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# All the Way Down the Slippery Slope: Gun Prohibition in England and Some Lessons for Civil Liberties in America

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## ESSAYS

# ALL THE WAY DOWN THE SLIPPERY SLOPE: GUN PROHIBITION IN ENGLAND AND SOME LESSONS FOR CIVIL LIBERTIES IN AMERICA

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### I. Introduction

Is it possible for a nation to go from wide-open freedom for a civil liberty, to near-total destruction of that liberty, in just a few decades? “Yes,” warn many American civil libertarians, arguing that allegedly “reasonable” restrictions on civil liberty today will start the nation down “the slippery slope” to severe repression in the future.<sup>3</sup> In response, proponents of today’s reasonable restrictions argue that the jeremiads about slippery slopes are unrealistic or even paranoid.<sup>4</sup>

This Essay aims to refine the understanding of slippery slopes by examining a particular nation that did slide all the way down the slippery slope.

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3. See, e.g., Henry Geller & Jane H. Yurow, *The Reasonable Access Provision (312(a)(7)) of the Communications Act: Once More Down the Slippery Slope*, 34 FED. COM. L.J. 389 (1982) (arguing that the Federal Election Commission review of a television station’s refusal to allow a federal candidate “reasonable access” creates a slippery slope for government control of the media’s editorial decisions); John Q. La Fond, *Washington’s Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655 (1992) (arguing that allowing the civil commitment of persons labeled as violent sexual predators creates a slippery slope to the widespread use of lifetime confinement of other people based on only a single crime); Jennifer L. Bradshaw, Comment, *The Slippery Slope of Modern Takings Jurisprudence in New Jersey*, 7 SETON HALL CONST. L.J. 433 (1987) (discussing a decision upholding the Pinelands Protection Act and arguing that the slippery slope endangers Fifth Amendment property rights).

Of course slippery slope arguments are not made only as arguments against a potential infringement of civil liberty. See, e.g., JAMES Q. WILSON, MORAL JUDGMENT: DOES THE ABUSE EXCUSE THREATEN OUR LEGAL SYSTEM (1997) (asserting that expert testimony about battered women’s syndrome creates a slippery slope away from personal responsibility).

4. For example, Andrew McClurg, in his sophisticated critique of the rhetoric for and against gun control, calls “fallacious” the invocation of the “slippery slope” argument against the Brady Bill. McClurg acknowledges that some leading advocates of the Brady Bill had a long-term objective of banning all guns or all handguns. Nevertheless, McClurg considers the slippery slope to be deficient of empirical support; he finds no reason to believe that a law like the Brady Bill could set the stage for eventual prohibition. See Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U.L. REV. 53, 84-89 (1992). In this Essay, we aim to answer the demand of Professor McClurg (and other gun control advocates) who ask for evidence that moderate gun controls actually could lead to gun confiscation.

When the twentieth century began, the right to arms in Great Britain was robust, and subject to virtually no restrictions. As the century closes, the right has been almost obliterated. In studying the destruction of the British right to arms, this Essay draws conclusions about how slippery slopes operate in real life, and about what kinds of conditions increase or decrease the risk that the first steps down a hill will turn into a slide down a slippery slope.

For purposes of this Essay, the reader will not be asked to make a judgement about the righteousness of the (former) British right to arms or the wisdom of current British gun prohibitions and controls. Instead, the object is simply to examine how a right that is widely respected and unrestricted can, one "reasonable" step at a time, be extinguished. This Essay pays particular attention to how the public's "rights consciousness," which forms such a strong barrier against repressive laws, can weaken and then disappear. The investigation of the British experience offers some insights about the current gun control debate in the United States, and also about ongoing debates over other civil liberties. This Essay does not require that the reader have any affection for the British right to arms; presumably, the reader does have affection for some civil liberties, and the Essay aims to discover principles about how slippery slopes operate. These principles can be applied to any debate where slippery slopes are an issue.

