neighbors. Douglas W. Allen & Peter T. Leeson, *Institutionally Constrained Technology Adoption: Resolving the Longbow Puzzle*, 58 J. Law & Econ. 683 (2015).

Because the longbow required so much practice and skill, "beaten serfs, trained in mass and motivated by kicks and curses were not the stuff from which armies of archers could be made. The skilled archer was, instead, among the most individualistic of warriors." Richard H. Marcus, The Militia of Colonial Connecticut, 1639-1775: An Institutional Study 17 (Ph.D. diss., U. of Colo. 1965).

A 1476 book by the Chief Justice of the King's Bench explained the connection between an armed population and English liberty. Sir John Fortescue's *Governance of England* (*De laudibus legum Angliæ*) contrasted the absolutist government of France with the mixed government of England. French absolutism could be traced to the French monarchy's reliance on mercenaries. Although French land was bountiful, French peasants were poor and ill-fed because they were overtaxed. Accordingly, they "gon crokyd, and ben feble, not able to fight, nor to defend the realm; nor thai haue wepen, nor money to bie thaim wepen withall." John Fortescue, The Governance of England: The Difference between an Absolute and a Limited Monarchy 114-15 (rev. ed. 1885). Fortescue was not expressing a right to arms in the sense of the American Second Amendment and its state analogues; he was reiterating the traditional view that a well-armed society of vigorous men will be free, and a society where armed force is in the hands of paid foreign professionals will not.

With a rate of fire of 10 to 12 shots per minute, the ability to penetrate medieval armor at 60 yards, and potentially deadly at 300 yards, the longbow was not surpassed as a standard infantry weapon until the development of the magazine-fed bolt-action rifle in the late nineteenth century. Charles C. Carlton, This Seat of Mars: War and the British Isles 1585-1746, at 4-5 (2011). *See also* Charles James Longman & H. Walrond, Archery 431 (1894) (at a 1550 event, some archers shot through one-inch planks of seasoned wood); Ernest Marsh Lloyd, A Review of the History of Infantry 67 (1908) (good archers could hit reliably at 220 yards, which was the standard practice distance, and arrows could sometimes travel twice as far). So why did the English government during the sixteenth century phase out longbows and replace them with firearms as the standard weapon?

The first reason is the invention of high carbon steel armor in the late fifteenth century. It was impervious to bows, but not to firearms. Steven Gunn, *Archery Practice in Early Tudor England*, 209 Past & Present 53, 74 (2010). Second, firearms are much easier to learn, and especially easy as used in the English military, which did not need its soldiers to aim at particular targets. John Nigel George, English Guns and Rifles 8 (1947). Further, the English of the sixteenth century lost their willingness to spend years learning how to be longbow experts.

Under the 1285 Statute of Winchester, bow ownership was mandatory (Part B). As English monarchs began discerning the military advantage of a nation of bowmen, monarchs mandated archery practice, while forbidding other games. In 1365, Edward III ordered archery practice (bows or crossbows) on church feast days, and forbade other sports, such as handball or football. Calendar of Close Rolls, Edward III, vol. 12, 1364-68, at 181-82 (membrane 23d, June 12, 1365) (Kraus 1972) (1910). In addition to Sunday, there were many Church feast days, and the Church's premise was that, after church, people should have fun. The English government agreed,

as long as "fun" meant arms practice.[49] *See* 12 Richard II ch. 6 (1388) (servants and laborers shall not have swords or daggers, except when traveling on behalf of their master; they "shall Have Bows and Arrows, and use the same on Sundays and Holydays," and shall not play tennis, football, dice, or other "importune Games"); 11 Henry IV ch. 4 (1409-10) (repeating Richard II's statute); 17 Edward IV ch. 3 (1477-78) (outlawing "Closh, Kailes, Half-bow, Hand-in Hand-out and Queckboard").[50]

Although some people apparently preferred tennis, longbow practice was typically an enjoyable social activity, followed by a session at a nearby ale house. Besides shooting at target ranges (butts), groups of men and boys would pick a target, such as a gatepost or a tree branch, shoot at it, see who came closest, retrieve their arrows, and then pick a new mark—much like in a round of golf. Ruth Goodman, How to Be a Tudor: A Dawn-to-Dusk Guide to Tudor Life 190-91 (2016). "Without sociability and play, few would heed the exhortations of concerned governments." *Id.* at 193.

Further reading: The Archery Library ("digital versions of old archery books, prints and articles from times past," including Roger Ascham's pro-archery 1545 classic, *Toxophilus*).

2. Henry VII and Henry VIII

The first British king from the Tudor family, Henry VII ascended the throne in 1485, having defeated Richard III at the Battle of Bosworth Field and won the War of the Roses, a dynastic struggle among the nobility. The Tudors were the first British monarchs who were Welsh. They would rule until 1603, when Henry VII's granddaughter Elizabeth died.

Early in the sixteenth century, Henry observed that the proliferation of crossbows was leading people to neglect longbow practice, and to shoot "the king's deer." By "the king's deer," he meant all deer in England, because he claimed ownership of all wild game. Accordingly, crossbow use was banned except for persons who "shote ow of a howse for the lawfull defens of same." There were exceptions for persons who had an annual income from land of at least 200 marks, or who were granted a crossbow license. Any person who witnessed illegal crossbow use was authorized to confiscate the bow. 19 Henry VII ch. 4 (1503-04).

Upon the death of Henry VII, his son became king in 1509. The 18-year-old Henry VIII was tall, vigorous, and a superb bowman. At a 1520 pageant with the King of France, the Field of the Cloth of Gold, he impressed everyone by repeatedly

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49. Edward III outlawed bowling (lawn or indoor) and several other sports in 1361. Bowling was relegalized in 1455, and then banned again in 1541. That ban stayed on the books until 1845. Tony Collins, "Bowls," *in* Encyclopedia of Traditional British Rural Sports 47-48 (Tony Collins, John Martin & Wray Vamplew eds., 2005). Permits were available for wealthy people who wished to host bowling parties. *Id.*

50. Closh ("cosh"), kailes ("kayles"), and half-bow ("half-bowl") were skittles-type games. Skittles is a bowling game. Hand-in Hand-out was handball. Encyclopedia of Traditional British Rural Sports, at 65, 141-44, 174.75. Queckboard was a dice game.

hitting the bullseye at 240 yards. Robert Hardy, The Longbow: A Social and Military History 130-31 (3d ed. 1992).

Like his predecessors, Henry VIII attempted to stamp out distracting games. A 1511 statute forbade servants and apprentices from playing table games, plus "tennis, cosh, dice, cards, bowls, nor any other unlawful games in no wise," except during the 12 days of Christmas. One stated reason was that gambling on games sometimes led servants to rob their masters. Additionally, it was necessary "that the most defensible and natural feat of shooting should in no wise decay but increase." Every able-bodied male aged 60 or under was required to have his own bow and arrows; fathers had to teach their sons how to shoot. 3 Henry VIII ch. 25 (1511).

Devoted to the longbow, Henry throughout his reign tried to deal with declining interest among the English public. As farms were being turned into sheep pastures, there were fewer sturdy tillers of the soil who had the strength to control a longbow. The English population was shrinking, catastrophically so during the 1540s and 1550s when the bubonic plague hit England and killed about one-third of the able-bodied population. When living standards fell, and fewer people could afford meat in their regular diet, the number of well-nourished and strong commoners declined further. Wages for military archers had been high during the previous century, but they were eroded by inflation. Besides that, the people were less persuaded by the notion that it was their duty to spend their time on longbow practice so that they could serve the king. On the military side, improvements in armor were making it arrow-proof. Hardy, at 131-33; George, at 9, 66 (one-third of men were listed as competent archers in the militia muster rolls in 1522, one-quarter in 1557). Around 1520, improvements in gunpowder production made the powder burn more efficiently and raised firearms' utility in combat. George, at 202-03.

A 1514 statute eliminated the home possession exemption for crossbows and brought handguns under the same system, with possession forbidden below the annual income level of 200 pounds. Again, the king's subjects were told to possess longbows, to practice with them, and to provide longbows to their children. 6 Henry VIII ch. 13 (1514). Wars with France forced Henry VIII to lower the property qualification for handguns and crossbows to 100 pounds. 14 & 15 Henry VIII ch. 7 (1523).

The 100-pound income rule exempted about 10 percent of the population from need for a license. Under the Tudor arms statutes, a person who did not meet the income minimum for handguns or crossbows could be issued a license from the monarch. The Tudor monarchs handed out many such licenses—including to commoners whom the king wanted to reward, and to nobles to allow their servants to be able to use the arms outside the home. Lois G. Schwoerer, Gun Culture in Early Modern England 65-73 (2016).

The Tudors were constantly frustrated by underenforcement of their arms laws. A 1526 royal proclamation demanded that the mayor, sheriffs, and justice of the peace in London not be "negligent, slack, or remiss" in implementing arms restrictions. 1 Tudor Royal Proclamations 151, 152 (Paul L. Hughes & James F. Larkin eds., 1964) (Apr. 10, 1526).[51] A few weeks later, another proclamation

51. Royal proclamations had less legal force than did statutes enacted by Parliament. Proclamations usually supplemented statutes.

reaffirmed the ban on bowling, tennis, cards, and other games. It complained that games distracted people from "the exercising of longbows and archery," and ordered all justices of the peace to ensure that the householders, their servants, and their children "hereafter have in their houses bows and arrow." *Id.* at 152 (May 5, 1526).

Two years later, Henry complained that longbow archery had decayed because of "the newfangled and wanton pleasure that men now have in using crossbows and handguns." Moreover, handguns and crossbows were being used in crimes, and for hunting by the middle and lower classes. "[I]t was one thing to forbid a man to load his family's dinner table by an easy means, and quite another to keep him from doing so." Robert Held, The Age of Firearms: A Pictorial History 63 (1956). The king authorized any person to confiscate any unlawful crossbow or handgun from any person. Further, any person who shall "probably suppose" that a home contained an illegal crossbow or handgun could enter that home and take it. *Id.* at 177 (Dec. 4, 1528). Such practices are part of the background that led to the American Fourth Amendment against warrantless searches.

In 1533, the handgun and crossbow statutes were replaced by a new statute along the same lines. The minimum income requirement for unlicensed handguns and crossbows remained 100 pounds. Unlicensed possession, regardless of income level, was allowed by persons living in walled towns within seven miles of the sea, or in the four counties near the Scottish border. The statute affirmed the lawfulness of manufacturing handguns and crossbows. Extant licenses for handguns and crossbows were cancelled. The king's unlimited power to give anyone a crossbow or handgun license was affirmed. 25 Henry VIII ch. 17 (1533).

Early in his reign, Henry VIII had opposed the Protestant Reformation, persecuted Protestants, and wrote a book defending Catholic orthodoxy, *Assertio Septem Sacramentorum* (Defense of the Seven Sacraments). For the book, Pope Leo X conferred on Henry the title *Fidei Defensor* (Defender of the Faith). But when the Pope refused to grant Henry an annulment of his marriage to the Spanish princess Catherine of Aragon, Henry broke with the Catholic Church. He replaced it with the Church of England, of which he would be the head. Everyone in England was required to belong to his new Anglican Church, which adopted some moderate reformation principles. Meanwhile, Henry confiscated enormous quantities of property held by the Roman Catholic Church.

Henry's anti-Catholic activities led to an uprising in northern England in 1536-37, the Pilgrimage of Grace. Among the demands were "The statutes of handguns and crossbows to be repealed, except in the King's forests or parks." Lois Schwoerer observes that the demand, contained in a document that mainly addressed religious and economic issues, "provides striking evidence" of the broad and deep dislike of the restrictive arms laws, at least in the north. Schwoerer, at 53.

In 1537, England's first handgun shooting association, the Guild of St. George, was formed. The group encouraged handgun practice and had the legal authority to license anyone in England, regardless of income level, to have handguns or crossbows. Gunn, at 75.

The king warned that if local officials did not enforce the arms bans, they would incur his "displeasure and indignation." 1 Tudor Royal Proclamations, at 249, 250 (Jan. 24, 1537). Public safety concerns about people carelessly shooting

in cities, towns, and boroughs led to a proclamation that, in London, handgun and hackbut shooting only take place at appropriate target ranges. 1 Tudor Royal Proclamations, at 288 (July 27, 1540). "Hackbut," "hagubut," "haquebutt," and "habussh" are archaic spellings for "harquebus" or "arquebus," a type of long gun.[52]

As of the 1540s, handguns were found all over England, first becoming popular in cities, where they were manufactured. They were affordable to people of all social classes, with an average cost of about eight shillings (two-fifths of a pound, or 96 pence). Gunn, at 77-78. "By 1540 all efforts at enforcement had dissolved into chaos." In the previous quarter-century, "firearmed robbers and cutthroats had come to roam the highways and the countryside, so that in turn farmers and travelers with modest incomes . . . were compelled to firearm themselves illegally in self-defense." Held, at 65.

The income restrictions on crossbows and handguns were extended to hackbuts and to demyhakes (an especially short hackbut). 33 Henry VIII ch. 6 (1541). Again, Henry wished to promote "the good and laudable excise of the longe bowe." The statute repealed all previous handgun and crossbow limits and set up a new system. The system kept the 100-pound rule, and added new restrictions: nobody should own handguns whose total length was less than one yard, or a hackbut/demyhake with a total length less than three-quarters of a yard. Without needing to meet the income requirements, inhabitants of market towns or boroughs, and anyone with a house more than two furlongs (440 yards) outside of town, could possess guns that met the minimum length standards. They could use the guns for self-defense and for shooting at earthen embankments, but not for hunting. Likewise, no license was necessary for persons who lived within five miles of the coasts, within 12 miles of the Scottish border, or on various small islands. *Id.*[53]

Facing a two-front war against France and Scotland, King Henry in 1544 issued a proclamation authorizing all native-born subjects to use handguns and "hagbusshes"—regardless of "any Statute heretofore to the contrary." Schwoerer, at 60. After the war ended, a 1546 proclamation put the 1541 restrictions back in place. 1 Tudor Royal Proclamations, at 372 (July 8, 1546).[54]

The Henrican 1541 statute "[g]radually . . . fell into disuse. Soon, only the £ 100 qualification was enforced. . . ." Held, at 66. For the income requirement, a

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52. The French word was "arquebus," and this spelling eventually won out. John Nigel George, English Guns and Rifles 7, 15 (1947). The arquebus was much lighter than a musket. Unlike a sixteenth-century musket, an arquebus was made to be fired by a user who simply held the gun to his shoulder. The musket, a heavy military gun, usually was rested on a forked stick. Harold L. Peterson, Arms and Armor in Colonial America 1526-1783, at 13-14 (Dover 2000) (1956). A typical musket size was five feet, two inches long; a typical harquebus was three feet, nine inches. Allen French, *The Arms and Military Training of Our Colonizing Ancestors*, 67 Mass. Historical Soc. Proceedings, 3d series 3, 20 n.2 (1941-44).

53. The provision for armament of Englishmen near the Scottish border was repealed after the union between Britain and Scotland. 4 James I ch. 1 (1606).

54. Parliament in 1539 had given Henry the authority to legislate by proclamation as long as his new laws did not include capital punishment or forfeitures of property. Statute of Proclamations, 31 Hen. VIII ch. 8 (1539). His wide-ranging proclamations were considered by critics to exemplify Tudor despotism.

conviction was reported in 1669.[55] Four cases in 1685-92 appear to have been the last efforts to enforce the handgun statute; none of them succeeded, as the King's Bench had become highly vigilant about pleading or procedural defects.[56]

Military historian Charles Oman explains that Henry's despotism was partially held in check because the English people were armed. However, the development of firearms was beginning to give the government the edge over the people. Unlike continental kings, Henry never attempted to build a permanent standing army:

> This was fortunate for his subjects—with *compagnies d'ordonnance*[57] or *tercios*[58] ready to his hand, his rule would have been even more arbitrary than was actually the case. More than once he had to restrain himself, when he discovered the general feelings of his subjects was against him. As the Pilgrimage of Grace showed, great bodies of malcontents might flare up in arms, and he had no sufficient military force to oppose them. His "gentlemen pensioners" and his yeoman of the guard[59] were but a handful, and bills [edged or bladed hand weapons] or bows were in every farm and cottage. . . . [A]mong the many results of the growing importance of firearms was the fact that popular risings became progressively more impotent against trained soldiery, from the mere question of armament. The last and most complete demonstration of the fact was reserved for the next century, and field of Sedgemoor [1685, Monmouth's Rebellion (Section H.3.b)], but there were examples of the same sort to be seen in Tudor times—especially in the suppression of both the eastern and western insurgents in the third year of Edward VI . . . [by] hired bands. . . . But King Henry never let matter come to the last extreme, or turned mercenaries loose on seditious assemblies. He . . . was never obliged—thanks to his tact—to bring [mercenaries] across the channel in any numbers.

Charles Oman, A History of the Art of War in the Sixteenth Century 288 (Greenhill 1999) (1937).

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55. *Sanders's Case*, 85 Eng. Rep. 311, 1 Williams' Saunders 262 (K.B. 1669) (handgun in the home). For more on prosecutions in this period, see Section H.3.a (describing use of the 1541 statute to enforce the 1671 Game Act against handgun hunting by commoners).

56. One case had a defective indictment. *Rex v. Silcot*, 87 Eng. Rep. 186, 3 Modern 280 (1690). Two others involved delays between indictment and trial that voided the jurisdiction of the justices of the peace. *Rex & Regina v. Bullock*, 87 Eng. Rep. 315, 4 Modern 147 (1692); *The King v. Litten*, 89 Eng. Rep. 644, 1 Shower's King's Bench Rep. 367 (1689). Another conviction was overturned because the defendant might have borrowed the handgun, an act not literally prohibited by statute. *The King v. Lewellin*, 89 Eng. Rep. 440, 1 Shower's King's Bench Rep. 48 (1685) "The conviction was for having a gun in his house: the statute is, use to keep in his or her house, and perhaps it might be lent him, the words of the statute ought to be pursued."). Henry's income qualification handgun statute was formally repealed in 1831. 1 & 2 William IV, ch. 22 (1831).

57. [Foreign mercenaries who ravaged the French people.—Eds.]

58. [Italian or Spanish infantry regiments.—Eds.]

59. [The monarch's bodyguards. In practice, the nucleus of a standing army.—Eds.]

3. Edward VI

During the brief reign of Henry's only son, Edward VI (1547-53), a ban on shooting "hayle shott" was applied to persons who did not have the income qualifications for handguns and hackbuts. 2 & 3 Edward VI ch. 14 (1548). "Hail shot" is what we today call "shotgun balls"—several small pellets, rather than a single large bullet. It is used mainly for bird hunting and self-defense.

The same statute also ordered persons who were eligible to shoot to register themselves with the local Justice of the Peace. *Id.* Although people did register when the statute was enacted, by 1581, the registration program was no longer in use. Lambarde, at 296 (1581); *see also* Dalton, The Countrey Justice, at 50 ("but quaere[60] if this be now in use"). Formal repeal did not come until 1695. *See* Section H.5.

Catholic rebellions in the counties of Devonshire and Norfolk in 1549 were suppressed by Italian and German mercenaries, "obviously because no shire-levies from either immediate neighborhood could be trusted in either case." Oman, at 368-69.

4. Mary and Philip

Mary, who was Henry's eldest daughter, succeeded to the crown in 1553. She was the Catholic child of Henry's first wife, the Spanish princess Catherine of Aragon, who was the victim of Henry's infamous divorce that caused the English split from the Roman Church.

Mary's announcement that she would marry the Spanish Prince Philip and rule jointly with him provoked a rebellion. When the London militia was called out to suppress it, many of them joined the rebels. Mary's personal bodyguard deserted. Mary saved her throne by "a vehement personal appeal to the fundamental loyalty to the Crown, which was still the strongest motive in the mind of nearly every Englishman. . . . Never was a rebellion so entirely settled by the public opinion of the masses—and this opinion was wavering almost down to the last moment." *Id.* at 369-70.

Restoring Catholicism as the established religion, Philip and Mary ended persecution of Catholics, and commenced even more intense persecution of Protestants. She earned the sobriquet "Bloody Mary."

Under Philip and Mary, Parliament enacted a major reorganization of the militia. It began by repealing all previous laws concerning "the keeping or finding of Horses or Armoure or of any of them." The word "armoure" in this usage included arms, not just defensive clothing. The only things that were saved were the pro-archery provisions of Henry's 1541 statute.

Like the old Assize of Arms (Part B) and the Statute of Winchester (Part B), the new law required persons in various categories of wealth to possess specified weapons, horses, or armor. The harquebus (which had become the main military long gun) was now mandatory for persons with annual estates of as low as ten pounds.

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60. [From the Latin *quaerere*, "to seek, ask." Used to introduce a question. 2 Shorter Oxford English Dictionary 2437 (1993).—Eds.]

Persons with annual incomes of more than five pounds but less than ten had to have a bow and a sheaf of arrows. For persons with incomes below five pounds, there was no mandate. The inhabitants of towns were ordered to use common funds to purchase the necessary arms for persons who did not possess their own, and to store them in a common area, such as a church. The militia was reorganized, with each county militia to be led by a Lord Lieutenant, who would be appointed by the monarch. 4 & 5 Phil. & M. ch. 2 (1557-58); *see also id.*, ch. 3 (rules for musters).

Half a century later, under King James I, Philip and Mary's statute would be repealed. The effect included reviving the old statutes that had been repealed under Philip and Mary.

5. Elizabeth I

When Mary died childless in 1558, she was succeeded by her younger half-sister Elizabeth. An Anglican, Elizabeth had participated in Catholic ritual when so required under Mary's reign. Queen Elizabeth I switched the established religion back to the Church of England. She was initially content with mere outward shows of conformity but became more repressive following a 1569-71 Catholic plot to overthrow and assassinate her. A Papal bull had purported to depose Elizabeth from the throne, had ordered Catholics to get rid of her, and had forbidden Catholics to give even minimal outward conformity to the Church of England. The Roman Catholic Church smuggled Jesuit priests into Great Britain to keep the faith covertly alive.

a. Handgun Control

In 1559 the Queen complained that "many men do daily ride with handguns and dags [a type of heavy handgun], under the length of three quarters of a yarde" and were committing robberies and murders. Noting "how negligently" the law "is of late observed," she ordered its due execution. 2 Tudor Royal Proclamations 116 (Paul L. Hughes & James F. Larkin eds., 1969). In 1579, she outlawed possession of pocket dags (small enough to fit in a pocket), and forbade their manufacture or repair. She also ordered the arrest of people who carried or shot guns in "great cities or the suburbs of the same," except at target ranges. Further, no shooting was allowed within two miles of wherever the Queen happened to residing. The wearing of concealed armor was forbidden. Law enforcement officers should search homes and shops for pocket dags and confiscate them.*Id.* at 442-44. According to Schwoerer, "The government rightly considered the dag highly dangerous and tried without much success to ban it entirely." Schwoerer, at 182.

In 1600, Elizabeth criticized the "slack execution" of the gun control laws, and "the common carrying and use of guns contrary to said statutes." She noted the practice of illegal carry by bird hunters, by "common and ordinary persons traveling the highway" who "carry pistols and other kinds of pieces," and by "ruffians and other lewd and dissolute men." 3 Tudor Royal Proclamations, at 218 (Dec. 21, 1600).

The local sheriffs and justices of the peace apparently did not put much emphasis on enforcing the Tudor arms control laws. For example, in 1550 a Norfolk clerk reported that on any given day, there would be 60 people hunting, none of them meeting the property requirement. Gunn, at 79. The arms control system

relied on paid informants, but the informants seemed to have little enthusiasm for reporting illegal possession. *See* M.W. Beresford, *The Common Informer, the Penal Statutes, and Economic Regulation*, 10 Econ. Hist. Rev. (2d series) 221, 226 (1957) (of 26,243 information cases brought before the Court of the Exchequer from 1519-1659, only 220 involved "guns, archery, horses").

b. Elizabeth's Militia

"Since the queen never possessed a standing army, she insisted on bringing the militia, the nation's only domestic armed force, tightly under her control." T.H. Breen, *English Origins and New World Development: The Case of the Covenanted Militia in Seventeenth Century Massachusetts*, 3 Past & Present 74, 76 (1972). Pursuant to the comprehensive militia and arms law statute enacted during the reign of Philip and Mary, Elizabeth appointed leading nobles as lords lieutenant of their county's militia. Integrating the nobles into the crown's military system was intended to make them compliant. *See* Gladys Scott Thomson, Lords Lieutenants in the Sixteenth Century: A Study in Tudor Local Administration (1923).

Nominally, Elizabeth retained the traditional militia consisting of almost all able-bodied males. Yet training was provided mainly to a select group: the trained bands, established in 1573. Training twice a month, the trained bands were a select militia drawn primarily from the middle class. The upper classes were formally obliged to serve, but were allowed to send a substitute, such as a servant, in their place. Villages or other communities were responsible for providing at least some of the militiamen with arms and storing them in a secure central location. *Id.* at 76-77; Calendar of State Papers, Domestic Series, of the Reign of Elizabeth, Addenda, 1566-1579, at 78-81 (June 19, 1569) (Mary Anne Everrett Green ed., 1871).[61] *See generally* John S. Nolan, *The Militarization of the Elizabethan State*, 58 J. Mil. Hist. 391 (1994). Men formally liable for militia service, but not in the trained bands, were called the "freehold band." Victor L. Stater, Noble Government: The Stuart Lord Lieutenancy and the Transformation of English Politics 207 n.70 (1994). Due to local opposition, the central storage mandate was poorly implemented and sometimes ignored. C. G. Cruickshank, Elizabeth's Army 110-12 (2d ed. 1966).

For militiamen not in the trained bands, the main activity was the muster. About once a year, all the militiamen in an area would assemble for a formal inspection to demonstrate that they had the arms and equipment required by law. "To pass muster" was to pass this inspection. Muster days could be a welcome relief from agricultural drudgery, and after the inspection, there was often a festive dinner. The militia could not be required to serve outside its own county, except in cases of actual or threatened invasion. Lindsay Boynton, The Elizabethan Militia 1558-1638 (1967); Richard Burn, A Digest of the Militia Laws (1779).

Because counties had the financial burden of taxing themselves for militia equipment, and of paying the militia officers and militiamen whenever they mustered or trained, militia mustering and training was often desultory. The continuing danger of Spanish invasion from 1585 to 1603 did focus attention on maintaining militia quality. Neil Younger, War and Politics in the Elizabethan Counties (2012).

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61. Many volumes of the Calendar of State Papers are available at British History Online.

When the Spanish Armada threatened in 1588, the southern counties raised a formidable militia. Michael J. Braddick, State Formation in Early Modern England 190-96 (2000).

c. Archery

In the Elizabethan militia, bowmen were still present, although outnumbered by harquebusiers, and later by musketmen. Not until 1595 was enrollment of archers in the militia terminated. Oman, at 379-87. Although being displaced by firearms, longbows would continue to have military use as late as 1644 in the British Civil War (Section H.2) and 1688 in the Scottish Highlands. Ralph Payne-Gallway, The Book of the Crossbow 35 (1995).

By Elizabeth's time, archery practice was much decayed. She ordered that everyone spend Sunday afternoons in archery, rather than in forbidden games such as dice or cards, by which means she hoped "archery may be revived." Apologetically, she noted that her subjects already were required to spend money on muskets and harquebuses, and now she was forcing them to buy bows and arrows. 21 Acts of the Privy Council 174-75 (June 6, 1591).[62]

One author suggests that Elizabeth's pro-bow policies were not really "for the defence of the realm," as she claimed. Rather, the longbow mandate was intended to distract the public from "the mania for gambling which had gripped the nation," and from the use of firearms for poaching and violent crime. Hardy, at 142. People "bought their bows to give some appearance of obeying the law, but never loosed an arrow from them." Cruickshank, at 105.

d. Elizabeth and Hunting

Elizabeth was an avid huntress, along with the ladies of her court. The crossbow was her favorite arm. R.L. Wilson, Silk and Steel: Woman at Arms 4-5, 29-31 (2003). She was not very concerned about enforcement of the game laws.

The same would not be true of her successors, the Stuart family. They would impose new game laws, upend the militia, and pursue the most aggressive arms control program in English history. The consequence would be revolution, and the enactment of a Bill of Rights guaranteeing the right to arms.

H. DISARMAMENT REJECTED: THE GLORIOUS REVOLUTION AND THE BILL OF RIGHTS

According to Americans, the right to arms "originally belonging to our forefathers was trampled under foot by Charles I. and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, finally incorporated conspicuously in our own Magna Charta!"

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62. Available at British History Online. At the time, the Privy Council consisted of the Queen's leading advisors, and the Queen could make law based on its advice. Its powers were greatly curtailed following the British Civil Wars (Section H.2) in the seventeenth century.

Nunn v. State, 1 Ga. 243, 251 (1846), quoted in *District of Columbia v. Heller*, 554 U.S. 570, 613 (2008) (Ch. 11.A). This Part tells the story of Charles Stuart and his relatives, and how their conduct led to a revolution in 1688. After the revolution, Parliament enacted a Bill of Rights, including a right to arms.

In the seventeenth century, the king, Parliament, and others fought over who should control the tools of violence in the United Kingdom. The issues were individual (who could possess and carry arms) and collective (who would control organized force, such as the militia or a standing army). The arms issues were closely related to civil liberties, including the rule of law itself. From the study of England's seventeenth century, Americans drew some of their ideology about when armed resistance to government is legitimate.

Section 1 deals with King James I and his son Charles I. James was oppressive, but within limits. Charles moved the nation toward military dictatorship. The consequence was the British Civil Wars, which are discussed in Section 2. In 1660, Charles II, the son of Charles I, re-established the monarchy. He was succeeded by his brother, James II. Their attempts to create a government monopoly of force led to the Glorious Revolution of 1688, as described in Section 3. Following the revolution, Parliament enacted a Bill of Rights, including a right to arms, the topic of Section 4. Section 5 describes the legal interpretation and effect of the right in the decades following the revolution. Observing conditions in England, James Madison and other Americans derided the English right to arms as weak and nearly useless, much inferior to the Second Amendment, as summarized in Section 6.

1. James I and Charles I: The First Stuarts

Queen Elizabeth I, the last of the Tudors, died in 1603, and was succeeded by her cousin James Stuart. Already reigning as James VI of Scotland, he took the British regnal name of James I. From then on Britons and Scots have been the subjects of the same monarch. The first Stuart kings (James I, Charles I, Charles II, James II) had an exalted view of the monarch's powers. According to James I, "The state of monarch is the supremest thing upon earth: for Kings are not only God's lieutenants upon earth and sit upon God's throne, but even by God Himself they are called gods." George Macauley Trevelyan, England Under the Stuarts 91 (Folio Soc. 1996) (reprint of 3d ed. 1946). In the view of James I, Parliament only existed because he allowed it to, and Parliament could not purport to limit his prerogative. "As to dispute what God may do is blasphemy, so it is sedition to dispute what a king may do in height of his power." *Id.* at 92.

Although James's queen was Catholic, James made it clear that he was not going to relegalize that religion. For decades, Catholics had been hoping for an improvement in their situation once Elizabeth died, but the minor loosening under James was insufficient. On November 5, 1605, Catholic radicals attempted to blow up the Parliament building on the day that Parliament began its session. Their Gunpowder Plot aimed to decapitate the government, and then carry out a coup to remove James and replace him with one of his Catholic relatives. Mostly by luck, the plot was foiled the night before. Forever after, Great Britain celebrated November 5 as a national day of thanksgiving, with bonfires, fireworks, and the

burning of effigies. "Guy Fawkes Day" is named for the captured conspirator who led the cell that tried to carry out the bombing.

a. Hunting

Like Elizabeth Tudor, James Stuart loved to hunt. Unlike her, he was jealous of hunting by other people. Game laws aimed at commoners were long-standing, and so were ulterior motives. Following the 1381 Peasants' Revolt, a 1389 statute aimed to prevent seditious gatherings, in part by preventing commoners from assembling armed for hunting. The minimum income requirement for hunting was fairly low—40 shillings (two pounds) per year—the same as the minimum income level for voting. Persons not allowed to hunt could possess neither nets nor hunting dogs, such as greyhounds, pointers, setters, or spaniels. 13 Richard II, stat. 1 ch. 13 (1389). Over the next centuries, game laws grew increasingly complex. There were even different laws for hares and rabbits. One thing that never changed was that anyone, regardless of income, could always kill vermin, such as badgers, otters, and rats.

At the end of Elizabeth's reign, foreign visitors were surprised to see that peasants were allowed to use dogs to hunt England's plentiful game. Trevelyan, at 4-6. Two months after ascending the throne of England and Wales, James cracked down. He proclaimed that anti-hunting laws had already forbidden commoners from "the having or keeping, as the using" of "Dogs, Gunnes, Crossebowes" or other hunting tools. He acknowledged that the laws "have had (especially of late time) little or no effect" and there "hath not bene any due execution" of those laws. Accordingly, he announced that no one should unlawfully hunt, nor should anyone possess dogs, arms, nets, or other hunting instruments contrary to the law. Henceforth, violators would be subjected not only to the legal penalties, but additional penalties inflicted by the king, regardless of the violator's "estate or degree." 1 Stuart Royal Proclamations, at 15-16.

Under James, the income requirement for some hunting was raised, first to 10 pounds annually, and then to 30, depending on the type of game or the method. 1 James 1 ch. 27 (1603-04) (various birds, plus hares); 7 James I ch. 11 (1609-10) (use of hawks to hunt pheasant or partridge). Further, James asserted that even nobles could not hunt without his permission. Parliament, which was elected in part by the middle class, but which in practice usually represented the upper classes, was skeptical of the theory that all game belonged to the king. Chester Kirby & Ethyn Kirby, *The Stuart Game Prerogative*, 46 Eng. Historical Rev. 239 (1931).

James in 1609 issued a proclamation complaining that both nobles and commoners were illegally hunting. 1 Stuart Royal Proclamations, at 229-30. Among the people who annoyed the king by ignoring the anti-hunting proclamation was Sir Edward Coke—formerly the Attorney General, and at the time Chief Justice of the court of Common Pleas. *Id.* at 229 n.2. Coke would become a leading opponent of the Stuarts' despotism.

b. Arms Restrictions

In 1610, the king ordered the disarmament of all Catholics. *Id.* at 247-48 (June 2, 1610). Then in 1613, he proclaimed that although "the bearing of Weapons covertly . . . had ever beene . . . straitly forbidden," the practice "is suddenly growen

very common." Accordingly, he forbade anyone to import guns with a barrel less than 12 inches, or to "beare or carry" such guns. Persons who owned the handguns were ordered to destroy them, or to surrender them to the government. The Stuarts were justifiably fearful of assassination. The proclamation may have been motivated by reports of Spain (England's mortal enemy) smuggling pocket pistols into England, and the Spanish fleet making threatening maneuvers. *Id.* at 284-85. A 1616 proclamation repeated the carry ban and forbade domestic manufacture or sales. *Id.* at 359-60. The next year a royal proclamation forbade everyone in certain areas on the Scotch-English border from having "all manner of Weapons, and Armors." Further, commoners were outlawed from possessing horses, except for "meane Nagges" worth less than 40 shillings. *Id.* at 378.

Enforcement was rigorous, at least in some places. A study of the southwestern county of Devon during the reign of James I reported that "Constables were compelled to make frequent searches for guns, crossbows, and 'other engines,' [e.g., snares, nets] and were themselves sometimes bound over to answer for their neglect in these matters." A.H.A. Hamilton, Quarter Sessions from Queen Elizabeth to Queen Anne 90 (1878). Until 1620, when the Stuarts became more relaxed about Catholics, Catholic homes were frequently searched for arms, which Catholics learned to conceal in the same places they hid their religious items. Trevelyan, at 72-73.

At the same time, use of fowling pieces (proto-shotguns) for bird hunting by farmers and small landholders was increasing rapidly. Wildfowling was "the favourite sport of the yeoman farmer and the smallholder. Especially in the eastern counties, much of the population subsisted on fowling in winter, when fields turned into marshes and fens, and wildfowl from Scandinavia wintered there." George, at 28, 34-35.[63]

c. Virginia and New England

The first English attempt to colonize America had been Sir Walter Raleigh's 1585 establishment of a short-lived settlement on Roanoke Island, on the Outer Banks of North Carolina. A second colonization attempt began in 1606, under King James.

As detailed in Chapter 3.A, the king's royal charter for the Virginia company granted the colonists, their descendants, and anyone else they allowed to come to Virginia the perpetual right to bring arms there, and to import arms from England, "for defence or otherwise." The 1606 Virginia charter appears to be the first written recognition of a right to arms in English law. The 1620 charter for New England contained similar terms.

In America, everyone who wanted to hunt could hunt. There were no limits on arms possession based on income. It was not long before the Americans started behaving with more independence than the monarchy wished. The final rupture between the monarch and the American colonists would come a century and a half later, when King George III imposed an arms embargo on America and attempted

63. Yeomen were commoners who possessed their land by freehold. They were qualified to serve on juries. 1 Blackstone, *supra*, *394.

to carry out arms confiscation, including at Lexington and Concord, Massachusetts. *See* Ch. 4.A & B.

d. Gunpowder Monopoly, Saltpeter, and Urine Control

English monarchs were fond of creating highly taxed monopolies, even for necessities.[64] The monarchs gave production, sale, or import rights to their friends in exchange for kickbacks. The Tudors had created a monopoly on gunpowder milling and import, and the Stuarts continued it. One of the most vexatious parts of the crown's arms control system was the national program to enforce the gunpowder monopoly. The gunpowder monopoly led to attempts to monopolize human and animal waste.

Neither firearms nor artillery are useful without gunpowder. Sophisticated chemical formulations to make smokeless gunpowder would be invented in the late nineteenth century. Today smokeless powder is standard for all firearms except antiques and replicas of antiques. *See* online Ch. 23.D. In the preceding centuries, however, what we call "black powder" was the only form of gunpowder. A common English recipe was one part sulfur, one part charcoal, and six parts saltpeter. Arthur Pine Van Gelder & Hugo Schlatter, History of the Explosives Industry in America 20, table 1 (Ayer 2004) (1927) (1742 standard English formula).[65]

Saltpeter, called "the mother of gunpowder," is a naturally occurring potassium nitrate that is produced by the slow decay of urine and dung in nitrous soil. The English were able to obtain some saltpeter from bat guano deposits in caves, but not nearly enough to meet the government's needs.

Beginning with the first Tudor king, Henry VII, the government authorized saltpetermen to harvest saltpeter from private property. The saltpeter program was desultory until the latter part of the reign of the last Tudor, Elizabeth I. King James Stuart intensified it. His son Charles I was usually inclined to further intensify the abuses of his father and the Tudors. Saltpeter was no exception.

Saltpetermen dug underneath structures of all kinds, including houses. Frequently, they left the place a wreck, with floorboards pulled up. Sometimes, the foundation of a structure was undermined so badly that the building collapsed. Afterward, the saltpetermen would force the locals to cart the excavated saltpeter to locations that were miles away. They paid the carters nothing. David Cressy, Saltpeter: The Mother of Gunpowder 36-120 (2012).

The royal proclamations setting up saltpetermen said that they should leave the property in the same condition they found it and should pay compensation for any damage done. When cases were brought to court, judges did enforce limits. *The Case of the King's Prerogative in Saltpetre*, 77 Eng. Rep. 1294, 12 Coke Rep. 12,

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64. By 1641, government-created monopolies included soap, salt, starch, coals, iron, pens, cards, dice, beavers (fur and hats), belts, linen, linen lace, game, eels, meat dressed in taverns, tobacco, wine, wine casks, hops, brewing, distilling, weighing hay and straw in London, gauging red herrings, butter casks, kelp, seaweed, buttons, hats, gut string, eyeglasses, combs, tobacco pipes, sedan chairs, hackney coaches, saltpeter, gunpowder, rags, and rag gathering. John Forster, The Debates on the Grand Remonstrance, November and December, 1641, at 248 (1860).

65. The charcoal makes the powder black.

(1606) (acknowledging king's power to take saltpeter for national defense without compensation, and forbidding digging in floors of houses and barns; digging must occur during daylight); 4 Blackstone, *159.

But most of the time, the saltpetermen could abuse without fear of being forced to pay compensation. Only the wealthy had the resources to bring lawsuits. In Parliament, Sir Edward Coke led efforts to impose statutory limits, particularly in defense of the gentry's property. Only minor reforms resulted. *E.g.*, 2 Stuart Royal Proclamations, at 453-57 (Mar. 14, 1635) (exempting cellars or vaults of noblemen or gentlemen, used for beer, wine, cider, or other drink).

Saltpeter is an excellent fertilizer, especially for grasslands used for grazing. Starting with Elizabeth I, royal proclamations forbade people from using saltpeter to fertilize their own fields.

Further, people were barred from improving their property if the improvement might impede saltpeter formation. For example, it was illegal to build floors in stables or under pigeon coops (dovecotes). 2 *id.* at 16 (Apr. 13, 1625), 157 (July 23, 1627).

According to the Tudors and the Stuarts, the monarch personally owned all saltpeter and could send his or her servants to collect it as he chose. Supposedly, saltpeter was part of the royal prerogatives. As understood in English law at the time, royal prerogatives were traditional powers that belonged to the king unilaterally. It was universally agreed that mining (e.g., in England's abundant tin mines) was a royal prerogative. By analogy, the collection of saltpeter was said to be a form of mining. Critics pointed out the differences between the millennia-old tradition of mining mineral deposits and the more recent practices of collecting months-old products of human and animal activity.

The saltpeter prerogative reached an extreme with Charles's 1627 order that all towns and villages store urine in "convenient vessels or receptacles" and also store "all the stale of beasts which they can save and gather together." The wastes were supposed to be transported to London, where they would be deposited in large fields for industrial production of saltpeter. That program failed. The English under the Stuarts never figured out large-scale manufacture of saltpeter. The ordinary saltpeter collection program resumed. Cressy, at 94-97.

Although vexatious, the saltpeter collections succeeded. In the first years of Elizabeth's reign, the English had produced only about 10 percent of their saltpeter and imported the rest from overseas. By the time of Charles, domestic production rose as high as 70 percent. With domestic gunpowder production thriving, Charles banned gunpowder imports. 2 Stuart Royal Proclamations, at 546 (Feb. 20, 1637).

The king had dismissed Parliament in 1629, and refused to call a new Parliament, because it might legislate contrary to his wishes. Without Parliament, the king could not impose taxes. So Charles devised mechanisms to raise money for himself and his standing army by other means. The gunpowder import ban allowed him to increase the monopoly price on royal gunpowder. Lindsay Boynton, The Elizabethan Militia 1558-1638, at 260-61 (1967); Charles Floulkes, The Gun-Founders of England 87-88 (1937). Notwithstanding the legal monopoly, there was a black market, fed by unauthorized imports and by illicit sales by saltpetermen. Cressy, at 119-21.

Because Charles foolishly started a religious war with Scotland in 1639, he had no alternative but to summon Parliament and ask for new funds. Parliament unleashed the Grand Remonstrance, cataloguing Charles's abuses and demanding

reform. The gunpowder monopoly was particularly denounced, separate from the complaints about monopolies in general. According to Charles's critics in Parliament, the gunpowder monopoly was "a project for disarming the kingdom." The high price was beyond the means of poor people, and it discouraged militia practice. The gunpowder monopoly and others were repealed in 1641. John Forster, The Debates on the Grand Remonstrance, November and December, 1641, at 232, 254-56 (1860); Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right 17-18 (1996).[66]

As detailed in Chapter 4.B.7, the American colonists during the Revolution faced their own critical shortage of saltpeter. Their method of addressing the problem was the opposite of the Tudor-Stuart policy—another difference between American and English arms cultures.

e. The Militia

Hatred of the saltpetermen united all classes and political persuasions. The English were divided about who was in charge of the militia and a standing army. In the view of Charles and his supporters, the king had the authority to raise and maintain a standing army of professional soldiers. Further, the militia should be the king's personal force, with his personal will imposed by the lords lieutenant whom the king appointed in every county to command the militia. Parliament disagreed and thought that Charles was moving toward military dictatorship.

Militia service was among the many duties to bear arms. Other duties included hue and cry, watch and ward, and *posse comitatus*, all well-established in law. *See* Part C. On top of that was the medieval practice of the king enrolling the able-bodied male population as sworn keepers of the peace, the *jurati*. The first invocation of the *jurati* power was in 1277, when most men had gone off to fight the Welsh. The orders of raising *jurati* were known as Commissions of Array. Powicke, at 119.

In 1604, the first year of the reign of Charles's father, James I, the militia statute and modern arms mandates from 1557-58 had been repealed. 1 James I ch. 25 (1603-04). King James relied on his alleged royal prerogative, rather than statutes, to govern the militia through the lords lieutenant. Because his foreign policy was generally pacific, neglect of the militia did not cause great controversy. Malcolm, at 7-8.

Indeed, for the entire reign of James I, and most of the reign of Charles I, the lords lieutenant were a constructive feature of government. They were appointed from the upper ranks of the nobility, and the appointment made them the top men in their county. With strong ties to the royal court and to their home counties, they were effective advocates at court for the interests of their counties. Their role extended far beyond the militia, as they were also the informal mediators of many disputes within their counties. Militia musters were mainly social occasions for the militiamen to display their respect for the lord lieutenant and his deputies, and for the lord and the deputies to distribute prizes, such as for good shooting. Stater, at 8-31.

Charles I, however, was much more belligerent overseas than was his father. Domestically, he shared his father's devotion to royal absolutism, but he lacked his father's wisdom about when to stop pressing a point that was excessively irritating

66. The full text of the Grand Remonstrance is in The Constitutional Documents of the Puritan Revolution 202-32 (Samuel Rawson Gardiner ed., 1979) (reprinting 3d. ed. 1906).

the nation. Charles aimed to create what he called "the perfect militia" or an "exact militia." He tried to enforce Henry's archery practice mandates, fostered the import of bowstaves, and ordered removal of impediments to access of archery grounds. Hardy, at 142; French, at 9. The trained part of Charles's militia was small. As of 1638, the trained bands comprised 73,116 infantry and 4,835 cavalry—out of an English population of about four or five million. Stater, at 22 (trained bands); Hubert P. H. Nusteling, *The population of England (1539-1873): An issue of Demographic Homeostasis*, 8 Histoire & Mesure 59, 77 (1993) (trans. Pascalle Videler) (population estimates).

In his futile attempt to revive archery, Charles was following Elizabeth. Yet he was more ambitious than she. She had two objectives for the militia: (1) assisting national defense, and (2) preventing her overthrow. Charles, however, used the militia for much more, especially extorting money for himself and forcing vulnerable citizens to bear the expenses of his army. Rather than spend royal funds on disabled soldiers returning from foreign wars, Charles's militia officers quartered disabled soldiers in the homes of poor families, and made the families pay for the soldiers' upkeep. Similarly, Charles's militia officers coerced householders to quarter Irish soldiers whom Charles had brought into England. Many soldiers were a barely controlled rabble who robbed their hosts, and made towns so dangerous that people were afraid to go to church, for fear that their homes might be looted in their absence. Much of the army's privates were the dregs of society; as towns had to fulfill military quotas, many of the men forced into service were local troublemakers whom the towns were glad to send elsewhere. Stater, at 40-41; Trevelyan, at 125-26; Breen, at 77-81. People who had voiced opposition to the king suffered the heaviest burdens. To Charles, a "perfect militia" was select (only a small and politically reliable subset of the population), strong, and personally controlled by him.

In 1629, Charles dismissed Parliament because it would not give him what he wanted, most importantly new taxes to pay for a naval construction program. Thus began a period known as Personal Rule. He raised the "ship money" himself, through unilateral impositions. Although many people considered the ship money to be flagrantly illegal, the courts upheld it, declaring that all property in England belonged to the king. *Rex v. Hampden*, 3 How. St. Tr. 825 (Exchequer 1638) (7-5 decision).