Part II of this Essay briefly sets forth the legal background of the British right to bear arms, as it developed from ancient times to the late nineteenth century. Part III describes the unimpaired British right to arms of the late nineteenth century and the changes in popular culture that began to threaten that right. Part IV describes how social unrest before World War I intensified the pressure for gun control, and finally resulted in the creation of a licensing system for rifles and handguns after the war. The gun control system was gradually expanded in the 1930s, relaxed in enforcement during World War II when Nazi invasion loomed, and then re-imposed with full force. Part V focuses on the turbulent 1960s, and how the government enacted a mild licensing system for shotguns, in order to deflect public cries for re-imposition of the death penalty, following the murder of three policemen by criminals using pistols. Part VI describes how the British gun licensing system is administered today and how police discretion is used to make the system much more restrictive, even without changes in statutory language. Part VII analyzes the conditions that have created the momentum for the gradual prohibition of all firearms ownership in Great Britain, and how isolated but sensational crimes are used as launching pads for further steps to prohibition. In Part VIII the Essay looks at how armed self-defense has, without statutory change, gone from being a "good reason" for the granting of a gun license to being prohibited. The decline of other British civil liberties in the late twentieth century, such as freedom of speech, protection from warrantless searches, and criminal procedure safeguards, is discussed in Part

IX. Finally, Part X summarizes and elaborates on some of the conditions that make possible a fall down the slippery slope.

Throughout this Essay, parallels are drawn between British history and the modern gun control debate in the United States, because the issue of whether any particular set of controls will set the stage for gun prohibition is one of the hotly contested questions in the contemporary discussion.

## II. Wrenching Freedom From the King - The 1689 English Bill of Rights and the Right to Arms

It began as a duty, operated as a mixed blessing for Kings, and wound up as one of the "true, ancient, and indubitable"<sup>5</sup> rights of Englishmen. From as early as 690,<sup>6</sup> the defense of the realm rested in the hands of ordinary Englishmen. Under the English militia system, every able-bodied freeman was expected to defend his society and to provide his own arms, paid for and possessed by himself.<sup>7</sup> It appears that the wearing of arms was widespread. The only early limitations placed on gun possession were for the misuse of arms by appearing in certain public places "with force" under a 1279 royal enactment<sup>8</sup> or by using them "in affray of the peace."<sup>9</sup> These limitations were construed to prohibit only the possession of arms "accompanied with such circumstances as are apt to terrify the people"<sup>10</sup> but not the mere "wearing [of] common weapons" for personal defense.<sup>11</sup>

The Tudor monarchs tried to prevent hunting with crossbows, and later with firearms, by commoners by setting a minimum annual income from land as a condition of hunting, or of possession of crossbows and handguns.<sup>12</sup> They were unsuccessful and, after first liberalizing the prohibitions, Henry VIII's government repealed them in 1546.<sup>13</sup> As the Tudor era ended, individual armament (typically with long bows) and an individual obligation to serve in the militia was the norm for Englishmen. Historians view the widespread individual ownership of arms as an important factor in the "moderation of monarchical rule and the development of the concept of individual liberties"<sup>14</sup> in England during a period when absolute, divine-right royal rule was expanding as the norm in continental Europe.<sup>15</sup>

5. See 1 W. & M., ch. 2 (Eng.); HANNIS TAYLOR, *THE ORIGINS AND GROWTH OF the English Constitution* 415-17 (4th ed. 1896).

6. See David Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 3 HARV. J.L. & PUB. POL'Y 559, 562 (1986).

7. See *id.* at 563-65. The word "militia" was not created until Elizabethan times, around 1590, although the system of popular defense had existed in some form for approximately a thousand years. The fact that most able-bodied males had national or local defense obligations, using weapons supplied by themselves, should not be taken to suggest that everything about military service was egalitarian. Feudalism was anything but. See, e.g., MICHAEL RHYS POWICKE, *MILITARY OBLIGATION IN MEDIEVAL ENGLAND: A STUDY IN LIBERTY AND DUTY* (1962).