One of Charles's money-making schemes was aggressive use of the forest laws. The "royal forests" included much land that was not a forest in an ecological sense. Charles expanded the boundary claims of the royal forests, and also started selling off some royal forest land to buyers who would enclose it with fences, and thereby dispossess commoners who used the land as a commons. The forest policies provoked widespread rioting in the south and west. Well-armed peasants pulled down new fences and drove away royal officials. Malcolm, at 14-15. The people showed themselves to be "versed in the arts of organizing irregular military bands." Eric Kerridge, *The Revolts in Wiltshire against Charles I*, 57 Wiltshire Arch. & Nat. Hist. Mag. 64, 72 (1958-59).

On the whole, Charles's dream of a "perfect" militia did not get very far. The lords lieutenant had spent a lot of their social capital forcing men into service in 1625 so that Charles could fight a war with Spain, which turned out to be a humiliating fiasco. So the lords lieutenant were not much interested in squandering what remained of their local goodwill to create the militia Charles wanted. Rather than

fining militiamen who failed to provide themselves with required equipment, the lords lieutenant left enforcement to the Privy Council (the king's circle of close advisors), which lacked the practical administrative reach to punish militia recalcitrants. Stater, at 32-41, 48. The lieutenancy at its best "embodied the resilient traditions of English local government—provincial, conservative, and attuned to the nuances of local society." *Id.* at 46.

Using his own money, Charles built an unpopular standing army. Even the Tudors had not dared to do so. There was widespread fear that Charles was on his way to making himself a military dictator. If Charles got his way with his perfect militia, there would be no armed body capable of resisting Charles ruling by force. When Charles threatened Parliament, that body's leaders raised the mob of London to defend Westminster Hall. Trevelyan, at 176-77.

2. The British Civil Wars and the Interregnum

Royal absolutism raised tensions, many of them religious. The only legal religion was that of the Church of England, which the king controlled by his appointments. His opponents wanted some measure of democratic control, such as putting Parliament in charge, or allowing congregations to choose their own minister. Trevelyan, at 183-84. With government trying to control religion, there were many conflicts among the established Church of England (Anglican), the established Church of Scotland (Presbyterian), Protestant Nonconformists (Congregationalists and English, Welsh, or Irish Presbyterians), Anabaptists, other "Sectarians," and the remnant of Catholics in Great Britain. Ireland was predominantly Catholic but was also home to an Anglican aristocracy and a significant population of Presbyterians, especially in the northeast (Ulster). Many of the latter were Scots-Irish, who had been moved from Scotland to Ireland in the early seventeenth century, as part of an English government program to settle "plantations" on land confiscated from Gaelic nobles. (The English language word "plantations" originates from the project in Ireland.) Alliances among the religions changed often, as did the monarchy's tolerance of them. Things got much worse when Charles I tried to crack down on the Scottish Presbyterian church, and thereby provoked a Scottish revolt in 1638. Scottish religion was "another instance, like the failed plan for an exact militia, of the king's refusal to recognize the natural limits of his authority." Stater, at 49.

At enormous county expense, the lords lieutenant reluctantly mobilized a large army in the summer of 1639, but then Charles I flinched from invading. The next year, he ordered another mobilization, and this time he did fight. Because so many resources had been squandered in 1639, the Scots gained the upper hand. Although many Englishmen considered the Scots savages, they were not eager to fight against sincere fellow Protestants. *See* Mark Charles Fissel, The Bishops' Wars: Charles I's Campaigns against Scotland, 1638-1640 (1994); Stater, at 48-60.

The Anglo-Scottish war provided the opportunity for a 1641 Catholic uprising in Ireland. The next year, the English Civil War began. The British Civil Wars (also known as the Wars of the Three Kingdoms) in Ireland, Scotland, and England continued until 1653, when a parliamentary army crushed the last resistance in Ireland. Subwars included the First and Second Bishops' Wars, the Irish Confederate Wars,

the First, Second, and Third English Civil Wars, and Oliver Cromwell's conquest of Ireland. Some civil wars have two sides, like the American Civil War (Union vs. Confederacy) but the British Civil Wars had multiple sides, and alliances shifted frequently.

The proximate cause of the English Civil War was control of the military. Carlton, at 185. King Charles and Parliament each thought they had the superior power over the militia and the army. Once Charles started the war with Scotland, he found that he needed more money, so he had to summon Parliament in April 1641. Parliament was willing to give him the money, but not unconditionally, so he dismissed the Short Parliament after three weeks. He found that he had to summon Parliament again that November. It would become the Long Parliament. As parliamentary resistance to Charles intensified, Charles was outwardly open to reform, but the Queen and he were busy trying to convince the army to carry out a coup, and to convince foreign governments to send armies to suppress the opponents of royal absolutism. Trevelyan, at 187-94.

Charles was angry that Parliament had sent him the Grand Remonstrance in November 1641, which complained about his many abuses of power. He was outraged that Parliament published it for the public to read. In early January 1642, he attempted a military coup, marching with 400 men to arrest five of his leading parliamentary opponents. Tipped off, they escaped, and Parliament had no doubt that Charles intended to rule by force and not by law. The trained bands of London and the surrounding area were called forth by Parliament for its defense. Charles found his position in London untenable and fled to Oxford to raise an army by which he would subdue Parliament. John Forster, Arrest of the Five Members by Charles the First (1860); Trevelyan, at 198-200.

On May 17, 1642, Parliament declared that no one could take up arms based on the king's command. 2 Cobbett's Parliamentary History of England 1235 (1807).[67] Parliament also passed a militia bill to suppress the Irish rebellion that had begun in 1641, and in which thousands of Protestants had been massacred. The bill contained a provision giving Parliament the right to appoint military officers. "By God, not for an hour!" the king thundered when a parliamentary delegation asked him to give the royal assent to the bill.[68] Edward Hyde, Earl of Clarendon, The History of the Rebellion and Civil Wars in England 589 (1701-14).

In Charles's mind, the militia was, next to conscience, "the fittest subject for a King's Quarrel; for without it Kingly power is but a shaddow." Charles I, *Directions for my Uxbridge (Commissioners), in* The King's Cabinet Opened 26-27 (1645) (secret papers of Charles that were captured and published).

Although Charles vetoed the militia bill, Parliament said that the militia bill was law anyway, as an "ordinance" rather than a statute. The Militia Ordinance gave Parliament the power of appointing lords lieutenant, a power that Parliament swiftly exercised to put its political allies in charge. Under James I, no one had minded that lieutenancy had no statutory basis, and was just the monarch's assertion of supposed royal prerogative. But when the lieutenancy had made itself unpopular

67. Available at archive.org.

68. The monarch vetoes by denying "the royal assent." The last exercise of this royal power was in 1708, when Queen Anne vetoed a bill to re-establish the Scottish militia.

as an instrument of Charles I's excesses, the absence of statutory authority made it an easy target for Parliament. *See* Constitutional Documents of the Puritan Revolution, at 245 (Mar. 5, 1642) (Militia Ordinance); Stater, at 61-63. Parliament and Charles issued conflicting orders about who was in charge. *See* 2 Stuart Royal Proclamations, at 767 (May 27, 1642) (forbidding militia and trained bands to follow orders from Parliament); Declaration of Lords and Commons (June 6, 1642), in Constitutional Documents of the Puritan Revolution, at 254 (June 6, 1642) (no one who obeys parliamentary orders may be arrested by someone executing the king's warrant); *cf.* 2 Stuart Royal Proclamations, at 781 (July 4, 1642) (no one may seize the king's magazines).

a. Arms and Ideology During the Civil Wars

Charles left London to raise an army to suppress Parliament. Lacking any statutory authority, he relied on the (allegedly still valid) royal prerogative medieval power to levy Commissions of Array. The dubious basis of the King's military authority made many reluctant to follow the King's orders. *See* Joyce Lee Malcolm, Caesar's Due: Loyalty and King Charles 1642-1646 (1983). Charles began the English Civil War on August 22, 1642, raising the standard "Give Caesar his due!" Carlton, at 120-21. The standard evoked Jesus' statement to his followers that they should pay taxes to the Romans. Roman coinage depicted the Roman Emperor, so Christians should "Render unto Caesar the things that are Caesar's, and unto God the things that are God's." *Matthew* 22:15-22; *Mark* 12:13-17; *Luke* 20:20-26.

But what was due to Caesar or any other king? Absolute obedience because Charles ruled by divine right? Or obedience only to the extent that the king ruled according to the law, for true law comes from true God? The latter view was articulated in 1644 by the Scottish Presbyterian Samuel Rutherford in his book *Lex, Rex, or the Law and the Prince*. The point of the title was that the law precedes the king; the monarch must obey the law. *Lex, Rex* refuted the royal absolutists who claimed *rex est lex loquens*—the king is the law speaking. Lord Chancellor Ellesmere, *The Speech of the Lord Chancellor of England, in the Exchequer Chamber, Touching the Post-Nati, in* Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere 248 (Louis A. Knafla ed., 1986). *Lex, Rex* was built on the intellectual foundation of *Vindication Against Tyrants*, a 1579 French Protestant treatise, which in turn was built on Catholic writing about Just Revolution. *See* online Ch 21.D.2.a, 21.C.3. In 1690, a half-century after *Lex, Rex*, John Locke's *Two Treatises of Government* (Section K.2) would elaborate *Lex, Rex* in secular terms. Government contrary to law is merely a high-level form of organized violent crime and may be resisted with armed force when necessary. So thought the parliamentary forces in 1642, and so thought the Americans of 1776.

King Charles I lost the war, was captured, and then violated the agreement under which he was being held, by attempting to overthrow Parliament. Conniving, dishonest, and dangerous, Charles Stuart was sincerely devoted to his own divine right of power. He was tried by a special parliamentary court and executed on January 30, 1649. Parliament abolished the office of king, abolished the House of Lords (the upper house of Parliament, representing the high nobility), and declared a commonwealth. The monarchs of continental Europe were outraged. In defense of the deposition of Charles, John Milton wrote the book *The Tenure of*

Kings and Magistrates, which argued that monarchs do not rule by divine right, but only by the consent of the people.

The events became vivid in the American mind. On July 6, 1776, a special committee of the Continental Congress met to create the Great Seal of the new United States of America. Benjamin Franklin proposed that the Great Seal bear the motto of John Bradshaw, the head of the court that had tried Charles: "Rebellion to Tyrants is Obedience to God."

When the Stuarts were out of power, the press and religion were freer, and the idea of the armed people was in favor. Thus, the year 1642 saw the first publication of *Maxims of State*, a book by the late Sir Walter Raleigh (ca. 1554-1618). Raleigh—a great adventurer, soldier, and historian—had analyzed arms control in world history. Following Plato and Aristotle (online Ch. 21.B.1.b), and adding modern examples, Raleigh explained that the form of government would determine the arms control laws, and vice versa. In a good monarchy, which Raleigh thought to be the best form of government, the government will "stir up the people, if they grow secure, and *negligent of Armour*." But care must be taken not to create too many false alarms, lest the people not respond to a genuine danger. Walter Raleigh, Maxims of State 34 (W. Bentley 1651).

According to Raleigh, in an oligarchy, the rich are compelled to have arms, while the poor are not. This is supposedly a hardship for the rich and a benefit for the poor, but it means that the poor are excluded from political power. *Id.* at 18, 53-54. In overt tyranny, "Tyrants (which allow the people, no manner of dealing in *State* matters) are forced to bereave them of their wits and weapons, and all other means by whereby they may resist, or amend themselves," as in Russia and Turkey. *Id.* at 6-7. The overt tyrant's means are to "forbid learning of liberal Arts, and Martial exercise, As in the *Russe* [Russian] *Government*, to *Julian* the *Apostate* [a Roman emperor] dealt with Christians. . . . To unarm his people of weapons, money, and all means, whereby they may resist his power." *Id.* at 43-44.[69]

The shrewd tyrant will be more subtle: "To unarm his people, and store up their weapons, under pretence of keeping them safe, and having them ready when service requireth, and then to arm with them, such as and so many as he shall think meet, and to commit them to such as are sure men." *Id.* at 49. Similarly, a new government that has taken power by force, and that has shaky legitimacy, will claim to be a protector rather than a tyrant. It will aim to make the people "disused from the practice of Arms, and other Exercises which increase courage, and be weakened of *Armour*, that they have neither spirit nor will to rebel." *Id.* at 40.

When Raleigh had written *Maxims* decades earlier, he was subtly criticizing the select militia of the Tudors and Stuarts. The 1642 publication of *Maxims* seemed to indicate that England's new government was committed to liberty. Yet over time, England's new government would become more like its Stuart predecessor.

b. Arms and Arms Laws of the Interregnum

In the early 1650s, the British shortage of saltpeter was solved. The British East India Company—a private company with very close ties to the government—was

69. Flavius Claudius Julianus (reigned 361-63A.D.) attempted to reverse the Christianization of the Roman Empire, and to restore the old Roman gods to their former status.

colonizing the Bengal area in India. The area turned out to have huge quantities of natural saltpeter. Eventually, 70 percent of global trade in saltpeter would come from India. India's abundance freed the British people of the vexations of the saltpetermen.

The British Civil Wars were by far the bloodiest ever fought on British soil, and on a per-capita basis, among the bloodiest anywhere. Ireland suffered worst, with about a fifth of the population dead by the end of the wars.

As is common during wars, many arms fell into civilian hands. Some were scavenged from battlefields. The men in Charles's army often sold their firearms to buy themselves food. *See, e.g.*, 2 Stuart Royal Proclamations, 828, 829 (Dec. 14, 1642) (noting the "great store" of arms "lost, sold, and left" in Worcester County by the king's army and the "Army of the Rebells"); *id.* at 842 (Jan. 5, 1643) (many soldiers in Oxford, where the king's army was keeping winter quarters, had sold, pawned, or negligently lost their arms; subjects should return them to the king); *id.* at 871, 872 (Mar. 10, 1643) (contrary to the king's orders, transfers of arms from the king's army to civilians "Continue, and increase"); *id.* at 890 (Apr. 22, 1643) (previous orders that people of Oxford should bring their arms to the king have not been "particularly observed"); *id.* at 1031, 1032 (ca. Apr. 30, 1644) ("many Countreymen have in theire Custody diver Pistolls Carabines Musquetts and other Armes" lost or taken during skirmishes between the king's army and the rebels; offering to pay for arms that are turned in; issuing threat against soldiers who pawn their arms).

Even before the wars, government-owned arms frequently had found their way into nongovernment hands. *See, e.g.*, 2 Stuart Royal Proclamations, at 174-75 (Dec. 8, 1627) ("great quantities" of arms and ammunition "have heretofore been, & still are dayly purloined, stolen, imbezelled, and conveyed away" by soldiers and sailors), 190 (Mar. 9, 1628) (same problem for government-owned militia arms; requiring such arms to have special markings).

Parliament remained interested in game laws. One Parliamentary order authorized warrantless search and arrests for people who hunted illegally, and for people who possessed greyhounds or "setting dogs" but who did not meet the ten-pound annual income requirement for hunting. The order said nothing about firearms possession by nonpoachers. Hamilton, Quarter Sessions, at 162.

The volunteers and militia who had fought for Parliament were eventually turned into a large and very capable professional force, the New Model Army. The head of the army was Oliver Cromwell, who ultimately became a military dictator (according to his critics), styling himself the "Lord Protector." Cromwell was a Puritan; at the time, Puritans were a faction within the Anglican Church, not a separate denomination. In 1647, Parliament ordered the army to disband, but it refused, mainly because Parliament had not paid overdue wages. Trevelyan, at 247. In 1648, moderate members of Parliament were expelled. Although the Rump Parliament still sat, Cromwell was in charge, by force of arms. In 1655, Cromwell got rid of the lords lieutenant, and divided England into 11 military districts, each of them ruled by a high-handed, oppressive major-general appointed by Cromwell. Stater, at 69-70.

The standing army that was supposed to defend the self-government of Englishmen had de facto replaced civil government with a military one. As educated Britons and Americans knew, the same thing had happened in classical

Rome, when the Republic was replaced by an Empire in which power belonged to whichever despot the army chose. *See* online Ch. 21.B.2. For centuries to come, the result of the British Civil Wars would be one of the foremost reasons why many Anglo-Americans distrusted standing armies. British history is one reason why the U.S. Constitution requires that a civilian—the President—and not a military man, be the commander-in-chief of the armed forces. U.S. Const. art. II, § 2.

Meanwhile, the Rump Parliament expanded Charles I's program of using a select militia for political repression, to surveil and disarm critics of the government. Malcolm, To Keep and Bear Arms, at 24-27.

Cromwell's select, oppressive militia and his standing army dictatorship were implicitly criticized in James Harrington's 1656 *The Commonwealth of Oceana*. Speaking for both radical libertarians and for country squires, Harrington expressed the conventional wisdom of the opponents of a standing army. Drawing on and advancing the militia ideology of the Renaissance Italian city-states (online Ch. 21.D.1), Harrington argued that a free society rests upon the foundation of small farmers who own their own land. The virtuous yeoman farmer, bringing his own arms to duty in a popular militia, is the best security of a free state. Unlike a standing army, a popular militia would never tyrannize its native land. Indeed, a militia could overthrow a despot. Unlike hired mercenaries or professional soldiers, the militiaman had his own country to fight for, and was therefore the best defense of a free state against foreign invasion. Harrington's ideas would be embraced by the Founders of the American republic.

Cromwell died in 1658 and was succeeded by his not especially competent son Richard ("Tumbledown Dick"), who was unable to hold power. Fearing counterrevolution, the Rump Parliament took gun control to a new extreme in 1659, demanding that all householders register all their arms, ammunition, and horses with local governments. 2 Acts and Ordinances of the Interregnum, 1642-1660, at 1317-19 (C.H. Firth & R.S. Rai eds., 1911).

With England on the brink of another civil war, in 1660 the head of the army invited Charles II, son of the executed Charles I, to return from his exile in France and resume the throne. Before giving Charles II the crown, Parliament made no effort to extract from him any concessions about civil liberty or the rule of law.

3. Charles II and James II: Arms Prohibition and the Glorious Revolution

Within weeks of the Restoration, King Charles II ordered gunsmiths to report all gun sales, and banned arms imports. Malcolm, To Keep and Bear Arms, at 42-43 (Privy Council orders). Another order forbade the import of all firearms and firearms parts. *Id.* at 48. A 1661 Militia Act declared that the king had the sole right to control the militia and all other military forces. The lords lieutenant were recreated, and finally put on a solid statutory foundation. 13 Charles II, stat. 1 ch. 6 (1661) (also immunizing persons who had seized arms from supporters of the commonwealth). A more thorough Militia Act of 1662 reorganized the militia, reaffirmed the king's unilateral power, and also authorized the king's agents "to search for and seize all arms" whom the lords lieutenant or their deputies considered dangerous. 14 Charles II ch. 3 (1662).

Before 1642, the lords lieutenant had generally been apolitical, and mainly concerned with maintaining harmony within their counties. But in the Restoration, they were chosen for political correctness. Lieutenants now needed royal approval for whom they appointed as deputy lieutenants. In imitation of the major generals under Cromwell, the lords lieutenant were tasked with using the militia to suppress political and religious nonconformists, including by confiscating their firearms. However, as the years passed, militiamen were often reluctant to perform the duty, especially against Dissenters — Protestants who did not submit to the Anglican Church. Some militiamen called out to intimidate the king's political opponents deserted at the first opportunity. *See* Malcolm, To Keep and Bear Arms, at 44-47; Braddick, at 227-31; Stater, at 66-160.[70]

Unbeknownst to the public, pursuant to the 1670 Secret Treaty of Dover, Charles II began receiving a large annual bribe from the king of France, in exchange for Charles's covert promise to ally with France and to reimpose Catholicism as the state religion. The bribe helped Charles build up a standing army for himself, without needing to ask Parliament for appropriations. Malcolm, To Keep and Bear Arms, at 67. The massive French bribery of Charles, his courtiers, and members of Parliament is a basis for the Foreign Emoluments Clause of the U.S. Constitution, which forbids federal officers to receive "any present, Emolument, Office, or Title, of any kind whatever, from any King Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8.

As for the soldiers in the former New Model Army, in 1670 Charles ordered them to stay away from London and forbade them to ride armed for six months. *Id.* The order indicates that in 1670, the old Statute of Northampton (Section F.1) from 1328 was not being interpreted or applied as a general ban on arms carrying.

a. The Game Act of 1671

Notwithstanding a century and a half of gun control by Tudors, Stuarts, and the Rump Parliament, as of the early 1670s, "it was widely accepted that guns were easily purchased in London." Even servant girls could buy small handguns, which had been formally illegal since the proclamation of James I in 1613. Schwoerer, at 135. Small handguns were also prohibited under the generally ignored minimum length rules of Henry VIII's 1541 statute. Section G.2.

Under Charles II, Parliament initiated the strictest gun control program England had ever known. The 1671 Game Act forbade the vast majority of the population from hunting, and barred nonhunters from owning guns or bows.[71] For centuries, English law had mandated ownership of particular types of bows, edged weapons, and firearms. For a millennium, the monarchy had worked to ensure that Englishmen would own arms and be expert in their use. Now, Charles Stuart

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70. After the Restoration, "nonconformist" and "dissenter" were interchangeable. A "dissenter" would be any Protestant who did not accept the Church of England. Previously, "nonconformist" had a narrower meaning, applying to Presbyterians and Congregationalists who accepted the doctrines of the Church of England, but who would not conform to certain Anglican practices. Goldie, *in* 6 Entring Book, at 258.

71. The previous law, from 1609, had allowed hunting by anyone with an annual income of at least 40 pounds, from any source. Malcolm, at 71.

wanted the English people disarmed. His new law authorized daytime searches of any home suspected of holding an illegal gun. 22 & 23 Charles II ch. 25 (1671).

To some in Parliament, the Game Act was more about hunting than about firearms. The British Civil Wars (Section H.2) had devastated England's many large forests. The Royal Forests had been harvested to build ships, or to provide fuel for the furnaces that built cannons. Private forests had been drastically thinned to pay the taxes that the various governments had imposed to feed their armies, and to pay the fines that were levied on whoever was out of political favor at the moment. "[G]ame had been destroyed wantonly, parks were ravaged of their deer." Kirby & Kirby, at 247. Falconry and hawking (using trained birds to hunt smaller birds) were devastated.

The nobility adapted by using fowling pieces (similar to shotguns) to hunt birds in flight. Although Charles's 1661 order had forbidden arms imports, excellent fowling pieces from the continent poured into England. Shotgun hunting became "almost in an instant the height of the mode." John Nigel George, English Guns and Rifles 63-65 (1947). Many in the upper classes still loved their hawks and falcons, but in the subsequent decades, marshes and fens were turned into cultivated land; and therefore herons and water fowl diminished, depriving the apex predator birds of natural prey. Gladys Scott Thomson, Life in a Noble Household 1641-1700, at 237 (1937).

Foxes had formerly been considered "vermin"—anyone could kill them but hunting them was not an activity fit for gentlemen. Now, chasing foxes on horseback while being led by trained hounds became popular. *Id.* The long chase of a fox hunt would often take the owner off his own property, and onto the property of others—sometimes even across county lines.

As previously described, English kings from William the Conqueror onward had asserted they owned all the wild animals, and that nobody could hunt without their permission—especially in "the king's forests," huge tracts of land directly owned by the king. The forest laws directly regulated these places, but the monarchs thought that the principle applied everywhere else, too. Kirby & Kirby.

There were many legal disputes about whether a tenant needed his landlord's permission to kill game on the tenant land, and whether a noble needed permission to hunt on his tenant's land or on someone else's land. The overt purposes of the 1671 Game Act were to strengthen hunting rights of the nobility, and to stop hunting by commoners, which had become common during the Interregnum. *Id.* Preventing future revolutions may have been an unexpressed purpose.

The 1671 Game Act greatly increased the annual income qualification for hunting, to 100 pounds. To exclude wealthy urban merchants, the new act required that the income had to come from land, rather than from trade or other sources. Although the Game Act did not repeal trespass laws, it removed any practical punishment for gentry who entered other people's lands to hunt. Now, without need for permission from kings or neighbors, the gentry could hunt wherever and whenever they wished. The Act helped the rural gentry reassert its social superiority, following the disruptions of the British Civil Wars and the Interregnum.

Besides being able to hunt on other people's land, the gentry were empowered by the new Game Act to enforce the game laws, to appoint gamekeepers to assist in enforcement, and to allow their social inferiors to hunt, if the gentry so

chose. In other words, a noble could allow a middle-class tradesman in his shire to hunt a few times a year on the noble's land. Granting permission to hunt (and therefore to keep arms) was an important part of the network of deference and generosity at the heart of social relations in rural England.

The 1671 Act delegated nearly limitless discretion to the rural gentry. If a noble wanted to reinforce friendships by allowing the middle class to hunt, he could do so. If he wanted to get an easily obtained warrant and rummage through his tenants' houses looking for firearms, bows, or nets, he and his gamekeepers could do that, too. P.B. Munsche, Gentlemen and Poachers: The English Game Laws 1671-1831, at 1-51 (1981). There are no known records of landlords actually using their broad powers to disarm their nonhunting tenants, although the landlords were often vigorous in tracking down poachers. Malcolm, To Keep and Bear Arms, at 87-88.

The 1671 Act had not specified any penalties beyond forfeiture of the hunting tool and paying the property owner for any damage. Thus, prosecutors who wanted additional punishment had to resort to older statutes. The 1328 Statute of Northampton was not invoked against arms carrying. Rather prosecutors relied on the Tudor statutes that banned hail shot (multiple small pellets), and penalized possession of crossbows and handguns if the possessor were below a certain income level.[72]

Much later, in 1831, the Game Reform Act repealed all the old laws. Henceforth, anyone could hunt on his own property, or on property where the owner gave permission to hunt. Not until 1880 was it legal for a tenant farmer to kill a hare on his leasehold without the landlord's permission. 43 & 44 Victoria ch. 47 (1880). After 1831, hunting by the lower classes on other people's property was controlled by the laws against trespass, for which the penalties were by then much more severe than for game law violations.

b. The Glorious Revolution

In February 1685, Charles II died, and was succeeded by his brother James II. Charles II had been quietly sympathetic to Catholicism and made a deathbed conversion to the faith. His younger brother James II was publicly an ardent Catholic. There was widespread fear that James II meant to turn the government into an absolutist regime similar to Catholic France.

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72. Munsche, at 241; John Christopher Atkinson, 6 Quarter Session Records 161 (n.d.) (case of Oct. 3, 1671; conviction of "a Rowsby gentleman, for shooting and killing hares with a hand gun charged with powder and hail-shot"), 213 (Apr. 28, 1674, "Barton yeoman for shooting at doves with a hand-gun charged with powder and hail-shot"); 216 (July 14, 1674, "Middleton laborer" for same, "and killing a pigeon"); S. C. Ratcliff & Harold Cottam Johnson, 6 Warwick County Records: Quarter Session Indictment Book, Easter 1631 to Epiphany 1674, at 195 (1941) (In 1673, "Abraham Heath of Birmingham, wheelwright, indicted for a keeping a handgun, and not having one hundred pounds a year"); William LeHardy, 1 County of Buckingham Calendar to the Sessions Records: 1678 to 1694, at 137 (1939) (indictment "for keeping guns, contrary to the statute of 33 Henry VIII"). Some courts became adept at finding technical reasons to dismiss the prosecutions. *See* Munsch 214 n. 45; *see also* Joseph Chitty, A Continuation of a Treatise on the Law Respecting Game and Fish 940-42, 946-47, 973, 977 (1816). As noted in Section G.2, the last known handgun-only conviction was in 1669; post-1669 cases included some known convictions for handguns with hail shot, and handgun-only indictments that do not report the disposition.

Most of the English people were fed up with changes of official religion. Henry VIII had broken from the Roman Catholic Church and established the Church of England (Anglican). Queen Mary (who reigned 1553-58) had switched Britain back to Catholicism. Her successor Elizabeth I (reigned 1558-1603) then reverted to the Church of England. Starting in 1642, the British Civil Wars (Section H.2) had changed the Church of England into a Puritan church. The Restoration had returned the traditional Anglicans to power in 1660. With every change, most people sheepishly complied, but those who did not were often persecuted. There was little appetite for yet another change in the established religion.

In 1686, Sir John Knight, an Anglican and a fierce political enemy of King James II, was acquitted for carrying a gun in a church. *See* Section F.3. Shortly after Knight's acquittal, King James II ordered full enforcement of the Game Act of 1671. Calendar of State Papers Domestic: James II, 1686-7, at 314 (E.K. Timings ed., 1964) (Earl of Sunderland to Earl of Burlington, Dec. 6, 1686. "The King having received information that a great many persons not qualified by law under pretence of shooting matches keep muskets or other guns in their houses, it is his pleasure that you should send orders to your Deputy Lieutenants to cause strict search to be made for such muskets or guns and to seize and safely keep them till further order");[73] Malcolm, To Keep and Bear Arms, at 104-05.

James II, like his elder brother Charles II, had every reason to fear an armed populace. The Rye House Plot to assassinate both of them was foiled in 1683. The Duke of Monmouth was the eldest of the many illegitimate children of Charles II (the "Merry Monarch") and his numerous mistresses.[74] Monmouth had been trying to maneuver himself onto the throne as the Protestant favorite. In June 1685 he and a small army he had raised in Holland attempted the Monmouth Rebellion in strongly Protestant southwest England. Under the leadership of General John Churchill, an ancestor of Winston, the army and militia quickly suppressed Monmouth. But James II took no chances. He asked Parliament to repeal the Habeas Corpus Act. When Parliament refused, he dismissed it. No new Parliament would sit during his reign.

The king attempted to build up his standing army. He stuffed the army with Catholic officers, especially at the highest ranks. The size of the standing army was increased from 8,565 to more than 34,000. Shrinking the militia, Charles II hoped it would wither as a threat to his power. *See* John Miller, *The Militia and the Arm in the Reign of James II*, 16 Historical Rev. 659 (1973). But with the militia, too, James II broke with the traditions of his predecessors. Under James I, Charles I, and Charles II, the lords lieutenant had been strongly Anglican and generally men of high stature in their counties. James II began replacing them with Catholics and with men of low rank—men who owed their position solely to the king, and not in part to their standing in their home county. The new men appointed by James II lacked the approval of

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73. Available at British History Online, http://www.british-history.ac.uk.

74. Some suggested that Monmouth was not the son of Charles II, but rather of Robert Sidney, another lover of the king's mistress Lucy Walters. Trevelyan, at 367. If so, Monmouth was the nephew of Algernon Sidney. Section K.3. Among the many certain extramarital descendants of Charles II was Lady Diana Spencer ("Princess Di"), whose oldest son, Prince William, is now second in line of succession to the British throne. Also extramaritally descended from Charles II is Camilla Parker Bowles, second wife of heir apparent Prince Charles, who would become Charles III should he ascend the throne.

the local people, and thus the ability to lead the militia effectively. The militia, which had been a powerful institution under Charles II, waned. Stater, at 161-74.

According to historian Charles Carlton, "nothing did the king greater harm than his policy towards the armed forces." Carlton, at 193. Soldiers were allowed to abuse civilians at will. Many feared that James was rapidly moving the nation into French-style absolutism.

During the Restoration under Charles II, Parliament had attempted to ensure Anglican control of government by enacting the Test Acts. They required appointees to government offices to take an oath swearing submission to the Church of England and denying transubstantiation.[75] 25 Charles II ch. 2 (1673); 30 Charles II, stat. 2, ch. 1 (1678). Transubstantiation is the Catholic and Eastern Orthodox doctrine that during communion, the bread and water are turned into the body and blood of Jesus Christ in a real sense, not only a symbolic one. To put Catholics in charge of the military, James II in 1687 announced that he was suspending the Test Acts. The courts allowed him to do so, holding that he had the unlimited "power to dispense with any of the laws of Government." *Godden v. Hales*, 89 Eng. Rep. 1050, 1051, 2 Show. K.B. 475 (1686). Shortly before the case was heard, King James had replaced 6 of the 12 judges. Goldie, at 276.

If James was going to oust the Church of England, there were not enough Catholics left in England to do the job. A century and a half of persecution had eliminated most overt Catholics except some wealthy families who had the resources to hold on. To fill the ranks of government with anti-Anglicans, James also announced the toleration of Protestant dissenters (Quakers, Presbyterians, etc.), who did not belong to the Church of England.

In theory, James's tolerance toward Catholics and non-Anglican Protestant dissenters was admirably liberal. The problem was that few people, including the dissenters, trusted the Catholic king's liberalism to last one minute longer than tactically necessary. Trevelyan, at 389-90. Catholic monarchs in continental Europe almost always persecuted non-Catholics. In 1685, French King Louis XIV revoked the Edict of Nantes, which had provided limited toleration of France's Protestant minority. (*See* online Ch. 21.D.2.a.) The Stuart monarchs had always been willing to ally with a wide variety of religious and political groups, had made strong promises of civil freedom to such groups, and had broken those promises the moment that the monarch found it convenient to do so.[76]

Through gun control, militia control, and a personally controlled standing army, the Stuarts had long been attempting to establish a monopoly of force. James

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75. The United States Constitution requires all government officials, at every level, to take an oath to support the Constitution, and specifically forbids any "religious Test" for holding office. U.S. Const. art. VI. The Constitution specifies the exact words of the presidential oath, and, in deference to Quaker sensibilities, allows a President to "affirm" rather than "swear" the oath, as the President chooses. U.S. Const. art. II, § 1.

76. When James had ascended the throne in 1685, he had immediately intensified the persecution of non-Anglican Protestants. "In England they were imprisoned, fined and ruined; in Scotland men were shot and women drowned. In this persecution James was following the desire of his heart; it was only when the breach with the [Anglican] episcopacy drove him to dissemble, that he took into his mouth Penn's noble doctrine of universal toleration." Trevelyan, at 384.

II was closer to achieving the goal than any of his predecessors. If he succeeded, the result might have been a French-style absolutist Catholic dictatorship, from which English people might never be able to escape. That, at least, was what many English feared.

People hoped that they could endure his reign, after which he would be succeeded by his Protestant daughters Mary and Anne, from his first marriage. But James's first wife was deceased, his new wife was Catholic, and in June she gave birth to a male, Catholic heir. People claimed that the baby, James Francis Edward Stuart, was not really a royal son, but had been smuggled into the royal bedchamber in a warming pan. Not confident that birtherism would keep the future James III off the throne, seven aristocrats ("the Immortal Seven") sent a letter to Mary's husband, the Protestant William of Orange, chief executive of the Dutch Republic. They urged him to invade England and depose James II. He was amenable to the idea, which would break the Anglo-French alliance that put the Dutch Republic in mortal peril.

The Dutch Armada caught the powerful "Protestant wind," and set sail under Dutch and English colors, with William's flagship bearing the motto "I will maintain the Protestant Religion and the Liberties of England." Edgar A. Sanderson, History of England and the British Empire 681 (1893); Marshal Mason Knappen, Constitutional and Legal History of England 447 (1942). While the Protestant wind kept King James's navy in port, William landed on the anniversary of the day the Gunpowder Plot had been foiled (that is, in the popular understanding, the day a Catholic coup had failed). Although William's invading army was far outnumbered, General John Churchill switched sides, and brought half the army with him. Some of the lords lieutenant also defected to William, and many of the rest, including the Catholic ones, kept the militia on the sidelines, rather than coming to assist James. Stater, at 175-82. James II fled to France and the forces still loyal to him collapsed. Total deaths in the Glorious Revolution were only 150. Carlton, at 195-96.[77]

Technically, Parliament could meet only when called by the monarch, and so when Parliament assembled on its own initiative in reaction to the Glorious Revolution, it did so as a Convention—an ad hoc body that performs a political function in lieu of a legislature. The question was who would be the new monarch: Mary, William, or both? The Convention eventually settled on both, but before deciding who the monarch would be, the Convention put the structure of government in proper order, by issuing a Declaration of Rights. William and Mary accepted the Declaration. Because only Parliament could pass a bill, when a new Parliament convened, it enacted the Declaration of Rights as the Bill of Rights. The new monarchs gave the royal assent.

The reforms re-established the system that the Convention considered to have been the norm before the despotic Tudors and Stuarts: limited monarchy, under the law and not above it, governing according to the English constitution. The

77. Catholic Austria and Spain, and even Pope Innocent XI favored the Calvinist William's invasion, because French King Louis XIV (the master and model of James II) was so powerful that he was a threat to all their independence. Trevelyan, at 394-95.

English constitution is not a single document, but rather a diverse collection of customs and understandings, as well as certain statutes of supreme importance, such as Magna Carta.[78]

Part of the despotism of the final years of Stuart rule had been wiping out local self-government — eliminating the charter of London, and the many other local charters and grants by which the English people had governed themselves in the counties and towns. The Stuart program had extended to North America, where Charles II and James II destroyed the colonial charters, and replaced the colonial legislatures with dictatorial rule by royally appointed governors. When Americans heard about the success of the Glorious Revolution, they deposed the Stuart governors, and restored balanced government. *See* Ch. 4.A.1.

4. The Bill of Rights

The Declaration of Rights was subsequently enacted by Parliament as the Bill of Rights. It is part of the English constitution. But as a statute, it can be changed by later Parliaments. The first part of the statute listed the abuses of James II and Charles II:

> 5. By raising and keeping a standing army within this kingdom in time of peace, without the consent of parliament, and quartering soldiers contrary to law.
> 6. By causing several good subjects, being protestants, to be disarmed at the same time when papists were both armed and employed contrary to law.

The second part of the Bill of Rights created positive laws to preserve what Parliament said were ancient rights:

> And thereupon the said Lords Spiritual and Temporal and Commons . . . do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties declare: . . .
>
> 6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against the law.
> 7. The subjects which are protestants may have arms for their defence suitable to their conditions and as allowed by law.

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78. From the period covered in this Chapter, documents that are often said to be part of the constitution are Magna Carta (1215) (Part D), Bill of Rights (1689) (Section H.4), Crown and Parliament Recognition Act (1689) (affirming the legality of the Glorious Revolution and the acts of the Convention), Act of Settlement (1701) (rules of succession to the crown, discussed in Section J.1, on Scotland), Acts of Union (1707) (joining Britain and Scotland under a single crown), and Act of Union (1800) (joining Great Britain and Ireland under a single crown).

1 Wm. & Mary, sess. 2, ch. 2 (1689).[79]

The right not to have standing armies in the kingdom was not ancient in the sense that any prior legal document had guaranteed the right, but it had been a long-established custom. Under feudalism, the king's tenants owed him military service (e.g., *X* quantity of mounted knights, *Y* quantity of pikemen, *Z* quantity of archers), but the service was usually limited to 40 days per year. If the king wanted an army for a longer campaign, he would have to pay for it. Although the king had his own revenue sources, only Parliament could impose or raise taxes. To get enough revenue to field a substantial army for more than 40 days, the king almost always needed to convince Parliament to vote for more taxes. The custom that the king could not have a long-term standing army in England without parliamentary consent was well-established; only because of the abuses of the Stuarts had it been necessary to express the rule in statute.

The quartering of soldiers in people's homes had been among the abuses denounced in the 1628 Petition of Right, to which Charles II had grudgingly given his royal assent. 3 Charles I ch. 1 (1628). But the view that forced quartering was tyrannical was much older than that. Only because the Stuarts had violated the ancient understanding had it been necessary for Parliament to address quartering in a written document. The point was worth making again, since both sides in the English Civil War (Section H.2) had quartered troops in the homes of political opponents.

As a written right, the right to arms was no more ancient than the 1606 Virginia charter, and its 1620 parallel for New England, but those were for Americans, not people in England. *See* Section H.1.c. Writings were not what made arms or anti-quartering ancient. They were ancient in the sense of British constitutionalism, in which long-standing unwritten traditions acquired the force of law. From Anglo-Saxon times until 1671, the English government had told Englishmen that they must be armed. As Fortescue and Raleigh had written, an armed populace was inherent in the British structure of government, and of any free government. The principle of the armed people had never meant that anyone could have any weapon; Richard II had outlawed launcegays for everyone, and class distinctions were deeply embedded in British life, including arms culture. Kings Charles II and James II had radically attacked the long-established order by attempting to disarm almost everyone under the pretext of the game laws. The Stuarts thus forced Parliament to affirmatively state as "ancient rights and liberties" what previously had been implicit social understandings. The Bill of Rights was a natural evolution from the unquestionable duty of Englishmen to keep and bear arms. "It is axiomatic that rights imply obligations; given time the reverse is also true." David R. Millar, The

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79. The Bill of Rights statute was enacted in January 1689. Under the calendar system that was used in England until 1752, the new year began on March 25 (the date of the Annunciation to the Virgin Mary). So the English who voted on the Bill of Rights considered January to be part of 1688. For simplicity, we cite the year at 1689, using the "New Style" calendar.

The first draft of the Bill of Rights was presented to the House of Commons on Feb. 2, 1689, titled "Heads of Grievances." Some of the items in that first draft were not included in the final version enacted by Parliament, such as "None of the royal family to marry a Papist" and "For repealing the Acts concerning the militia and settling it anew."

Militia, the Army, and Independency in Colonial Massachusetts 15 (Ph.D. diss. in History, Cornell U. 1967).

The surviving records of the English Bill of Rights' movement through Parliament are scant. We do know that the upper chamber, the House of Lords, changed the phrase "arms for their common defence" by deleting the word "common." The change oriented the right toward what everyone recognized as the natural law right of self-defense, and less toward militia service. Malcolm, To Keep and Bear Arms, at 119. However, as described below, the standard interpretations of the right in the eighteenth century did include the common defense against tyranny, a right that is most effectively exercised by the people collectively, and not by solitary individuals. Of course, the collective right would be a nullity if there were no right of individuals to possess arms.

The language "suitable to their conditions and as allowed by law" reserved to Parliament the authority to enact some regulations on arms. In this regard, the English Bill of Rights prefigured late nineteenth-century state constitutions, which guaranteed the right to arms while reserving some subjects for legislative discretion. *See* Ch. 7.I. The Bill of Rights did not apply in Scotland, which at the time had its own Parliament, and to this day maintains a separate legal system. Nor did Parliament choose to extend the English Bill of Rights to Ireland, which also had its own Parliament. According to Americans, the Bill of Rights did apply to the American colonies, because colonial charters guaranteed that Americans would enjoy all the rights of Englishmen. *See* Ch. 3.A.

5. Legislation and Litigation After the Bill of Rights

Catholics were a tiny percentage of the English population, and they were excluded from the right to arms because they were considered potentially disloyal and seditious, especially because of the frequent efforts of the Pope and of the Catholic monarchs in France and Spain to overthrow the English Anglican kings. Civil disabilities against Catholics had been the policy since the 1580s, formalized in the Act against Popish Recusants. 35 Eliz. ch. 2 (1592-93) (Catholics must register themselves with the government and may not travel more than five miles from their homes without a special license).

As previously noted, in 1610, King James I had ordered the seizure of all "Armour, Gunpowder, and Munition" belonging to "Popish Recusants." 1 Stuart Royal Proclamations, at 247-48; *see also* Dalton, *The Countrey Justice* (1622), at 94 (Justices of the Peace should confiscate arms of convicted "popish Recusants"); 2 Stuart Royal Proclamations, 736, 737 (Nov. 11, 1640) (seizure of arms from all convicted "Popish Recusants"). Recusancy was the criminal offense of failing to attend services of the Church of England.

Having established that Catholics had no right to arms, Parliament in 1689 did improve Catholics' situation. It allowed Catholics to own and carry arms (activities for which Protestants had a constitutional right) if they would swear a loyalty oath to the monarchy. For Catholics who would not swear such an oath, arms were allowed "for the defence of his House or person" if a justice of the peace gave permission. 1 William & Mary, Session 1, ch. 15, § 4 (1689). The small English Catholic

population was generally submissive, and so over the next two centuries, the many civil disabilities against English Catholics were gradually lifted.

The situation was very different in Catholic Ireland. The population there strongly supported James Stuart, and almost as soon as William of Orange landed in England, Jacobite forces in Ireland rose in revolt, to support King James. They took over almost all the island, and were joined by James II himself, along with a French army. As discussed in Section J.2, the British Parliament's reaction was to attempt to eliminate arms possession by Irish Catholics.

A 1692 Game Act omitted firearms from the list of prohibited devices in England. 4 & 5 William & Mary ch. 23 (1692). But it did not formally repeal the gun ban in the 1671 Act. In a 1693 debate on game law revisions, Parliament rejected an amendment to expressly allow Protestants to keep muskets in their houses for self-defense. Proponents said that "for the security of the government . . . all Protestants should be armed sufficiently to defend themselves." Opponents retorted that the amendment was procedurally out of order, and besides, it "savours of the politics to arm the mob," which "is not very safe for any government." The Parliamentary Diary of Narcissus Luttrell, 1691-1693, at 444 (Henry Horwitz ed., 1972) (Debate of Feb. 23, 1693).

The next year, Parliament repealed Edward VI's 1548 statute that had banned hail shot and had required people who met the income requirements for handguns and crossbows to register with a justice of the peace. 6 & 7 William III ch. 13 (1694) (noting that these laws "hath not for many yeares last past been putt in execution but became uselesse and unnecessary yett neverthelesse several malicious persons have of late prosecuted several Gentlemen qualified to keep and use Guns").[80]

According to game law historian P.B. Munsche, the repeal of the 1548 statute made prosecutions for the rest of the Tudor gun laws impossible. Having no enforceable gun-specific statute, some prosecutors tried to use a general term in the game laws, by "arguing that guns were 'engines' to take game." Munsche, at 214.

Although it is true that firearms can be engines for hunting, courts rejected attempts to prosecute firearms ownership where there had been no illegal hunting. For example, in 1704 a court held that searches of a commoner's home for dogs or nets were permissible, and so was confiscation of guns used for hunting. However, no Protestants might "by virtue hereof disturbed in keeping arms for their own preservation." Hamilton, Quarter Sessions, at 269.

In the Game Act of 1706, Parliament omitted guns, and forbade greyhounds, setting dogs, lurchers,[81] "Tunnells or any other Engine to kill and destroy game." 6 Anne ch. 16 (1706) (in some editions, 5 & 6 Anne ch. 14). The legislative history indicates specific intent not to interfere with gun ownership. Malcolm, To Keep

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80. Following modern practice in the United Kingdom, we use the modern English abbreviations of the regnal names. In the original, "James" is abbreviated "Jaq" (for the French "Jacques."). Likewise, we write "William," but the original cite was "Gm." (for the French "Guillaume").

81. A lurcher is a cross of certain other breeds, usually involving a greyhound. The game laws usually applied only to sporting dogs, and not to other types, such as terriers (for killing vermin) or working dogs (e.g., herders, including sheepdogs or collies).

and Bear Arms, at 128. Still unwilling to put an explicit statement of arms rights into the game laws, Parliament in 1730 rejected a game law amendment "for allowing Persons, unqualified to kill Game, to keep Guns, for Defence of their Houses." 21 Journal of the House of Commons 566 (May 2, 1730).

Meanwhile, the courts continued to distinguish between hunting-only items (illegal per se, for people below the income line) and firearms (illegal only when used for hunting). A 1722 case contrasted a lurcher dog, which "could only be to destroy the game, and the keeping of a gun, which a man might do for defence of home." *Rex v. Filer*, 93 Eng. Rep. 657, 657, 1 Strange 497 (K.B. 1722). In 1739, the King's Bench held that the "engine to destroy game" did not encompass firearms, unless the prosecutor proved that the firearm had been used for hunting. The Game Act did "not extend to prohibit a man keeping a gun for his necessary defense." Indeed, "the Legislature did purposely omit the word 'gun,' because farmers are generally obliged to keep a gun." *Rex v. Gardner*, 87 Eng. Rep. 1240, 1241, 7 Modern 278 (K.B. 1739).