8. 7 Edw., ch. 2 (Eng.).

9. 2 Edw. 3, ch. 3 (Eng.). This "Statute of Northampton" reiterated the prohibition on misuse by those who "go or ride armed by day or night" in certain public locations. See *id.*

10. 1 WILLIAM HAWKINS, *PLEAS OF THE CROWN* 267 (6th ed. 1788).

11. *Rex v. Knight*, 87 Eng. Rep. 75 (K. B. 1686).

12. See 19 Hen. 7, ch. 4 (Eng.); 6 Hen. 8, ch. 13 (Eng.).

13. See 33 Hen. 8, ch. 6 (Eng.). See generally, RALPH PAYNE-GALLWEY, *THE BOOK OF THE CROSSBOW* 31-37 (1995).

14. Hardy, *supra* note 6, at 570.

In the period leading up to the Glorious Revolution, the Stuart monarchs adopted a radical policy of personal disarmament toward those who politically threatened their royal prerogatives. This included the militia of armed freemen as well as direct political rivals. Through a series of parliamentary enactments, they tried registration of possession, registration of sales, hunting restrictions,<sup>16</sup> possession bans ostensibly aimed at controlling illegal hunting, restrictions on personal arms possessed by the militia,<sup>17</sup> warrantless searches, and confiscations.<sup>18</sup> By 1689, the Stuart monarchs had succeeded, not at full disarmament, but at alienating their "allies" as well as their opponents and losing their throne in a bloodless revolution.

When William of Orange and Mary arrived to begin their reign on England's throne, the country's political leaders recognized the need to rein in any tendency of the new monarchs toward the excessive royal power the nation had just suffered under James II. Thus, William and Mary were required to accept a "declaration of rights" as a definitive statement of the rights of their subjects. That declaration was later enacted as the Bill of Rights.<sup>19</sup> The Declaration of Rights was prepared in great haste, limited to noncontroversial matters, and viewed as a statement of the existing rights of Englishmen. It contained only two individual rights applicable to the general public: to petition and to arms. Furthermore, it only effectively limited the monarch, not the Parliament. Even though the Bill of Rights was by its terms to be upheld "in all times to come," nothing one Parliament does can constrain the actions of subsequent Parliaments.<sup>20</sup> That was the problem with the Bill of Rights being enacted as statute, however important a statute. The Anglo-American legal world would not implement a genuine constitution until 1776, when newly-independent Virginia created her first.

The experience under the Stuarts, demonstrating the political uses of disarmament, convinced many in the Convention Parliament that there was great danger to the security of English liberties from a disarmed citizenry.<sup>21</sup> In Commons, member after member complained about the loss of liberty

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15. See, e.g., SIR JOHN FORTESCUE, *ON GOVERNMENT* (approx. 1497).

Thai [the French peasants] 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. But verely thai liven in the most extreme pouertie and miserie, and yet dwellyn thai in on the most fertile reaume of the worlde. Werthurgh the French kynge hath not men of his owne reaume able to defende it, except his nobles, wich beyren non such imposicions, and ther fore thai ben right likely of their bodies; bi wiich cause the said kynge is compellid to make his armeys and retinues for the defence of his lande of straungers, as Scottes, Spaynardes, Arrogoners, men of Almeyn [Germans], and of other nacions, or ellis all his enymes myght ouerrenne hym; for he hath no defence of his owne except his castels and fortresses. Lo, this is the fruit of jus reale. Yf the reaume of Englonde, wich is an Ile, and therfor mey not lyghtly geyte succore of other landes, were rulid under such a lawe, and under such a prince, it wolde then be a pray to all other nacions that wolde conquer, robbe or deuour it.

*Id.*

16. See Game Act of 1671, 22 & 23 Car. 2, ch. 25 (Eng.).

17. See Militia Act of 1662, 14 Car. 2, ch. 3 (Eng.).

18. See Hardy, *supra* note 6, at 571-79. See also JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (1994).

19. See 1 W. & M., ch. 2 (Eng.).

20. James Madison's greatest insight as he prepared America's written Bill of Rights was that there is as much threat to liberty from a popularly elected legislature as there is from a monarch. See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 290 (1996).