Relying on *Rex v. Gardner*, the King's Bench in 1752 explained "It is not to be imagined, that it was in the intention of the legislature," in enacting the 1706 Game Act, "to disarm all the people of England." Greyhounds and setting dogs have no purpose but for hunting, so an indictment need not allege that they were used for hunting. "But as Guns are not expressly mentioned in that Statute, and as a Gun may be kept for the Defence of Man's House, and for divers other lawful purpose," an indictment must allege that the gun was actually used for hunting. *Wingfield v. Statford & Osman*, Sayer 15, 96 Eng. Rep. 787; 1 Wils. K.B. 314, 95 Eng. Rep. 637 (K.B. 1751).[82]

By the next century, according to the leading game law treatise, "the *keeping* of a gun or dog is *prima facie* lawful."[83] Or as the editor of a late eighteenth-century edition of Blackstone put it, "everyone is at liberty to keep or carry a gun, if he does not use it for the destruction of game." 2 William Blackstone, Commentaries 412 n.2 (Edward Christian ed., 12th ed. 1793-95).

In sum, "There is, in particular little evidence that Englishmen as a whole were 'disarmed' by the game laws. Some undoubtedly had their guns taken from them; others may have been forced to hide theirs temporarily." Assertions of widespread disarmament are contradicted "by the known popularity of shooting matches at this time and by the openness with which unqualified men acknowledged their possession of firearms." Munsche, at 81. "Indeed, given the haphazard system of law enforcement in the late seventeenth and early eighteenth centuries, disarmament of the population was a remote possibility at best." *Id.* "But if a man's gun was relatively safe, his dog was not. Country gentlemen did not see the keeping of setters, lurchers, and greyhounds as necessary for the defense of English liberty." *Id.* at 82. Enforcement of the laws against commoners owning sporting dogs may have been aided by the fact that dogs are much harder to conceal than guns.

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82. The case was reported by two different reporters. The quote is from the longer report, by Sayer, which is reprinted in volume 96 of English Reports.

83. Joseph Chitty, Continuation of A Treatise on the Law Respecting Game and Fish 133 n. g (1816), citing *Read v. Phelps*, 33 Eng. Rep. 846, 15 East 271 (K.B. 1812); *see also* Richard Burn & George Chetwynd, 2 The Justice of the Peace and Parish Officer 547-48 (25th ed. 1830) (discussing *Phelps* and other dog cases).

To control the standing army, Parliament found three practical solutions. First, revisions in the tax system cut the percentage of government revenue that went directly to the king down to 3 percent, compared to a high of 75 percent under Charles I. Second, Parliament ensured that the king would have to call a Parliament every year. To maintain discipline, the military needed to operate courts martial, and such courts were legal only because the Mutiny Act so authorized. Because the Mutiny Act always had a one-year sunset clause, the king needed to summon annual Parliaments to renew the Act. Carlton, at 216-19. The U.S. Constitution addresses similar issues by providing fixed dates for Congress to assemble, and by limiting appropriations for the army to no more than two years. U.S. Const. art. I, § 4, *amended by* U.S. Const. amend. XX, § 2, art. I, § 8, cl. 12; *cf.* United States, Declaration of Independence (1776) ("He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures. He has affected to render the Military independent of and superior to the Civil Power").

Finally, commissions for high-ranking officers were placed on the open market, where they could be bought and sold. Because of the rules of primogeniture, a landowner's real estate had to pass undivided to the eldest son; thus, younger sons needed something to do. Buying themselves a commission in the military was one outlet. The higher the rank, the more expensive the commission. Military leadership was thereby kept in the hands of the aristocracy, eliminating the possibility that the king could appoint all the officers, who would be loyal only to him personally. Carlton, at 183-87.

With the Stuarts gone, the freedom of the press expanded substantially. Now allowed was publication of pro-militia writings such as Algernon Sidney, Discourses Concerning Government (1698) (Section K.3); John Toland, The Militia Reformed (1698); Anonymous [probably John Toland, Walter Moyle, & John Trenchard], An Argument Showing that a Standing Army is inconsistent with a Free Government, and absolutely destructive to the Constitution of the English Monarchy (1697), and A Short History of Standing Armies (1698). For a more skeptical view of militias, see Andrew Fletcher, Discourse Concerning Militias (1697).

The religious conflict in England was much reduced by the Act of Toleration, 1 William & Mary ch. 18 (1689). It offered freedom of worship to all Protestants, but did not change the laws preventing non-Anglicans from holding government offices. Those laws would gradually be repealed during the following two centuries.

For more on the seventeenth-century militia conflict, see, in addition to the sources cited earlier, Lois G. Schwoerer, "No Standing Armies!" The Antiarmy Ideology in Seventeenth-Century England (1974). For a survey of the complicated politics of the Stuart period, see Peter Ackroyd, Rebellion: The History of England from James I to the Glorious Revolution (2014).

6. James Madison and Other Americans on the English Bill of Rights

In 1789 in the First Congress, James Madison introduced a set of constitutional amendments, which would become known as the Bill of Rights. Madison's notes for his speech introducing the amendments showed that he viewed the English Bill of Rights as a good start, but too weak. He wrote that his amendments "relate 1st. to private rights." A Bill of Rights was "useful—not essential." There was a "fallacy

on both sides—especy as to English Decln. of Rts." First, the English Rights were a "mere act of parlt." In other words, because the English Bill of Rights was a statute, it could be overridden, explicitly or implicitly, by any future Parliament. Thus, the Bill of Rights constrained the king but not future Parliaments.

Second, according to Madison, the scope of the English Bill of Rights was too small; it omitted certain rights and protected others too narrowly. In particular, there was "no freedom of press—Conscience." There was no prohibition on "Gl. Warrants" and no protection for "Habs. corpus." Nor was there a guarantee of "jury in Civil Causes" or a ban on "criml. attainders." Lastly, the Declaration protected only "arms to Protestts." James Madison, Notes for Speech in Congress Supporting Amendments, June 8, 1789, *in* The Origin of the Second Amendment 645 (David E. Young ed., 1991).

As discussed above, the arms control laws of the Tudors and Stuarts were failures. Arms ownership by people who did not meet the statutory income qualifications was widespread, and usually not necessary to conceal. However, Americans tended to understand the arms situation based on the English statutes, so they thought that the English had been mostly disarmed. For example, the leading legal treatise in the Early Republic was St. George Tucker's American Blackstone (Ch. 5.F.2.a). Tucker added many footnotes to Blackstone's text (Section K.1), as well as a volume on the American Constitution, to describe how American law differed from British law. Tucker's analysis of the American right to arms denounced the English game laws for having disarmed almost the entire population. *See* Ch. 5.F.2.a. Other leading authors of treatises on American constitutional law, such as William Rawle and Supreme Court Justice Joseph Story, agreed. They contrasted the robust American right with its feeble English counterpart. *See* Ch. 5.F.

An 1848 American book kept up the theme. It accurately described the harsh legal restrictions imposed in Ireland (Section J.2): "the lord-lieutenant also, under the power of certain acts, deprived the people of Dublin and many other parts of Ireland, of their guns, pistols, and other arms, a few privileged and licensed persons only being authorised to keep weapons for their defence. Persons having arms contrary to law are liable to be imprisoned. . . ." R. W. Russell, America Compared with England 147 (1848).

The book argued that even in Great Britain, freedom of the press was insecure, and the right to arms was infringed by laws against armed assembly (Section F.6):

> Any landed aristocrat, called a justice of the peace, may treat the innkeeper as a criminal if he allows any newspaper to be read in his house which tends to make people dissatisfied with the existing order of things. . . . As to the right of bearing arms.—Any person seen walking in step and learning to act together, may be arrested . . . as criminals and transported. The subject of English liberty is one which ought to be exposed fully. It is time for the people of this country and for the nations of Europe to be informed of the actual extent of the boasted liberty of Englishmen. The prevailing fallacy is productive of much positive mischief. Americans, French, Germans, and Italians, are electors and national guards-men, whilst the British and Irish are treated as unfit to be freemen. Any danger is preferred to that of allowing the people to learn the use of arms; they are consequently as little to be feared as Hindoos. . . .

Id. at 148. The language about Hindus was a reference to the British colonial policy of disarming the people of India. In the American view, arms rights were among the many ways in which liberty was real in America, and sometimes only nominal in the United Kingdom.

NOTES & QUESTIONS

1. **CQ:** As part of the modern debate about the Second Amendment, there is vigorous argument about the meaning of the English Bill of Rights' clause 7, guaranteeing Protestants "arms for their defence." Justice Scalia in *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Ch. 11.A), saw the English clause as an ancestor of the Second Amendment, guaranteeing a personal right to arms for self-defense. Dissenting in *Heller*, Justice Stevens dismissed the English right as not useful in interpreting the Second Amendment. Justice Breyer, dissenting in *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (Ch. 11.B), argued that the clause means that a militia is to be preferred to a standing army, and that it recognizes no individual right. Which interpretation do you find persuasive? For more, see Malcolm, To Keep and Bear Arms (the right was for personal defense); Patrick J. Charles, *The Right of Self-Preservation and Resistance: A True Legal and Historical Understanding of the Anglo-American Right to Arms*, 2010 Cardozo L. Rev. De Novo 18 (2010) (the Bill of Rights meant that Parliament and not the king could arm the militia).

2. Some argue that restrictions from English history are implicitly incorporated in the Second Amendment and can be imposed today in the United States. *See, e.g.*, *Aymette v. State*, 21 Tenn. (2 Humph.) 154 (1840) (Ch. 6.B.2) (the minimum income restrictions of the 1671 Game Act are included in the Second Amendment but are negated by the Tennessee Constitution). Similarly, the 1328 Statute of Northampton is read by some modern scholars as prohibiting all arms carrying. Accordingly, the Second Amendment right to "bear arms" does not allow arms bearing outside one's property. Section F.5.

The contrary view is that James Madison himself wanted the Second Amendment to be stronger than its English predecessor. Although the legal history of the English right is important background to the Second Amendment, it does not set the limits of the American right. Similar issues arise in regard to the First Amendment. Justice Douglas wrote: "[T]o assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.'" *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Com. of Mass.*, 383 U.S. 413, 429 (1966) (Douglas, J., concurring) (quoting Henry Schofield, *Freedom of the Press in the United States*, 9 Publications Amer. Sociol. Soc. 67, 76 (1914)). Which view do you find more persuasive?

3. Suppose that the English history were considered authoritative for all Second Amendment issues. Would it be constitutional to impose arms restrictions based on religion? For example, to prohibit Muslims from possessing arms, or to require them to obtain licenses that could be refused, based on broad discretion of the licensing authority? Such laws would almost certainly be held to violate the Free Exercise Clause of the First Amendment. But suppose there were no Free Exercise

Clause. Would a Muslim Disarmament Act violate the Second Amendment? What about arms restrictions based on a person's income, such as the Tudor laws about handguns and crossbows? What if the laws did not explicitly limit arms ownership by annual income, but instead set fees for arms licenses so high that they were beyond the reach of poor people, and were burdensome to the middle class?

The right to hunt in America led to the adoption in the late nineteenth century of the North American Model for wildlife conservation. Ch. 7.G.6. Under this model, wild game belongs to the people (not to a king or a class) and is to be managed by the government as a public trust, so that game species thrive for the current generation and future generations. One of the trustee's duties is to make licensed hunting available to all the public, not just persons in certain economic classes. If the American right to arms were treated as identical to the English right to arms, what would become of the North American Model?

Another feature of the English right to arms seems to have been that regions that have rebelled may be disarmed, at least for a period of years. *See* Part J.1 & 2 (Ireland and the Scottish Highlands). Other than the Confederate States of America, can you think of any historic instances where such disarmament could have been applied in the United States? Any modern ones? There were riots in many large American cities from 1965-68. Would it have been constitutional to confiscate all firearms from the neighborhoods where the rioters lived? What about more recent riots?

4. *Dog control.* Besides restricting the ownership of hunting tools, the game laws restricted dog ownership. Why would anti-hunting laws include anti-dog laws? In England, the dog control laws were enforced more effectively than were the gun control laws. Could dog ownership be considered part of the right to arms? Does the answer depend on whether arms are for all legitimate purposes, including hunting (*Heller*) or only for "defence" (English Bill of Rights)? The English dog control laws were aimed at sporting breeds, and not at all dog ownership. Is a breed-specific ban for sporting breeds consistent with the English right?

CQ: Some American colonies and slave states had laws that banned or restricted firearms possession by slaves and sometimes by free people of color. Many of these laws applied with equal force to dog ownership and were not limited to specific breeds. Besides impeding hunting, what are some of the reasons that a government wanting to enforce a racial caste system would ban dog ownership, or require special licenses for the subordinate caste?

5. *Urine control.* Suppose that an American president issued an executive order similar to the Tudor-Stuart program for saltpetermen: Government officials can enter anyone's property and dig under buildings to collect saltpeter. Would there be any constitutional objections? Recall King Charles I's failed 1627 program for a national command economy of urine and dung—requiring that wastes be collected and transported to central locations to make saltpeter. Would a similar program in the United States be constitutional? Today, household human waste is usually transported off-site by municipal sewage systems. Some municipalities have processed the waste for use as agricultural fertilizer. Would there be any constitutional problem with a federal statute requiring that all waste be turned over to the federal government for gunpowder production? *Cf. Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding law against feeding one's own grain to one's own cattle). To

make saltpeter, the most efficacious human urine is from males who drink wine and strong beer. Can congressional powers for the army and the militia be read broadly enough to allow Congress to preempt state or local laws impeding the consumption of beer and wine? Could an American government lawfully declare gunpowder manufacture to be a government monopoly? Is there a right to manufacture gunpowder?

6. **CQ:** Consider the gunpowder manufacture question in light of current controversies in home manufacture of firearms for personal use. *See* Ch. 15.D.2.

I. ARMS TECHNOLOGY AND OWNERSHIP IN THE UNITED KINGDOM

Chapter 2.I provided a condensed survey of the development of arms technology in the United Kingdom. A more thorough description is available in online Chapter 23. To avoid duplication, Sections 1 through 4 of this Part I contain only brief summaries. Section 5, on arms prevalence in the United Kingdom, is presented in full.

1. Matchlocks and Wheellocks

When the first Tudor king, Henry VII, took power in 1485, firearms had been in use for over a century. Before the Tudor era, firearms had been of little significance militarily in England. The most important improvement in firearms technology from 1485 to 1800 was the ignition system. The ignition change made firearms more reliable, faster to reload, and much better suited for carrying for an extended time while loaded.

In the 1400s, the user ignited a firearm's gunpowder by just holding a flame to the *touch hole*—a small hole that connected the gunpowder charge inside the gun to the outside of the gun. By 1500, the standard ignition system was *matchlock*. By pulling the trigger, the user lowered a lit rope cord down to a small pan of gunpowder. The cord would ignite the gunpowder, and the flame would travel through the touch hole and ignite the main charge of gunpowder.

Around 1500, Leonardo da Vinci invented the *wheellock*. Vernard Foley, *Leonardo and the Invention of the Wheellock*, Scientific Am., Jan. 1998, at 96. Rather than using a burning cord, the wheellock was self-igniting. When a wound-up steel wheel was released, the serrated wheel struck a piece of iron pyrite. A shower of sparks would ignite the powder in the pan. The wheellock mechanism is similar to the ignition for today's disposable cigarette lighters.

The wheellock weighed less and could be carried so that it was ready to shoot, like all modern firearms. In a self-defense emergency, the defender would not need to light a rope before being able to use the firearm. A study by Prof. Carlisle Moody suggests that the growing availability of always available defensive firearms in the centuries after 1500 may have contributed to the sharp decline in European homicide rates. *See* online Ch. 19.D.1.

2. The Flintlock and the Brown Bess

Early in the seventeenth century, a much-improved version of the wheellock was invented: the *flintlock*. It has few moving parts, was faster to reload, was more reliable, and was less expensive. In the eighteenth century, the flintlock became the standard of the British army. The British flintlocks were called "the Brown Bess."

Due to the necessities of hunting and Indian-fighting, Americans made the transition from matchlocks to flintlocks much sooner than the British did. Likewise, rifles—which have spiral grooves in the bore to impart aerodynamic stability to the bullet—were insignificant in England during the eighteenth century, but very important in America. *See* online Ch. 23.B.2.

3. The Blunderbuss

Especially common in the seventeenth and eighteenth centuries was the blunderbuss, a short flintlock. It could fire either one large projectile, or several at once. Most often it was loaded with about 20 large pellets, and so it was devastating at short range. Brown 143. The name seems to be an adaptation of the Dutch "donder-buse" or "thunder gun." Excellent for self-defense at close quarters, the blunderbuss was of little use for anything else, having an effective range of about 20 yards.

4. Breechloaders and Repeaters

The vast majority of other firearms were *muzzleloaders*. To load or reload the gun, the user would pour a premeasured quantity of gunpowder into the muzzle. Next, the user would insert the ball(s) of ammunition into the muzzle. With a ramrod, the user then pushed the balls and the powder all the way to the back of the barrel, the breech. During the nineteenth century, breechloaders would replace muzzleloaders. *See* online Ch. 23.C.

Most firearms in the eighteenth century were *single-shot*. To fire a second shot, the user had to repeat the process of ramming the powder and the bullet down the muzzle. Today, most firearms can fire more than one shot without having to be reloaded. *Repeating* arms carry their supply of ammunition internally. For example, a *revolver* usually has five or six units of ammunition in a revolving *cylinder*.

Some shotguns and rifles have two barrels, either side-by-side, or over-and-under. They can fire two shots, and then have to be reloaded. The double-barreled shotgun was firmly on stage by the end of the eighteenth century, for hunting and for self-defense. John Nigel George, English Guns and Rifles 228-38 (1947).

Breechloaders had been invented in the late fifteenth century. Brown, at 103. Repeaters appeared no later than the early sixteenth century. *See* Brown, at 50 (German breechloading matchlock arquebus from around 1490-1530 with a ten-shot revolving cylinder); Greener, at 81-82 (Henry VIII's revolving cylinder matchlock harquebus); David B. Kopel, *The History of Firearms Magazines and of Magazine Prohibition*, 88 Albany L. Rev. 849, 852 (2015) (16-round wheellock from about 1580).

However, breechloaders and repeaters require much closer fittings among their parts than do single-shot or muzzle-loading guns. Until the invention of machine tools to make uniform parts, the quantity of labor required to build a breechloader or repeater made such guns very expensive. (Machine tools are discussed in Chapters 6.C.2 and online Ch. 23.C.) Thus, British gunsmiths concentrated on building affordable single-shot muzzle-loading flintlocks. The breechloader or repeater would be a special order for a customer who could afford to pay for a great deal of labor.

5. Firearms Prevalence

How common were personally owned firearms in Great Britain during the eighteenth or early nineteenth century? There are many more historical records, such as diaries, about the upper classes than about the others. Among the aristocracy, firearms were ubiquitous, as hunting and warfare were two of their leading pastimes.

As for everyone else, there is conflicting evidence. We know that Americans were insistent that the game laws and the Protestants-only scope of the English Bill of Rights had negated the English Bill of Rights' guarantee right of the right to arms. *See* Section H.6. Some Englishmen made the same point. For example, a 1769 pamphlet railed against game associations, by which wealthy persons pooled resources to hire gamekeepers to thwart poaching. According to the pamphlet, the game association was denuding the rural public of all firearms. *An alarm to the people of England; shewing their rights, liberties, and properties, to be in the utmost danger from the present destructive and unconstitutional association, for the preservation of the game all over England* 36 (1757) ("A Farmer truly must not be allowed to keep a Gun in his House, for Fear he should discharge it at a paltry Partridge"; "were they permitted, as formerly, to fire their Guns in support of themselves and their families").

On the other hand, we know that English courts clearly recognized the constitutional right of Englishmen to own and carry firearms, and that no statutes prohibited them from doing so—except that commoners could not use firearms for hunting, potentially seditious armed assemblies were prohibited, and rebels or Catholics who would not swear a loyalty oath to the monarch could be disarmed. Sections F.4 & 6, H.5.

There are often differences between the law on the books and the practical experiences of the public. It is possible that the 1769 pamphlet against game associations was literally accurate, and that the associations were violating the constitutional rights of the rural common people by confiscating firearms under the pretext of anti-poaching. That was certainly how the American critics described the plight of all English commoners. Or perhaps the pamphlet engaged in political hyperbole, and game association misdeeds were not universal throughout the countryside. We also know that whatever the national or local authorities said, the English had a tradition of being armed—such as the servant girls of Stuart England in the seventeenth century who apparently had no trouble buying pocket handguns, notwithstanding over a century of statutes and proclamations against such guns. Section H.3.a.

In any case, the English remembered the time as one of widespread gun ownership. Writing in 1939, the leading English firearms historian J.N. George described the eighteenth- and early nineteenth-century blunderbuss as the arm of "farmers travelling upon the roads." The blunderbuss held "a place of honour alike in the inn parlour, the farm kitchen, and the merchant's counting house, none of which was complete without such a weapon hanging over its fireplace, where the warmth of the fire would keep its powder dry." George, at 93, 223. As George noted, the ubiquitous blunderbuss was a standard image in the plays, movies, and novels about the days of stagecoaches and highwaymen.

Whatever the prevalence of firearms among the English middle and lower classes after the Bill of Rights, Americans considered it deficient. Although the English Bill of Rights protected keeping and bearing arms in England, it did not apply to the Scots or the Irish, who are discussed next.

J. THE EIGHTEENTH CENTURY AND BEYOND

Sections 1 and 2 of this Part examine disarmament of the Scots and the Irish. Section 3 discusses the worst riots in London's history, and the legal issues that arose when armed householders helped suppress the riots. Section 4 provides a brief overview of developments in the United Kingdom in the nineteenth and early twentieth centuries.

The precedent of special laws for rebellious nations had been set in Wales, a relatively mountainous portion of western Britain, which had long defended its separate sovereignty. English King Edward I brought the Welsh to subjugation in 1282. The Welsh reclaimed self-government for a while in the Welsh Revolt of 1400-15, led by Owen Glendower. The revolt coincided with laws imposing disabilities on the Welsh. *See*, *e.g.*, 2 Henry IV ch. 12 (1400-01) (Welshmen may not wear armor in towns). The disarming laws were little enforced after 1440, and anti-Welsh laws were formally repealed in the early seventeenth century as part of a general statutory cleanup. 21 James I ch. 28, § 11 (1624).

Although the post-1440 Welsh could possess arms, Parliament still saw a need for special laws about Wales. To promote shooting, Parliament banned Welsh "games of runnyage wrestling leaping or any other games, the game of shotinge only exceptyd." Further, all Welsh, nobles included, were forbidden to carry arms within two miles of a sitting court, or to any "towne, churche, fayre, market, or other congregacion." Nor could they bring arms or armor on the highways "in affray" of the King's peace. 26 Henry VIII ch. 6 (1534).

1. Scottish Highlanders

After losing the Glorious Revolution in England and then being defeated in Ireland, the Stuarts had taken up residence in continental Europe, where they continued plotting invasions of the British Isles. Their first attempt at an invasion would be timed to coincide with a succession crisis in the United Kingdom.

William and Mary had jointly held the crown. After Mary's death, William ruled alone until he died in 1702. Mary's younger sister Anne then ruled until she passed away.[84] William and Mary had no children; Anne had 17 pregnancies, but no children who outlived her. By the standard rules of succession, the oldest surviving son of James II had the best claim to the throne. That son, James Francis Edward Stuart, considered himself to be the rightful "James III" of England. He was a Catholic, living in exile in France, and Parliament did not want a return of the problems that had necessitated the Glorious Revolution.

According to Parliament, the Glorious Revolution meant that no one could be monarch without Parliament's consent. Parliament was the sole sovereign and was composed of three elements: the House of Commons, the House of Lords ("the Lords Spiritual and Temporal"—high-ranking ecclesiastics and laity), and the "King-in-Parliament." Without Parliament, the king was nothing; the king was in Parliament, and not above it. Parliament was not going to give the throne to a son of James II who thought that Parliament had been wrong and James II had been right in 1688.

Parliament anticipated the problem of Anne dying without a direct heir, and in 1701 passed the Act of Settlement, which, as amended, continues to govern succession to the crown. Not for the first time in British history, the nation traced the monarch's family tree backwards, and chose a different branch for the next monarch. The crown was bestowed on the Protestant descendants of Princess Sophia, a granddaughter of James I who had married the Elector of Hanover, an independent German state. So in 1714, Sophia's son George, the Elector of Hanover, became Britain's King George I. By the ordinary rules of inheritance, there were 57 people who had a better claim to the crown than he did. But one of the points of the Glorious Revolution was that the crown was not somebody's personal property. It was bestowed by the free choice of the people, expressing their will through Parliament.

Many Scots did not agree. The Stuart family had been monarchs of Scotland since 1371. In 1603 King James VI of Scotland had also become King James I of England. Even then, Scotland and England were two separate kingdoms. In 1707, the Acts of Union had joined England and Scotland into the single United Kingdom of Great Britain. (Ireland was also ruled by England's monarch, but it was a separate kingdom until 1801.) With a population only one-eighth of Britain's, Scotland was barely a junior partner in the United Kingdom, and often treated as less than that.

When George I showed up in London in September 1714, he was not especially popular. A native speaker of German, he spoke little English and did not like the British people, although he was impressed with their army. The time was right for an August 1715 revolt by the Jacobites[85] (adherents to King James II and his sons) in Scotland and England. They wanted a Stuart, not a Hanoverian, on the throne, and the Scots wanted to undo the Act of Union.

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84. Anne legally had the sole right to the crown after her older sister died, but she had promised not to assert the right so long as William lived.

85. From the Latin version of his name, *Jacobus*.

The revolt started well, but it was on its way to defeat by the end of year. The pretender to the crown, "James III" of England/"James VIII" of Scotland, did not arrive in Scotland until late December, and he was chased away within a few weeks, returning humiliated to France.

The most effective Jacobite fighters had been the Scottish Highlanders. The Highlands are the northwestern half of Scotland, and the nearby smaller islands. The mountainous terrain is difficult to traverse, and the land not very productive. The Highlanders lived in patriarchal clans led by chieftains and were notoriously fierce warriors. They were mostly Catholic and spoke Gaelic, in contrast to the Scottish Lowlanders, who were mostly Presbyterian and spoke English. The London government exerted little practical power over the Highlanders.

Because of the Jacobite rebellion, Parliament imposed the Disarming Act of 1715. According to the Act, "the custom that has two long prevailed amongst the Highlanders of Scotland, of having arms in their custody, and using and bearing them in travelling abroad in the fields, and at publick meetings, has greatly obstructed the civilizing of the people within the counties herein after named; has prevented their applying themselves to husbandry, manufactories, trade, and other virtuous and profitable employments." The Act forbade Highlanders "to have in his or their custody, use or bear broad sword, or target, poynard, whinger, or durk, side-pistol, or side-pistols, gun, or any other warlike weapons, in the fields," or when going to or from markets, church or meetings, "or any other occasion whatsoever," or to come armed into the Lowlands. There was an exception for the highest nobility (Peers of the Realm) and their sons. There was another exception for Highlander commoners who were eligible to vote. They could have two firelocks (a firelock is a wheellock or a flintlock), two pair of pistols, and two swords. The lords lieutenant and their deputies could issue warrants to search for illegal arms. Highlanders who had been loyal to George I during the Jacobite rebellion would receive compensation for handing over their arms. The personal duty to perform services such as watch and ward was replaced by the obligation to pay an annual tax of equivalent value. 1 George I, stat. 2, ch. 54 (1715).[86]

The Disarming Act accomplished little, so it was augmented in 1724 by "An act for the more effectual disarming the highlands." The Act noted that notwithstanding the 1715 law, "many persons" still possessed "Quantities of Arms and warlike weapons, which they use and bear as formerly." The new act empowered the lords lieutenant or other agents of the king to issue summons to individuals ordering them to appear at a specified time and place to surrender their arms. Persons who did not comply would be held without bail until trial. Entire clans could be subject to the summons if the summons were affixed to a church door on Sunday. Sheriffs were ordered to issue the clan summons everywhere in their county. If concealed arms were found in a house or other building, the tenant or possessor would be presumed guilty, unless he or she could prove lack of knowledge. The king's agents

86. A poignard (modern spelling) is a short, thin dagger. A whinger is a type of knife usable at the table, and for fighting. A durk (as it is spelled in Scotland, or "dirk," as spelled elsewhere) is a long dagger. "Dirks" and "daggers" were sometimes included in latter nineteenth-century American state laws against carrying concealed weapons. In eighteenth-century usage, a "pistol" (what we today call a handgun) was distinct from a "gun" (what we today call a long gun).

could write themselves warrants for day or night searches of houses. Enforcers of the law were immunized from criminal or civil law actions against them. The 1724 law had a sunset clause: Once seven years had passed, the law would expire at the end of the next session of Parliament. 11 George I ch. 26 (1724). The new law did work better, although not completely. Many arms confiscations were carried out by Britain's Major-General George Wade, who commanded the British army of occupation in Scotland.

In July 1745, James II's grandson attempted an invasion. Because of the British fleet, his ship carrying arms was sunk, and the ship containing allied French soldiers turned around and went home. "Bonnie Prince Charlie" landed with a very small force in the Highlands, yet he rallied one clan after another to his cause. The clans had an eclectic collection of arms; many had broad swords, some had firearms, and others had farming tools repurposed as weapons. Many Scottish Lowlanders came over to Bonnie Prince Charlie as well. Prince Charles had been an avid hunter all his life; he impressed the Highlanders by exceeding them in rapidly traversing rugged terrain — tireless and dauntless. Two months after his arrival he defeated a much larger British army and found himself recognized as the sovereign by part of Scotland.

The French were impressed, and assembled an army to help the Jacobites, but it was held up in port by bad weather and by English naval deployments. Bonnie Prince Charlie and the Jacobites advanced within 150 miles of London. But the tide turned, and by the next April, the Jacobites had been demolished. Their final battle, at Cullodeen, was the last land battle ever fought in Great Britain.

For the next five months, Bonnie Prince Charlie and his small band were on the run, trying to escape the English and to find a ship to take them back to France. Disguised as a common man or as a servant woman, he hid in caves and the Scottish moors. The Highlanders recognized him during his flight, but no one betrayed him, not even for the reward of 30,000 pounds. Meanwhile, the British Army savaged the Highlands. Almost every building was destroyed; the cattle were stolen or killed, and stores of grain and other foods demolished. Many Highlanders died of starvation. Carolly Erickson, Bonnie Prince Charlie: A Biography (1990).

Parliament decided that the clans and their culture would be eliminated. The new Disarming Act was part of a broader Act of Proscription, which also included the Dress Act, outlawing "the Highland garb," such as plaid and tartan.[87] The Gaelic language was forbidden. The 1746 Disarmament Act tracked much of the language of its 1715 predecessor. 19 George II ch. 39 (1746). Another act dispossessed the clan chieftains of their lands, and subjected sheriffs' offices (which were hereditary in some parts of Scotland) to royal appointment. Heritable Jurisdictions (Scotland) Act, 20 George II ch. 43 (1746). All these acts applied with full rigor even to the Scottish clans that had fought *for* the British government during the 1745-46 war.

A 1748 follow-up statute again ordered the Highlanders to surrender their arms. 21 George II ch. 34 (1748). As the English man of letters Samuel Johnson wrote in 1775, "the last law by which the Highlanders are deprived of their arms, has operated with efficacy beyond expectations. . . . Of former statutes made with

87. The ban on Highland dress was repealed on July 1, 1782, the anniversary of which is now celebrated in Australasia as International Tartan Day. 22 George III ch. 63 (1782).

the same design, the execution had been feeble, and the effect inconsiderable." But this time, "the arms were collected with such rigour, that every house was despoiled of its defence." Samuel Johnson, *Journey to the Western Islands of Scotland*, in 2 The Works of Samuel Johnson 645 (1834) (1775). As the Highlanders learned, arms confiscation can be more thorough if all the buildings in the area are burnt to the ground. Similar practices have been employed more recently by the governments of Uganda and Kenya, against tribes unwilling to surrender their arms. *See* online Ch. 19.C.10.

The Scottish militia had been undermined in the seventeenth century by the Stuarts. An attempt to revive it was vetoed by Queen Anne in 1708, the last time that a bill passed by Parliament was denied the royal assent. The Scots intensely resented the absence of their own militia. To them, no militia meant that Scots were subservient to Englishmen, not equals in a United Kingdom. They argued that under Scotland's Constitution — including the nation's unwritten and long-standing tradition — they had a right to a militia. The English finally relented in 1797, due to the threat of invasion from Napoleonic France. Americans listened to the Scots' outcries; the first clause of the Second Amendment was influenced by the writings of pro-militia Scotsmen. David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "The Right of the People to Keep and Bear Arms,"* 22 Law & Hist. Rev. 119 (2004).

NOTES & QUESTIONS

1. The 1715 and 1746 statutes made it illegal for Highlanders to "have in his or their custody, use, or bear" various arms. The U.S. Supreme Court considered the law when analyzing the legal meaning of "bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 588 n.10 (2008) (Ch. 11.A). In the anti-Highlander statutes, what do you think "bear" arms meant? To bear when in militia service, or to carry for personal purposes, such as self-defense or hunting?

2. If you were an American in 1775, what lessons about arms and arms laws would you draw from the history of Scotland?

2. Ireland

A London government had ruled at least part of Ireland ever since an 1167 invasion by Henry II's wicked son John (who, when he became King of England, would be forced to sign the Magna Carta (Part D) in 1215). For the next several centuries, until the time of Henry VIII, England's practical contro1 of Ireland often did not extend much beyond Dublin.

As the English gained control, they wiped out the Irish legal system of Brehon Law and tried to destroy all the Brehon texts. Based on druidic, Catholic, and natural law roots, Brehon law made no distinction between torts and crimes. If X injured or killed Y, then X would have to pay compensation — with payment in self-defense cases reduced or eliminated at the discretion of the judge. Killing a trespasser (which presumably would include a burglar) was expressly exempt from the need for compensation. *See* Jo Kerrigan, Brehon Laws: The Ancient Wisdom

of Ireland 72-73 (2020); Laurence Ginnell, The Brehon Laws: A Legal Handbook (2012) (1894).

In 1603, English rule was fully consolidated in Ireland. Before and after 1603, the Irish often rose in rebellion, especially when the English were distracted elsewhere. For example, the Irish Confederate Wars of 1641-53 overlapped with the English Civil Wars (Section H.2) and the preceding Bishops' Wars between England and Scotland. In a war that left 20 percent of the population dead, the Irish Catholics were mostly subdued by Oliver Cromwell's army, but guerillas remained active throughout the 1650s.[88] Soon after the Catholic James II was chased out of Great Britain in the Glorious Revolution of November 1688 (Section H.3), Ireland rose in a Jacobite rebellion. James, his Irish supporters, and their French allies met their final defeat in 1691. It was no surprise, then, that when the British Parliament enacted the 1689 Bill of Rights, it was not made applicable to Ireland. Even if it had applied, the right to arms was only for Protestants.

The 1691 Treaty of Limerick, formally ending the Jacobite rebellion, promised that "[e]very nobleman and gentleman . . . shall have liberty to ride with a sword and case of pistols,[89] if they think fit, and keep a gun in their houses for the defence of the same, or for fowling"—provided they took a loyalty oath to the monarch. Treaty of Limerick, Civil Articles, ¶ 7 (1691). The Treaty did not specify arms rules for persons other than loyal noblemen and gentlemen.

Irish guerillas continued to operate even after 1691. As one member of Parliament put it, "the Irish have been required to bring in their arms, which has only served to make them hide them, and when search has been made after them it has been too late." Luttrell, Parliamentary Diary 1691-1693, at 438 (Hon. Goodwin Wharton, Feb. 22, 1693). The Catholics would cover their guns with tallow, plug the holes, and "throw them into the loughs and rivers and take them up after and they are as good as ever." *Id.* at 440 (Lord Coningsby). "You may search till you are weary and not find one gun," but the guns "can all be ready in a hour's warning," one Williamite soldier complained. Carlton, at 224.

The Irish House of Commons was dominated by Protestants. In 1695 they enacted a statute ordering Catholics to hand over to the government all their arms and ammunition. However, Catholic gentlemen and noblemen who were within the terms of the Treaty of Limerick were allowed to keep their arms as specified in the Treaty. Other Irish Catholics could have arms if they were issued a discretionary license from the local governor. The Act further provided: "No person making firearms, swords, knives or other weapons shall take or instruct as an apprentice any

88. The Irish never forgot Cromwell. In the early 1970s, there was a terrorist campaign in Northern Ireland by the so-called Provisional Irish Republican Army. Among the U.K.'s responses were detention without trial of IRA suspects, and today it is recognized that this policy led to the imprisonment of many innocent people, as well as many guilty. In early 1972, the best-selling record in Irish history became "Men Behind the Wire," whose second verse is "Not for them a judge or jury, nor for them a crime at all. Being Irish means they're guilty, so we're guilty one and all. Around the world the truth will echo, Cromwell's men are here again. England's name again is sullied, in the eyes of honest men." Loyalists (Protestants) in Northern Ireland also engaged in terrorism, and were also indefinitely detained, both guilty and innocent. The Loyalists wrote their own version of "Men Behind the Wire."

89. Two matching pistols. Also called a "brace of pistols."

person of the popish religion." Informers who told the government about Catholics with arms would get half the fine as a personal reward. Any judge who even once refused to enforce the arms ban would lose office. "An Act for the better securing the government, by disarming papists," 7 William & Mary ch. 5 (Ireland 1695).

The 1695 statute was part of the period's consolidation of "Laws in Ireland for the Suppression of Popery," commonly called the "Penal Laws." The laws forbade Catholics to purchase land, to hold government office, and to sit in the Irish Parliament, among other disabilities.

In 1699, Irish Catholic arms licenses were revoked, allegedly because many of them had been fraudulently obtained. The Post Boy, Dec. 19-21, 1699, at 1, col. 1 ("all Licenses whatsoever to bear Arms, formerly Granted to any Papist in this Kingdom"). Anyone with a license had to reapply.

The Council-Chamber in Dublin (an executive body) in 1704 proclaimed that the Irish were continuing to own and carry firearms based on recalled or counterfeited licenses. The Council explained that qualified Irish Catholics could apply for licenses to "bear and keep such Arms." The licenses would specify the arms that could be borne — typically a pair of handguns, one long gun, and a sword. Irish Catholics Licensed to Keep Arms (1704), 4 Archivium Hibernicum 59, 64-65.

A 1739 statute mandated that Irish law enforcement officials conduct annual searches for arms possessed by Catholics in their jurisdiction, revoked all Irish Catholic arms licenses, and ordered the surrender of arms, with exceptions for persons covered by the Treaty of Limerick. 13 George II ch. 6 (1739).[90] Yet the Irish kept many guns. Even after Irish arms ownership was later legalized, until the 1860s the supply of hidden flintlocks "which had somehow survived all early attempts at disarmament" was "so immense" that the Irish did not buy many of the new firearms that used percussion caps. Rather, they simply had the old flintlocks retrofitted. George, English Guns and Rifles, at 296.[91]

Mostly prohibited from openly carrying firearms or edged weapons, Irish began carrying shillelaghs, walking sticks well suited for use as cudgels. Soon, the shillelagh became an Irish icon and the basis of a martial art.

When the British army in Ireland was shipped off to America to attempt to suppress the American Revolution, the island became vulnerable to foreign invasion by France or Spain, both of which by 1778 were engaged in a world war against Great Britain. Companies of Irish Volunteers began to engage in militia training. Initially Protestant, they were eventually joined by Catholics. Reluctantly, the London government supplied them with arms. In 1782, the Volunteers held a convention, and passed resolutions asking for Irish autonomy in domestic affairs.

During a parliamentary debate in 1793, a Member of the Irish Parliament described the legal differences between Irish Catholics and English Catholics: Irish Catholics could neither vote nor serve on grand juries. Further, "Catholics in Ireland are prohibited from keeping arms; no such prohibition is in England;

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90. The texts of these statutes are available at University of Minnesota Law School, Laws in Ireland for the Suppression of Popery Commonly Known as the Penal Laws.

91. The percussion cap is a separate primer that ignites the gunpowder when the percussion cap is struck by the firearm's hammer. Percussion caps appeared in 1820. Today, they are used in modern muzzleloaders. *See* Ch. 6.C.3.b., online 23.C.2.b.

but every Irish Catholic of any rank above the mere working artizan or peasant may obtain a licence to keep and carry arms, at the expense of one shilling, if he thinks fit to apply for it. . . ." The "difference then in the situation of Catholics in England and in Ireland, is that Catholics in Ireland may be deprived of arms, unless they obtain licences for using them. . . ." The Parliamentary register: or, History of the proceedings and debates of the House of Commons of Ireland 123 (Dublin: P. Byrne, 1793) (Feb. 4, 1793).

A 1793 reform bill enacted by the Irish Parliament repealed certain anti-Catholic laws, and revised the arms laws. Persons who had an annual income from land of more than 100 pounds, or over a thousand pounds in persons wealth, "are hereby authorized to keep arms and ammunition as Protestants now by law may." Catholics with landed income over 10 pounds annually, or personal wealth of over 300 pounds, could do the same if they took a loyalty oath. For other Irish Catholics, arms remained forbidden without a license. 33 George III, ch. 21 (1793).

London's attempted solution to the Irish problem was to bribe and coerce the Irish Parliament into accepting full union with Great Britain. The United Kingdom of Great Britain and Ireland came into being on January 1, 1801. Henceforth, it would be ruled by the Parliament in London, to which the Irish could send representatives, although they would never have enough votes to outnumber the English. R.K. Webb, Modern England: From the 18th Century to the Present 91-92, 141-42 (2d ed. 1880).

Whenever England was fighting with France or Spain, England's enemies often attempted to support anti-English insurrection (or wars of national liberation, depending on one's perspective) in Ireland or Scotland. Thus, with Napoleonic invasion of England a threat, temporary legislation in 1806 restricted arms and ammunition imports into Ireland. 47 George III, ch. 54 (1806). The restrictions were regularly renewed, even after Napoleon was long gone. *See, e.g.*, 6 & 7 William IV ch. 9 (1836).

All Irish (Protestants included) who lawfully possessed arms had to register them pursuant to an 1807 statute. "An Act to prevent improper Persons from having Arms in Ireland," 47 George III, Session 2, ch. 54 (1807). Parliamentary opponents argued that the bill violated the constitutional right to arms, believed the Irish should have the rights of Englishmen, and compared the effort to disarm the Irish to the similar, failed program against New England from decades before. Proponents argued that the Irish situation called for different policies than those for Great Britain. 9 Hansard's Parliamentary Debates 1086-92 (Aug. 7, 1807).

The Parliament in London in 1843 enacted a new Irish licensing system, which on its face was religiously neutral. Now, a license was required for Irish of any religion to have arms. The license to keep arms was also a license to bear arms. Serial numbers had to be placed on Irish guns, so that the authorities could be sure that an Irishman was carrying only the particular gun(s) for which he had been licensed. 6 & 7 Victoria ch. 74 (1843).

Opponents described the arbitrary abuses of the existing gun licensing system, such as an applicant being denied because he lived in a thatch house (which meant that he was poor) or because the licensing authority did not like the applicant's looks. 69 Hansard's Parliamentary Debates 1020 (May 29, 1843). Opponents insisted that the Irish had the same common law rights as the English. One Member of Parliament "claimed for Ireland the same rights with respect to bearing arms

as those enjoyed by Englishmen. . . ." *Id.* at 1118. In the words of another M.P., the licensing bill was "contrary to the constitution of the country. It was acknowledged by the Bill of Rights, which being declaratory was part of the common law, that every citizen had a right to possess himself with arms for any lawful purposes, and that bill was as applicable to Ireland as to England." *Id.* at 1123. A third opponent noted the absence of any "violent or revolutionary outbreak" that would create a need to limit "the right to bear arms for self-protection." Rather, the M.P. "considered the people of Ireland to possess every constitutional right equally with the people of England." Thus, it was improper "to restrict the Irish people from the free exercise of their admitted constitutional right to bear arms." *Id.* at 1578, 1581 (June 15, 1843).

Even if Irish arms did lead to revolution, the Irish had the right to use them, implied one M.P. Rejecting "a restriction on the common-law right to bear arms" and "an invasion of a constitutional right," he pointed out that the right to bear arms had "enabled the people of the United States to oppose to our tyranny." *Id.* at 1098-99 (May 29, 1843).

But the proponents of the licensing bill carried the day. They pointed to the long restrictions on Irish arms. *Id.* at 996–99. A reluctant supporter voted for the bill because of the serious problem of violent crime in Ireland, even though "the carrying of arms is a noble and distinguishing mark of freedom, and a constitutional right of great value. I would not infringe that right without the most grave consideration. . . ." *Id.* at 1175-76 (May 31, 1843).

Lord John Russell (who would serve as Prime Minister 1846-52 and 1865-66) explained the difference between English and Irish law on bearing arms:

> [T]he right to bear arms, which is the universal right in England, and qualified only by individual circumstances, is reversed in Ireland; the right to bear arms here being the rule, the right to bear arms in Ireland being the exception. . . . [I]t has been the principle of all Governments that you should require in Ireland a licence to bear arms, and that the right to bear arms should he held an exception to the general rule, although it be the general rule in England without any licence that every individual should be entitled to bear arms.

70 Hansard's Parliamentary Debates 66 (June 16, 1843).

The 1843 arms licensing system for Ireland later became the model for a similar system to be applied against the British population, starting in 1921. By then, the British government had become just a mistrustful of the British people as earlier governments had been of the Irish. Section J.4.

Further reading: Halbrook, The Right to Bear Arms, at 75-87, 90-102.

3. The Gordon Riots

By 1778, the British war against the American rebellion was not going as well as had been expected. The attempt to disarm and suppress the supposed "rabble" of the Massachusetts militia had failed. So had trying to cut New England off from the rest of the United States by taking control of the Hudson River. Indeed, the British

defeat at Saratoga, New York, in October 1777 had led to the French overtly entering the war on the American side. Much of the British Army was already in North America, but more manpower was needed, and enlistments were below what was necessary. To make matters much worse, France was not just fighting in America, but had initiated a global war against Great Britain. Spain had joined the French.

So the government decided to relax some anti-Catholic laws, with the expectation that Catholics, who rarely enlisted, might help fill the Redcoat ranks. In 1778, Parliament passed the Papists Act, which removed some Catholic disabilities which had been enacted in 1698, and which at present were rarely enforced. Thanks to the 1778 Act, it became lawful for Catholics to own and inherit real estate. The sentence of life in prison for Catholic clergy and schoolteachers was eliminated. 18 George III ch. 60 (1778).

On June 2, 1780, a raucous crowd of at least fifty thousand assembled outside Parliament to demand a repeal of the 1778 statute. Despite the angry mob, Parliament did not back down. What ensued was perhaps the worst riot in living memory. The first victims were Catholics and foreigners. Soon, the targets became the government itself, especially judges, courts, and prisons. The rioters were abetted and inspired by the radical Lord George Gordon of Scotland, who defended their cause in Parliament, and took to the streets to exhort them in person. As is typical in riots, the rioters who may have had some ideological motive were joined by people, from all classes, who simply wanted to loot, burn, pillage, and kill. The British army available in London was too small to suppress the mobbers, who seemed to be everywhere. The arrival of reinforcements of soldiers and militia from outside the city was inadequate to restore order. Christopher Hibbert, King Mob: The London Riots of 1780 (1958); *see also* Charles Dickens, Barnaby Rudge: A Tale of the Riots of Eighty (1841) (historical novel about the Gordon Riots).

On Tuesday night, June 6, mobs broke open Newgate Prison and the Clink Prison, liberating the convicts. For much of the public, this was the last straw, and citizens decided to protect their communities themselves. Spontaneous armed patrols began securing neighborhoods. Some of these patrols were from the London Military Association and other civic groups that had long encouraged arms training and practice (somewhat similar to the U.S. civic association volunteer militias of the eighteenth and nineteenth centuries; *see* Chs. 4-7).

Most patrols were small, but there were some large bodies. In Cripplegate Ward, two thousand armed residents guarded the community. Southwark borough had a *posse comitatus* of more than three thousand. In Covent Garden, the inhabitants "unanimously resolved each man with his servants to defend his own house and his neighbor's house." Hibbert, at 117-19.

This civic mobilization was the turning point. As historian Christopher Hibbert wrote, "It was undoubtedly due to the obvious determination of the ordinary citizens of London, who, after a week of nervous uncertainty, were resolved to defend not only themselves and their property, but also the lives and properties of fellow Londoners, whoever they might be and whatever their religion, that the young [Member of Parliament William] Pitt was able to assure his anxious mother that 'everything seems likely to subside.'" *Id.* at 117-18.

The public had mobilized itself beginning on Tuesday night; by Thursday night, there were only a few isolated attacks, and by Friday, June 9, peace had

returned. More citizens decided that they wanted to form civic patrols to ensure that the city stayed peaceful. The Commander in Chief of the army in England, Lord Amherst, "would have been thankful for the help of more irregular volunteers during the rioting," but he "was not convinced that the necessity for them any longer existed." Some of the patrolmen had been given arms by the military, and it was already proving difficult to get them back. He did not want to give away more guns. *Id.* at 118-19.

The Lord Mayor of London had a different view. He proposed arming all of London's inhabitants and housekeepers. Lord Amherst wrote him a letter of disapproval on June 12, ordering just the opposite: "[O]n the subject of the inhabitants of the city [London] being permitted to carry arms. . . . [I]f, therefore, any arms are found in the hands of persons, except they are of the city militia, or are persons authorized by the King to be armed, you will be pleased to order the arms to be delivered up to you, to be safely kept until further order." In a letter to Colonel Twistleton, Amherst was more blunt: "No person can bear arms in this country but under officers having the King's Commission. The using of firearms is improper, unnecessary, and cannot be approved." *Id.* at 119.

Lord Amherst's instructions did not sit well with Parliament. During a June 19 debate in the House of Lords regarding the Gordon Riots, the Duke of Richmond said that "the letter from noble lord [Amherst] at the head of the army to col. Twistleton, relative to disarming the citizens of London, ought to be made an object of parliamentary enquiry, and he expected the noble lord would be ready either to produce his authority for writing such a letter, or explain what he meant when he wrote it. It was founded in the law of nature for every man to arm himself in his own defence. It was the municipal, as well as the natural right of Englishmen in general, and the citizens of London in particular." 21 Parliamentary History of England from the Earliest Period to the Year 1803: Comprising the Period from the Eleventh of February 1780, to the Twenty-Fifth of March 1781, at 691 (June 19, 1780) (William Cobbett ed., 1814).

Lord Amherst admitted that he had written the letter. "He said, he thought it both improper and unsafe to trust arms in the hands of the people indiscriminately, or into the hands of a rabble or a mob." Lord Richmond then "asked the noble lord if the inhabitants of London, for that was the expression used in the first paragraph of the noble lord's letter, were a mob? . . . [D]id not the disapprobation expressed in that letter imply a disapprobation of the inhabitants being permitted to carry arms? . . . Did it not command, or authorize, col. Twistleton to take the arms from the citizens thus armed? Was not his disarming Englishmen, and with every possible aggravation of insult and injustice, wresting out of their hands their own actual property, and the means of defending their lives and fortunes?" *Id.* at 691-92.

The Earl of Bathurst spoke next: "God forbid that any man should offer to deny or controvert the right of Protestant Englishmen to arm themselves, in defense of their own houses, or those of their neighbors." He said there was "a wide difference between marching out in martial array, and acting upon the defensive to protect men's lives and properties; the latter was clearly justifiable; the former might lead to many dangerous consequences."

Richmond retorted that "embodying and march" could be legitimate, because "a state of defence included every thing necessary to render it effective; or if it did not, it amounted in fact to no defence at all." *Id.* at 692-93. The discussion in the

House of Lords then moved to other issues, such as whether the rioters ought to be charged with treason.

Eventually, the Recorder of London — the city attorney — was asked if the right to arms protected armed groups, such as those that had helped suppress the riots. He wrote:

> The right of his majesty's Protestant subjects, to have arms for their own defense, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of this kingdom, not only as a *right*, but as a *duty*; for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And that right, which every Protestant most unquestionably possesses, *individually*, may, and in many cases *must*, be exercised collectively, is likewise a point which I conceive to be most clearly established by the authority of judicial decisions and ancient acts of parliament, as well as by reason and common sense.

William Blizard, Desultory Reflections on Police: With an Essay on the Means of Preventing Crime and Amending Criminals 59-60 (1785) (emphasis in original). The Recorder of London agreed with the Duke of Richmond and the Earl of Bathurst that each Protestant Englishman had a right to arms. Further, as Richmond had argued, that individual right sometimes had to be "exercised collectively." The groups of armed men acting together to suppress the riot were acting lawfully, according to "most clearly established . . . authority of judicial decisions and ancient acts of parliament."

NOTES & QUESTIONS

1. *Armed defense against riots and other public violent attacks.* In August 2011, there was a controversial police shooting of a man in Tottenham, a region of north London. Riots ensued nationwide. Sales on Amazon.co.uk of baseball bats and self-defense weapons rose more than 5,000 percent in 24 hours. Zeke Miller, *Sales of Police Batons on Amazon.uk Are up Over 41,000% as Riots Continue*, BusinessInsider.com (Aug. 9, 2011). Firearms are difficult to obtain in the United Kingdom, and their use in self-defense is severely restricted. For example, since the early 1950s, the public carrying of *any* item with the intent to use it for self-defense has been forbidden. *See* online Ch. 19.C.1.

The same London neighborhood had been the site of the "Tottenham Outrage" in 1909. Two men armed with handguns robbed a payroll truck. A wild chase and gun battle ensued, between the robbers on the one hand, and two police officers assisted by a large spontaneous posse on the other. In England at the time, citizens could freely carry handguns, and police could not, so the police were armed by revolvers from the citizens. Frank Miniter, The Future of the Gun 137-41 (2014).

In the modern United States, some government officials have urged Americans to arm themselves to be able to respond to terrorist attacks and mass shootings. *See, e.g.*, Austin Fulleraustin, *DeBary Mayor Clint Johnson Calls for All Residents to Be Armed after Orlando Shooting*, Daytona Beach News-Journal (June 22, 2016); *Egg*

Harbor Township Mayor: Allow NJ Citizens to Carry Concealed Weapons, CBS Philly (Dec. 8, 2015); George Hunter, *Police Chief Craig: Armed Detroiters Cut Terror Risk*, Detroit News (Dec. 1, 2015).

From 1965-68, there were race riots in almost every major American city, and one result was a large increase in the purchase of firearms for self-defense—and also the passage of the federal Gun Control Act of 1968 (Ch. 9.A & C); David B. Kopel, *The Great Gun Control War of the 20th Century—and Its Lessons for Today*, 39 Fordham Urban L.J. 1527, 1537-46 (2012). The tumultuous summer of 2020 saw many similar riots, some of them comparable in destruction to the worst of those in the 1960s. In some cities, law enforcement was ordered to stand aside. As before, firearm sales soared—although riots were not the only reason. Sales had already been rising due to the COVID-19 pandemic and presidential candidate Joe Biden's promises for stringent gun control. There were approximately 21 million firearms sold in 2020, a 60 percent increase over 2019. First-time buyers accounted for about 40 percent of sales. Women (not all of them first-timers) were 40 percent of buyers. Purchases by Blacks rose 56 percent compared to 2019. *See Gun Sales Reach Record Highs in 2020 Especially among African Americans and First-Time Gun Buyers*, National Shooting Sports Foundation (Feb. 4, 2021).

For examinations of the relevance of the right to keep and bear arms when law enforcement cannot or does not protect the public, see Nelson Lund, *The Future of the Second Amendment in a Time of Lawless Violence*, 116 Nw. L. Rev. (forthcoming 2021); Joyce Lee Malcolm, *Self Defense, an Unalienable Right in a Time of Peril: Protected and Preserved by the Second Amendment*, SSRN.com (2020); David E. Bernstein, *The Right to Armed Self-Defense in the Light of Law Enforcement Abdication*, SSRN.com (2020).

What are the similarities and differences between the above situations and the Gordon Riots? Do armed citizens preserve law and order, or does citizen armament create disorder? What variables affect the answers?

2. *The militia in the eighteenth century.* As in America, the English militia was important mainly when there were immediate threats to national security. The militia in Great Britain was of little importance in the early eighteenth century, but was reinvigorated in 1757, during the Great War for Empire against France. J.R. Western, The English Militia in the Eighteenth Century (1965). The 1754-63 war (known in America as the French & Indian War) led to a new militia law. It maintained, and even intensified, some of the restrictive practices of the previous century. Militia arms supplied by the government had to be specially marked. They could not be distributed until the militia unit had constituted, and they had to be returned as soon as the militia drills were completed. 30 George II ch. 25 (1757). Chapter 3 compares and contrasts American militia practices with those of the British.

4. The Nineteenth and Early Twentieth Centuries

During the nineteenth century, many formal legal discriminations against Catholics were removed. In 1843, the Ireland arms ban for Catholics was replaced with a general prohibition of firearms and swords for everyone in Ireland, unless the person had been issued a license. The identity of the particular sword or firearm had to be registered at the person's local town hall and listed on the license document. Section J.2. In practice, arms possession was allowed only for persons considered politically reliable.

Throughout the nineteenth century, gun control in England was close to nil, with a few exceptions. The 1815 end of the Napoleonic Wars in Europe caused an economic downturn. The London government reduced military spending, and England's economic competitors on the continent were again open for business, free of the British naval blockade. Making matters worse, Parliament had enacted the first Corn Laws, which shielded grain farms from foreign competition, and raised the price of food so much that famine resulted.

Among the working classes, clubs had been created for political education to promote reform. Sometimes, the clubs engaged in military drills—which to the upper class reminded them too much of the French Revolution. In August 1819, at least fifty thousand people gathered in Saint Peter's Fields, Manchester, to hear the speeches of radicals who demanded repeal of the Corn Laws, and enactment of parliamentary reform, such as expanding the electoral franchise. When the horse-mounted militia was ordered to arrest a speaker, they were trapped by the crowd; as the army attempted to rescue them, several people were killed and hundreds injured. Critics called it the "Peterloo Massacre," evoking the United Kingdom's 1815 defeat of Napoleon at Waterloo, Belgium.

Parliament then passed the Six Acts, including The Seizure of Arms Act. It applied to two cities and 11 counties that were thought most vulnerable to sedition. It outlawed military-style drilling and arms training. With a warrant, justices of the peace could search for and confiscate arms that might be used "for any purpose dangerous to the Public Peace." Persons could be arrested for carrying arms for "purposes dangerous to the Public Peace." 60 George III & 1 George IV ch. 2 (1819).

The Six Acts were met with furious but unsuccessful opposition in Parliament, partly because they were said to violate the right to arms in the Bill of Rights. The Seizure of Arms Act sunset after two years. R.K. Webb, Modern England: From the 18th Century to the Present 164-67 (2d ed. 1880); S.G. Checkland, The Rise of Industrial Society in England 1815-1885, at 325-28 (1964).[92] Noting the events in Manchester, John Adams wrote that "A select militia will soon become a standing army, or a corps of Manchester yeomanry." John Adams, letter to William H. Sumner, May 19, 1823, *in* William H. Sumner, An Inquiry into the Importance of a Militia in a Free Commonwealth 70 (1823).

The Seizure of Arms Act did not prevent anyone from carrying arms in the restricted areas, but it did forbid armed assemblies of rebels. Upholding the prosecution of an armed assembly, a court the court instructed the jury:

> "The subjects which are Protestants may have arms for their defence suitable to their condition, and as allowed by law."
>
> But are arms suitable to the condition of people in the ordinary class of life, and are they allowed by law? A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is

92. English journalist William Cobbett contrasted the British and American situations. In America, the government and standing army were small, harmless, and frugal. "[T]here are no shooting of the people, and no legal murders committed, in order to defend the government against the just vengeance of an oppressed and insulted nation. . . . The government could not stand a week, if it were hated by the people, nor, indeed, ought it to stand an hour." William Cobbett, Cobbett's America 205, 212 (J.E. Morpugo ed., 1985).

> travelling or going for the ordinary purposes of business. But I have no difficulty in saying you have no right to carry arms to a public meeting, if the number of arms which are so carried are calculated to produce terror and alarm. . . .

Rex v. Dewhurst, 1 State Trials, New Series 529, 601-02 (1820).

After the Seizure of Arms Act expired, gun control almost vanished in Great Britain (but not Ireland) until the twentieth century. An exception was the Gun Licenses Act of 1870, requiring a ten-shilling annual license to "use or carry a gun elsewhere than in a dwelling-house or the curtilage thereof." The license could be obtained at a post office, and the postal clerks had no discretion to deny a license to anyone who paid the ten shillings. Joyce Lee Malcolm, Guns and Violence: The English Experience 117-22 (2002). Ten shillings—equal to half of a one-pound sterling—was equivalent to about 61 pounds today, or about 84 modern American dollars.

The nineteenth-century Whig historian Thomas Macaulay reflected consensus opinion when he wrote that the right of British subjects to arms was "the security without which every other is insufficient." Thomas Macaulay, Critical and Historical Essays, Contributed to the Edinburgh Review 154, 162 (1850).

In the Boer War of 1899-1902, the British Empire consolidated control of the region that is today the nation of South Africa. The war revealed, in the words of one writer, "that the average British citizen couldn't hit the ground with his hat in three throws, let alone hit a man with a rifle under war conditions." Consequently, the British government began to encourage the sport of small-bore (.22 caliber rifle) target shooting, which became very popular. Edward G. Crossman, Small-Bore Rifle Shooting 3-4 (1927).

During World War I (1914-18), the government, fearful of German spies or saboteurs, imposed gun licensing as an emergency wartime measure. After the German surrender in November 1918, the government worried about the imminent expiration of the wartime controls. The main concern was Communist revolution. Vladimir Lenin had taken over Russia in a November 1917 coup, and had defeated the Western armies (British, U.S., French, and others) that had attempted to depose him. A Communist attempt to forcibly seize Poland was only narrowly defeated. Immediate Bolshevik revolution was the aim of armed Communists throughout the Anglosphere, and elsewhere.

Besides the Communist problem, there was the enduring fear of Irish insurrection. During Easter week in 1916, Irish rebels had declared independence and seized the General Post Office in Dublin. Although the Easter Rebellion had lasted for barely more than a week, the executions of the rebels made them martyrs. London's Irish worries were well-founded. After sweeping the 1918 elections for Ireland's seats in the British Parliament, the Sinn Fein ("Ourselves Alone") party refused to take their seats, and instead declared independence on January 21, 1919. This time, the Irish won their war of independence, with a December 1921 treaty recognizing the Irish Free State.[93]

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93. Six Irish counties in the northeast voted to remain and became the U.K. nation of Northern Ireland. The Irish Free State initially had Dominion status within the British Empire, similar to Canada. It later separated entirely from the crown, and today is the Republic of Ireland (in Irish, *Poblacht na hÉireann*).

In 1920, the British government brought forward its proposal to control Communists by controlling guns. The Irish system for gun licensing would now be used in Great Britain. Since 1920, it has been the foundation for gun control there. There were two important differences between the laws against the Irish and the 1920 law. First, the Firearms Act 1920 was for handguns and rifles only—not for shotguns. Shotgun licensing was not instituted until 1966, and even then, it was more lenient until about 1990. Shotguns were seen as hunting tools of the landed gentry, whereas rifles and pistols had military connotations. Second, the Firearms Act was initially enforced liberally; applicants would be granted a Firearms Licence unless there was a particular reason to deny an applicant.

Speaking to Parliament and the public, the 1920 government did not disclose its concerns about Communist or Irish revolt. Instead, the government claimed—falsely—that there was a tremendous wave of gun crime. In fact, ordinary gun crime (robbery, murder, etc.) was close to nil, as it had long been. Clayton E. Cramer & Joseph Edward Olson, *Gun Control: Political Fears Trump Crime Control*, 61 Maine L. Rev. 57 (2009).

Over the course of a generation, the Firearms Act 1920 greatly weakened the traditional British system of home island defense by a well-armed population. When the possibility of Nazi invasion loomed in 1940, after the fall of France, the United Kingdom's citizen defenders lacked the capacity to put up resistance. *See* Ch. 8.F.2. The further story of the United Kingdom in the twentieth and twenty-first centuries is told in online Chapter 19.C.1.

NOTES & QUESTIONS

1. In the thirteenth and early fourteenth centuries, the English homicide rate was approximately 18 to 23 annually per 100,000 inhabitants. Thereafter, the homicide rate began a six-century decline. Even after firearms became generally available in the sixteenth century, homicide rates continued to fall. Violent crimes continued to decline until the twentieth century. Joyce Malcolm, Guns and Violence: The English Experience 20-21, 141-49 (2002). A country that had been known as one of the most dangerous in Europe became one of the safest. As in much of the Western world, starting in the 1960s, the U.K. saw violent crime increase to levels that had long been unknown. What factors might account for the long decline, and then the increase?

2. So far as the records of the parliamentary debates reveal, none of the laws to restrict arms carrying or armed assemblies by Scottish Highlanders, English Catholics, Irish Catholics, or English revolutionaries ever mentioned the Statute of Northampton. Why not?

K. THE PHILOSOPHY OF RESISTANCE

This Chapter has described the history of arms-bearing in the United Kingdom. It now shifts to provide the background of what would become the Anglo-American view of forcible resistance to lawless government. It is the foundation for

understanding how the English principles of the right of resistance were embraced by Americans and became an intellectual foundation of the American Revolution.

1. Blackstone

William Blackstone's *Commentaries* is the most influential legal treatise ever written in English. It carries enormous authority in every nation that has adopted the common law. Writing in the 1760s, Blackstone exemplified the mainstream of English legal thought of the time. His treatise was "the preeminent authority on English law for the founding generation." *District of Columbia v. Heller*, 554 U.S. 570, 593-94 (2008) (Ch. 11.A) (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)).

In detailing common law protection of human rights, Blackstone first set forth the three primary, natural, and absolute rights: personal security, personal liberty, and private property. 1 Blackstone *120-36. Blackstone then turned to the auxiliary rights that protect the primary rights. These were the existence of Parliament, the clear limits on the king's prerogative, the right to apply to courts for redress of injuries, and the right to petition the government for redress of grievances. *Id.* *136-39.

> The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. and M. st. 2 c. 2 and it is indeed a public allowance under due restrictions, 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.

Id. *139.

Later in the four-volume treatise, Blackstone reiterated his point about armed resistance: "[I]n cases of national oppression, the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people." 4 *id.* *82. Governments that feared popular resistance used anti-hunting laws "for prevention of popular insurrection and resistance to the government, by disarming the bulk of the people . . . [a] reason oftener meant, than avowed by the makers of forest or game laws." 2 *id.* *412. Unsurprisingly, Blackstone warned against standing armies: "Nothing then . . . ought to be more guarded against in a free state, than making the military power . . . a body too distinct from the people." 1 *id.* *401.

In the following excerpt, Blackstone summarized the common law of lethal force against violent criminals.

4 William Blackstone

Commentaries on the Laws of England

*179-82 (1769)

. . . HOMICIDES, committed for the advancement of public justice, are; . . . 2. If an officer, or any private person, attempts to take a man charged with felony, and is resisted; and, in the endeavour to take him, kills him. . . . 3. IN the next place, such

homicide, as is committed for the prevention of any forcible and atrocious crime, is justifiable by the law of nature; and also by the law of England, as it stood so early as the time of Bracton,[94] and as it is since declared by statute 24 Hen. VIII. c. 5. . . . This reaches not to any crime unaccompanied with force, as picking of pockets, or to the breaking open of any house in the day time, unless it carries with it an attempt of robbery also. So the Jewish law, which punished no theft with death, makes homicide only justifiable, in case of nocturnal house-breaking: "if a thief be found breaking up, and he be smitten that he die, no blood shall be shed for him: but if the sun be risen upon him, there shall blood be shed for him; for he should have made full restitution."[95] At Athens, if any theft was committed by night, it was lawful to kill the criminal, if taken in the fact: and, by the Roman law of the twelve tables,[96] a thief might be slain by night with impunity; or even by day, if he armed himself with any dangerous weapon: which amounts very nearly to the same as is permitted by our own constitutions.

THE Roman law also justifies homicide, when committed in defence of the chastity either of oneself or relations: and so also, according to Selden,[97] stood the law in the Jewish republic. The English law likewise justifies a woman, killing one who attempts to ravish her: and so too the husband or father may justify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other. And I make no doubt but the forcibly attempting a crime, of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor. For the one uniform principle that runs through our own, and all other laws, seems to be this: that where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. But we must not carry this doctrine to the same visionary length that Mr. Locke does; who holds "that all manner of force without right upon a man's person," puts him in a "state of war with the aggressor;" and, of consequence, that, "being in such a state of war, he may lawfully kill him" that conclusion may be in a state of uncivilized nature, yet the law of England, like that of every other well-regulated community, is too tender of the public peace, too careful of the lives of the subjects, to adopt so contentious a system; nor will suffer with impunity any crime to be prevented by death, unless the same, if committed, would also be punished by death.[98]

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94. [Henry de Bracton (ca. 1210-68), author of De Legibus et Consuetudinibus Angliae (On the Laws and Customs of England).—Eds.]

95. [*Exodus* 22:2. The universal Jewish interpretation of "if the sun be risen upon him" was metaphorical. Regardless of the time of day, if the burglar were a violent threat to the people in the house, he could be killed. If he were not a violent threat, he could not be. For more on Jewish law, see online Chapter 21.C.1.—Eds.]

96. [The Twelve Tables were, literally, 12 bronze tablets containing basic legal rules, published in final form in 449 B.C. They were placed in the Forum, so that every citizen could easily read them. After extensive public debate and discussion, they were created by a committee of ten (decemvirs), which relied in part on Greek law, and which made further revisions based on public comment by citizens. Titus Livius, The Early History of Rome 192-248 (Aubrey de Sélincourt trans., 1971) (first published sometime during the reign of Augustus Caesar). *See also* online Ch. 21.B.2.a.—Eds.]

97. [John Selden (1584-1654), scholar of the history of English and Jewish law.—Eds.]

98. [At the time, major violent felonies were capital offenses.—Eds.]

IN these instances of justifiable homicide, you will observe that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame.

2. John Locke

The English philosopher John Locke (1632-1704) is known as the "Father of Liberalism." Some historians consider him the preeminent political philosopher for the American Revolution, while others rank him as one of several. Locke believed that legitimate government should be understood as a contract between citizens. Men were initially in a "state of nature," unbound by positive law. In this condition, individuals were free to use force to punish violations of their rights. However, because the state of nature is prone to devolve into war, reason dictates that persons would mutually agree to leave the state of nature by giving up some of their freedoms to a civil government to better protect their lives, liberty, and property. Yet Locke also argued that even under government, exceptional situations can arise where individuals legitimately may use force to safeguard their natural rights, whether against a common thief or a would-be tyrant. Because no rational person would agree to surrender those rights of resistance in the social contract, the rights were retained.

John Locke

Second Treatise of Government

1690

§ 16 The *State of War* is a State of Enmity and Destruction; And therefore declaring by Word or Action . . . a sedate settled Design, upon another Man's Life, *puts him in a State of War* with him against whom he has declared such an Intention, and so has exposed his Life to the others Power to be taken away by him, or any one that joins with him in his Defence, and espouses his Quarrel: it being reasonable and just I should have a Right to destroy that which threatens me with Destruction. For *by the Fundamental Law of Nature* . . . one may destroy a Man who makes War upon him . . . for the same Reason, that he may kill a *Wolf* or a *Lion;* because such Men are not under the ties of the Common Law of Reason, have no other Rule, but that of Force and Violence, and so may be treated as Beasts of Prey. . . .

§ 17 And hence it is, that he who attempts to get another Man into his Absolute Power, does thereby *put himself into a State of War* with him; It being . . . a Declaration of a Design upon his Life. For . . . he who would get me into his Power without my consent, would use me as he pleased, when he had got me there, and destroy me to when he had fancy to it: for no body can desire to *have me in his Absolute Power*, unless it be to compel me by force to that which is against the Right of my Freedom, *i.e.*, make me a Slave. To be free from such force is the only security of my Preservation. . . . He that in the State of Nature, *would take away the Freedom*, that belongs to any one in that State must necessarily be supposed to have a design to

take away every thing else, that *Freedom* being the Foundation of all the rest: As he that in the State of Society would take away the *Freedom* belonging to those of that Society or Common-wealth, must be supposed to design to take away from them every thing else, and so to be looked on as *in a State of War.*

§ 18 This makes it Lawful for a Man to *kill a Thief*, who has not in the least hurt him, nor declared any design upon his Life, any farther than by the use of Force, so to get him in his Power, as to take away his Money, or what he pleases from him: because using force, where he has no Right, to get me in his Power, let his pretence be what it will, I have no reason to suppose, that he, who would *take away my Liberty*, would not when he had me in his Power, take away everything else. And therefore it is Lawful for me to treat him, as one who has put *himself into a State of War* with me, *i.e.* kill him if I can; for to that hazard does he justly expose himself, whoever introduces a State of War, and is *aggressor* in it. . . .

§ 23 . . . For a Man, not having the Power of his own Life [because life is a gift in trust from God], *cannot*, by Compact, or his own Consent, *enslave* himself to any one, nor put himself under the Absolute, Arbitrary Power of another, to take away his Life, when he pleases. . . .

§ 220 To tell *people* they *may provide for themselves*, by erecting a new Legislature, when by Oppression, Artifice, or being delivered over to a Foreign Power, their old one is gone, is only to tell them they may expect Relief, when it is too late, and the evil is past Cure. This is in effect no more than to bid them first to be Slaves, and then to take care of their Liberty; and when their Chains are on, tell them, they may act like Freemen. . . . Men can never be secure from Tyranny, if there be no means to escape it, till they are perfectly under it: And therefore it is, that they have not only a Right to get out of it, but to prevent it. . . .

§228 . . . If the innocent honest Man must quietly quit all he has for Peace sake, to him who will lay violent hands upon it, I desire it may be considered, what a kind of Peace there will be in the World, which consists only in Violence and Rapine; and which is to be maintained only for the benefit of the Robbers and Oppressors. Who would not think it an admirable Peace betwixt the Mighty and the Mean, when the Lamb, without resistance, yielded his Throat to be torn by the imperious Wolf?

3. Algernon Sidney

Algernon Sidney was a descendant of Harry Percy, the "Hotspur" of Shakespeare's *Richard II* and *Henry IV, Part 1*. Algernon Sidney, Discourses Concerning Government xxvii (Thomas G. West ed., 1996).[99] Sidney fought bravely with the Parliamentary forces during the English Civil War (Section H.2), and lived in exile in France after the Restoration. After 1681, when fears about the Stuarts' totalitarian ambitions grew intense, Sidney, who had returned to England, worked assiduously to organize their overthrow. In 1683, Sidney was arrested for treason, related to the Rye House Plot. He was convicted in a trial that was later regarded as

99. This section is adapted from David B. Kopel, The Morality of Self-Defense and Military Action: The Judeo- Christian Tradition (2017).

a travesty of justice, not being allowed to see the indictment. The unpublished text of his *Discourses* was used as evidence against him. Samuel March Phillips, 2 State Trials 87-117 (1826). Executed on December 7, 1683, Sidney was venerated by the Americans as one of the greatest martyrs of liberty.

Sidney's *Discourses Concerning Government* could not have been published while the despotic Stuarts sat on the throne, but the freer atmosphere after the Glorious Revolution allowed posthumous publication. Like Locke's *First Treatise*, Sidney's *Discourses Concerning Government* was a refutation of Robert Filmer's *Patriarcha*, which had argued that all kings share in the dominion that God granted to Adam, and that any resistance to a king, no matter how tyrannical he might be, is sinful. Filmer did not merely seek to restore the Dark Ages theory that the king must never be forcibly resisted. Even under the Dark Ages standard, the king was required to rule according to the law and customs of the nation. Filmer claimed that the king was free of every constraint.

Sidney tore into *Patriarcha* line by line. Because of the Reformation, almost every English-speaking home contained a Bible, and so the Jewish heroes who had led forcible resistance of bad governments were well-known: "Moses, Othniel, Ehud, Barak, Gideon, Samson, Jephthah, Samuel, David, Jehu, the Maccabees, and others." Sidney ch. 1, § 3. Such men were "perpetually renowned for having led the people by extraordinary ways . . . to recover their liberties, and avenge injuries received from foreign or domestick tyrants." *Id.* ch. 2, § 24.

As one section's title summarized, "Popular Governments are less subject to Civil Disorders than Monarchies; manage them more ably, and more easily recover out of them." *Id.* ch. 2, § 234. Hence, a violent revolution to instill a popular government would, in the long run, lead to more stability and less violence.

Sidney was a militia enthusiast, using many examples from ancient Greece and Rome, and from more recent European history, to show that a militia fighting for its freedom would defeat mercenaries merely interested in pay. *Id.* ch. 2, § 21.

On the duty of individuals and nations to use force, when necessary, to protect their own interests, Sidney coined the English version of the epigram: "God helps those who help themselves." *Id.* ch. 2, § 23.[100]

Without a natural right of self-defense, society itself would cease to exist:

> Nay, all laws must fall, human societies that subsist by them must be dissolved, and all innocent persons be exposed to the violence of most wicked, if men might not justly defend themselves against injustice by their own natural right, when the ways prescribed by public authority cannot be taken.

Id. ch. 2, § 4. From the right of personal self-defense, a right of self-defense against tyrants necessarily followed. *Id.* ch. 2, § 4. To be subject to a tyrant was little different from being under the power of a pirate. *Id.* ch. 3, § 46. The fifth-century Christian writer Augustine of Hippo had said the same, as had the Confucian philosopher Mencius. (Online Ch. 21.A.1, n.7.) Thus, "those arms were just and pious that were necessary, and necessary when there was no hope of safety by any

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100. In the fable of *Hercules and the Waggoner*, Aesop had written, "The gods help them that help themselves."

other way. This is the voice of mankind, and is disliked only" by princes who fear deserved punishments, and their flatterers and servants who share the princes' guilt. *Id.* ch. 3, § 40.

The necessary corollary of the right of self-defense against tyrants was the possession of arms: "he 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." *Id.* ch. 2, § 4.

England's situation in the 1680s worried Sidney, for the old checks and balances were vanishing: "That which might have easily been performed when the people were armed, and had a great, strong, virtuous and powerful nobility to lead them, is made difficult, now they are disarmed, and that nobility abolished." *Id.* ch. 3, § 37.

The English were not obliged to live under the same system of government as their ancestors, because human understanding had increased. So "if it be lawful for us by the use of that understanding to build houses, ships, and forts better than our ancestors, to make such arms as are most fit for our defence, and to invent printing, with an infinite number of other arts beneficial to mankind, why have we not the same right in matters of government. . . ." *Id.* ch. 3, § 7.

While parts of the New Testament (particularly, *Romans* 13; see online Ch. 21.C.2.d) had urged submission to government, "those precepts were merely temporary, and directed to the person of the apostles, who were armed only with the sword of the spirit; that the primitive Christians used prayers and tears only no longer than whilst they had no other arms." By becoming Christians, men "had not lost the rights belonging to all mankind." So "when God had put means into their hands of defending themselves," then "the Christian valour soon became no less famous and remarkable than that of the pagans." *Id.* ch. 3, § 7.

Sidney disputed Filmer's claim that God "caused some to be born with crowns upon their heads, and all others with saddles upon their backs." *Id.* ch. 3, § 33. A few days before Thomas Jefferson died on July 4, 1826, the fiftieth anniversary of the Declaration of Independence, Jefferson wrote his final letter, which echoed Sidney's words from a century and a half before:

> All eyes are opened, or opening, to the rights of man. The general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God.

Letter from Thomas Jefferson to Roger Weightman (June 24, 1826), *in* The Portable Thomas Jefferson 585 (Merrill D. Peterson ed., 1977).

Together, Algernon Sidney and John Locke made the case that the right of armed resistance is inseparable from the right of religious freedom. In the past, groups who had successfully fought for their own religious freedom were usually intolerant of the freedom of other religions. Among the many examples are the Jewish Maccabees, who won a war of national independence against a government in Syria; the Lutherans and Calvinists in continental Europe who liberated themselves from Catholic rule; and the Scottish Presbyterians. The early resistance theorists were passionately interested in their own religious freedom, and intolerant of the freedom of other religions. Locke and Sidney advanced the right of resistance

to mean the right of religious freedom for everyone.[101] Since no one could use the power of the state to force a religion on someone else, there was no need to fear or suppress anyone else's religion.

It would take some time for Locke's and Sidney's ideas to be fully accepted in England. In the American colonies, they would help set off the shot heard 'round the world.

4. Novanglus

In "Novanglus," a series of 1775 newspaper essays, John Adams set forth the most sophisticated legal and philosophical arguments for the colonists' right of resistance. In essay number six, Adams cited the preeminent international law theorist Hugo Grotius to support the point that it was not seditious to resist a ruler who was assuming powers that had never been granted:

> The same course is justly used against a legal magistrate who takes upon him to exercise a power which the law does not give; for in that respect he is a private man,—"*Quia*," as Grotius says, "*eatenus non habet imperium*," [Because he does not have the authority to that extent.]—and may be restrained as well as any other; because he is not set up to do what he lists, but what the law appoints for the good of the people; and as he has no other power than what the law allows, so the same law limits and directs the exercise of that which he has.

John Adams, *Novanglus*, essay 6 (Feb. 27, 1776), *in* Charles Francis Adams, 4 The Works of John Adams 82 (1856) (some internal quotation marks omitted).

Adams quoted verbatim a massive footnote by Jean de Barbeyrac, author of an extensively annotated edition of Samuel von Pufendorf's treatise (online Chapter 18.C.4) on international law and political philosophy. In the footnote, Barbeyrac wove together Grotius (the primary founder of classical international law, and a preeminent political philosopher), and Pufendorf (the first professor of international law, and author of a treatise that was second only to that of Grotius). Elaborating on the works of Catholic scholars such as Francisco de Victoria and Francisco Suarez, Grotius and Pufendorf had used the principle of the right of personal self-defense to extrapolate an international law of warfare. For example, if a home invader had been captured and was tied up, it was not permissible to kill him. By analogy, prisoners of war could not be killed. Pufendorf's treatise was the foremost guide to moral and political philosophy in Enlightenment Europe.

Barbeyrac also drew on Jean LeClerc (a liberal Swiss Protestant philosopher and theologian), John Locke, and Algernon Sidney. Barbeyrac, with Adams in agreement, had argued that revolution against tyranny was a means to restore civil society, that resistance was justified before the tyranny was fully consolidated, and

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101. Locke's toleration did not include Catholics, whom he considered to be loyal to a foreign potentate (the Pope) rather than to the British government. Nor did it include atheists, who were considered to have no moral self-constraint.

that armed resistance would not lead to mob rule. The Barbeyrac quote is a proper end for this Chapter, for it synthesizes some of the key sources on which Americans relied to justify their armed revolt against the British Empire.

John Adams

Novanglus

4 The Works of John Adams 82-84 (Charles Francis Adams ed., 1856)

When we speak of a tyrant that may lawfully be dethroned by the people, we do not mean by the word *people*, the vile populace or rabble of the country, nor the cabal of a small number of factious persons, but the greater and more judicious part of the subjects, of all ranks. Besides, the tyranny must be so notorious, and evidently clear, as to leave nobody any room to doubt of it, & c. Now, a prince may easily avoid making himself so universally suspected and odious to his subjects; for, as Mr. Locke says in his Treatise of Civil Government, c. 18, § 209,—"It is as impossible for a governor, if he really means the good of the people, and the preservation of them and the laws together, not to make them see and feel it, as it is for the father of a family not to let his children see he loves and takes care of them." And therefore the general insurrection of a whole nation does not deserve the name of a rebellion. We may see what Mr. Sidney says upon this subject in his Discourse concerning Government:—"Neither are subjects bound to stay till the prince has entirely finished the chains which he is preparing for them, and put it out of their power to oppose. It is sufficient that all the advances which he makes are manifestly tending to their oppression, that he is marching boldly on to the ruin of the State." In such a case, says Mr. Locke, admirably well,—"How can a man any more hinder himself from believing, in his own mind, which way things are going, or from casting about to save himself, than he could from believing the captain of the ship he was in was carrying him and the rest of his company to Algiers, when he found him always steering that course, though cross winds, leaks in his ship, and want of men and provisions, did often force him to turn his course another way for some time, which he steadily returned to again, as soon as the winds, weather, and other circumstances would let him?" This chiefly takes place with respect to kings, whose power is limited by fundamental laws.

If it is objected that the people, being ignorant and always discontented, to lay the foundation of government in the unsteady opinion and the uncertain humor of the people, is to expose it to certain ruin; the same author will answer you, that "on the contrary, people are not so easily got out of their old forms as some are apt to suggest. England, for instance, notwithstanding the many revolutions that have been seen in that kingdom, has always kept to its old legislative of king, lords, and commons; and whatever provocations have made the crown to be taken from some of their princes' heads, they never carried the people so far as to place it in another line." But it will be said, this hypothesis lays a ferment for frequent rebellion. "No more," says Mr. Locke, "than any other hypothesis. For when the people are made miserable, and find themselves exposed to the ill usage of arbitrary power, cry up their governors as you will for sons of Jupiter;

let them be sacred and divine, descended or authorized from heaven; give them out for whom or what you please, the same will happen. The people generally ill treated, and contrary to right, will be ready upon any occasion to ease themselves of a burden that sits heavy upon them. 2. Such revolutions happen not upon every little mismanagement in public affairs. Great mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty will be borne by the people without mutiny and murmur. 3. This power in the people of providing for their safety anew by a legislative, when their legislators have acted contrary to their trust by invading their property, is the best fence against rebellion, and the probablest means to hinder it; for rebellion being an opposition, not to persons, but authority, which is founded only in the constitutions and laws of the government; those, whoever they be, *who by force break through, and by force justify the violation of them, are truly and properly rebels.* For when men, by entering into society and civil government, have excluded force, and introduced laws for the preservation of property, peace, and unity, among themselves; those who set up force again, in opposition to the laws, do *rebellare*, that is, do bring back again the state of war, and are properly, rebels," as the author shows. In the last place, he demonstrates that there are also greater inconveniences in allowing all to those that govern, than in granting something to the people. But it will be said, that ill affected and factious men may spread among the people, and make them believe that the prince or legislative act contrary to their trust, when they only make use of their due prerogative. To this Mr. Locke answers, that the people, however, is to judge of all that; because nobody can better judge whether his trustee or deputy acts well, and according to the trust reposed in him, than he who deputed him. "He might make the like query," (says Mr. Le Clerc, from whom this extract is taken) "and ask, whether the people being oppressed by an authority which they set up, but for their own good, it is just that those who are vested with this authority, and of which they are complaining, should themselves be judges of the complaints made against them." The greatest flatterers of kings dare not say, that the people are obliged to suffer absolutely all their humors, how irregular soever they be; and therefore must confess, that when no regard is had to their complaints, the very foundations of society are destroyed; the prince and people are in a state of war with each other, like two independent states, that are doing themselves justice, and acknowledge no person upon earth, who, in a sovereign manner, can determine the disputes between them.

NOTES & QUESTIONS

1. **CQ:** Thomas Jefferson described Aristotle, Cicero, John Locke, and Algernon Sidney as the four major sources of the American consensus on rights and liberty, which Jefferson distilled into the Declaration of Independence (Ch. 4.B.5). Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *in* 16 The Writings of Thomas Jefferson 117-19 (Andrew A. Lipscomb ed., 1903). Can you identify passages in the Declaration that reflect the views of Locke or Sidney? Aristotle and Cicero are discussed in online Chapter 21.B.1.c, B.2.c.

2. If you were writing a constitution and you agreed with the views expressed above by Locke and Sidney, what provisions would you include?

3. Timothy McVeigh was a neo-Nazi who perpetrated the worst act of domestic terrorism in American history, blowing up the Alfred P. Murrah federal building in Oklahoma City in 1995, murdering 168 people. McVeigh was captured while fleeing in his automobile. In the car was Locke's Second Treatise on Government. McVeigh was wearing a t-shirt with the words *sic semper tyrannis* ("thus always to tyrants"). This is the state motto of Virginia, whose state flag portrays the Roman goddess Virtus holding a spear and standing with one foot on the chest of a king she has justly slain. The phrase was attributed to Brutus when he killed Julius Caesar, and it was uttered by John Wilkes Booth when he murdered Abraham Lincoln. There was a picture of Lincoln on McVeigh's t-shirt. Are crimes like McVeigh's and Booth's predictable outgrowths of a society allowing access to tools of violence and the publication of books like Locke's, or of works praising the assassination of Caesar?

4. Some critics of Locke agreed with him about the right of revolution but thought that Locke was too ready to invoke that right at early stages of oppression. Do you agree?

5. *The natural right of self-defense.* Locke and others extrapolated resistance to tyranny from the natural right of self-defense. Is the premise correct? Herbert Wechsler, one of the most influential criminal law scholars of the twentieth century, wrote that laws regarding self-defense reflect the "universal judgment that there is no social interest in preserving the lives of the aggressors at the cost of those of their victims." Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide*, 37 Colum. L. Rev. 701, 736 (1937). Is such a judgment universal now? Was it ever? Personal self-defense is part of the law of every legal system in the world today. Schlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 Va. L. Rev. 999, 999 (2005) ("the right to self-defense is recognized in all jurisdictions"). The scope of the right, however, varies from nation to nation.

Locke's theories incorporated arguments by Thomas Hobbes, who wrote that people create governments to free themselves from a state of nature in which life is "nasty, brutish, and short" because there exists constant competition that leads to a constant "condition of warre." Thomas Hobbes, Leviathan 84-85 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651). In Hobbes's view, individuals covenant to cede all natural rights (including the ability to do whatever one wanted in the state of nature) to the government, including the right to change their government, no matter how bad it is. *Id.* at 120. Hobbes made an exception, however, noting that "[a] Covenant not to defend my selfe from force, by force, is always voyd. . . . For man by nature chooseth the . . . danger of death in resisting . . . than . . . certain and present death in not resisting." *Id.* at 94-95. A right that can be surrendered or delegated to the government is an "alienable" right.

CQ: The Declaration of Independence affirms that certain rights are "inalienable," and thus could never have been surrendered to Parliament or the king. Do you agree with Hobbes that self-defense is inalienable? If so, what are the legal implications?

6. *Can self-defense be prohibited?* The Second Amendment was held to be enforceable against the states in *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (Ch. 11.B). The Supreme Court reversed a decision of the Seventh Circuit, written

by Judge William Bauer and joined by Judges Frank Easterbrook and Richard Posner. *National Rifle Association et al. v. City of Chicago, Illinois, and Village of Oak Park, Illinois*, 567 F.3d 856 (7th Cir. 2009). The Seventh Circuit recognized that *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Ch. 11.A), had said that people have a right to own handguns for self-defense. But, argued the Seventh Circuit, handguns could still be banned, as long as a state first banned self-defense. "Suppose a state were to decide that people cornered in their homes must surrender rather than fight back—in other words, that burglars should be deterred by the criminal law rather than self-help. That decision would imply that no one is entitled to keep a handgun at home for self-defense, because self-defense would itself be a crime, and *Heller* concluded that the Second Amendment protects only the interests of law-abiding citizens. . . . Our hypothetical is not as far-fetched as it sounds." *Id.* at 859. Can a legitimate government outlaw self-defense, or would the prohibition delegitimize the government?

7. *Self-defense against criminals and criminal governments.* The view that unjust government is just a large-scale form of organized crime is deeply rooted in Western and Eastern political philosophy; the corollary is that resistance to the large-scale tyranny of an evil king is no different in principle than resistance to the micro-tyranny of a band of robbers or rapists. Among the exponents of this view have been Cicero (Roman lawyer), Augustine (Christian writer), Thomas Aquinas (Christian writer), and Mencius (Confucian writer). *See* online Ch. 21. It was central to the ideology of the American Revolution. *See* Chs. 3-4. To the Americans, and to the Britons the Americans admired most, personal and collective self-defense were not separate categories; they were applications of the same principle. Collective action, such as in the militia, was necessary to suppress the most powerful criminals. Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 Const. Comm. 87 (1992).

8. *Government in rebellion against the people.* Theodore Schroeder was leader of the Free Speech League, the first group in American history to defend the rights of all speakers on all subjects, based on the principles of the First Amendment. Schroeder's 1916 book *Free Speech for Radicals* used the Glorious Revolution of 1688 to argue for protection of speech urging the overthrow of the government:

> If we are to erect this complaint against disarming part of the people into a general principle, it must be that to maintain freedom we must keep alive both the spirit and the means of resistance to government whenever "government is in rebellion against the people," that being a phrase of the time. This of course included the right to advocate the timeliness and right of resistance.
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> The reformers of that period were more or less consciously aiming toward the destruction of government from over the people in favor of government from out of the people, or as Lincoln put it, "government of, for and by the people." Those who saw this clearest were working towards the democratization of the army by abolishing standing armies and replacing them by an armed populace defending themselves, not being defended and repressed by those in whose name the defence is made.

> Upon these precedents, others like them, and upon general principles reformers like DeLolme and John Cartwright[102] made it plain that the right to resist government was one protected by the English Constitution.

Theodore Schroeder, Free Speech for Radicals 105-06 (1916). Is Schroeder correct that the Declaration of Rights implicitly recognizes a right of the people to take up arms against a government that is "in rebellion against the people?" Is the argument stronger when coupled with Blackstone's interpretation of the right to arms? How can Schroeder's views be reconciled with the fact that *after* the Declaration of Rights, England still had laws against sedition, and that Blackstone wrote about such laws with apparent approval?

9. *Arms rights and the freedom of religion.* Can you think of some reasons why protections of religious freedom and conscience in the U.S. First Amendment are followed by an amendment about arms rights? At the Virginia Convention of ratification of the U.S. Constitution, Zachariah Johnson argued that there was no risk of federal tyranny, and that a Bill of Rights was unnecessary. He pointed out that "the people are not to be disarmed of their weapons. They are left in full possession of them." Further, the government would be freely elected by the people. Unlike in the United Kingdom, the U.S. Constitution provided that "no religious Test shall ever be required as a Qualification to an Office or public Trust under the United States." U.S. Const., art. VI. Should the federal government attempt to impose a single religion, "in prejudice of the rest, they would be universally detested and opposed, and easily frustrated. This is the principle which secures religious liberty most firmly. The government will depend on the assistance of the people in the day of distress." 3 Debates on the Adoption of the Federal Constitution 644-46 (June 25, 1778) (Jonathan Elliot ed. 1845). How does the history of the United Kingdom support or contradict Johnson's political theory?

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102. [British aristocrat John Cartwright was an early supporter of American independence, and an advocate of radical reform in Great Britain, including a Parliament elected by universal suffrage. The Swiss Jean Louis de Lolme, while living in England, authored *The Constitution of England* in 1775. Quoting Blackstone's language about "the right of having and using arms for self-preservation and defence," de Lolme noted that "resistance gave birth to the Great Charter" (Magna Carta). While "resistance is looked upon by them [the English people] as the ultimate and lawful resource against the violences of Power," an armed citizenry would rarely need to resist, for "[t]he Power of the People is not when they strike, but when they keep in awe: it is when they can overthrow every thing, that they never need to move, . . . *Ostendite bellum, pace habebitis* [Make but a show of war and you shall have peace]" Jean Louis de Lolme, 1 The Constitution of England 214-15, 219 (David Lieberman ed.) (Liberty Fund 2007) (1784) (1775). De Lolme also warned against standing armies. The first step of a government protected by a standing army would be to "retrench from their unarmed Subjects, a freedom which, transmitted to the Soldiery, would be attended with so fatal consequences. . . ." Namely, the army would behave licentiously while controlling the people's behavior. *Id.* at 290.—Eds.]