21. See generally MALCOLM, *supra* note 18.

they had personally suffered when disarmed of their private arms by actions "authorized" under the 1662 Militia Act, the 1671 Game Act, and various other laws. Since the new monarchy was to be a limited one, the members saw both a personal and national interest in the ability of ordinary Englishmen to possess their own defensive arms to restrain the Crown. After much discussion and numerous revisions, the right to arms evolved into a statement that "the Subjects which are protestants may have Arms for their Defense suitable to their Conditions and as allowed by law."<sup>22</sup> Historian Joyce Lee Malcolm concluded that:

[t]he last-minute amendments that changed that article from a guarantee of a popular power into an individual right to have arms was a compromise forced on the Whigs. The vague clauses about arms "suitable to their conditions and as allowed by law" left the way open for legislative clarification and for perpetuation of restrictions . . . . But though the right could be circumscribed, it had been affirmed. The proof of how comprehensive the article was meant to be would emerge from future actions of Parliament and the courts.<sup>23</sup>

By the time of the American Revolution, legislation and court decisions had made it clear that Englishmen had a real right to possess arms,<sup>24</sup> even during times of turmoil such as the anti-Catholic Gordon riots in London in 1780. The Recorder of London, the equivalent of a modern-day city's general counsel, gave this opinion in 1780:

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 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

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22. See 1 W. & M., ch. 2 (Eng.).

23. See MALCOLM, *supra* note 18, at 121. Part II of this Essay is meant only to give a brief summary of the legal foundation of the English right to arms, and not to trace the complexities of its development during the Stuart period. For readers who want the full story, Malcolm's book is superb, as United States Supreme Court Justice Scalia has recognized. See Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 136-37 (1997). For a critique of Malcolm's argument that the Convention Parliament created a right to arms, rather than recognizing a traditional right, see David B. Kopel, *It Isn't About Duck Hunting: The British Origins of Right to Arms*, 96 MICH. L. REV. 1333 (1995). For a response to Carl Bogus's assertion that the 1689 Bill of Rights did not recognize any individual right to arms, see David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1523-24 (1998).

24. See, e.g., *Rex v. Gardner*, 87 Eng. Rep. 1240 (K.B. 1739).

established by the authority of judicial decisions and ancient acts of parliament, as well as by reason and common sense.<sup>25</sup>

Blackstone's celebrated treatise lauded the individual right to arms as one of the "five auxiliary rights of the subject," and explained that the right was for personal defense against criminals, and for collective defense against government tyranny.<sup>26</sup> He further explained that "in 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."<sup>27</sup> The Englishman's boast that he and his countrymen were "the freest subjects under Heaven" because he had the right "to be guarded and defended . . . by [his] own arms, kept in [his] own hands, and used at [his] own charge under [his] Prince's Conduct"<sup>28</sup> was true. This did not mean, of course, that Englishmen enjoyed perfect civil liberty, as those in the United States frequently pointed out. Englishmen did, however, enjoy much greater freedom and participation in government than did the people of Continental Europe, and it was England's conventional wisdom that the freedom of the English people was closely tied to their right to possess arms, and thereby deter any thought of usurpation by the government.

From the day when the Stuarts fled to France, there were virtually no restrictions on an Englishman's right to own and carry firearms, providing that he did not hunt with them, for the next two centuries. The only notable exceptions were the Seizure of Arms Act and the Training Prevention Act, which banned drilling with firearms and allowed confiscation of guns from revolutionaries in selected regions.<sup>29</sup> The Acts were the product of social unrest related to the Industrial Revolution, climaxing in the 1819 Peterloo Massacre, in which government forces killed unarmed demonstrators. The Acts expired by their own terms in 1822. Even while the 1819 Acts were in force, the case of *Rex v. Dewhurst* explained that the "suitable to their condition" clause in the Bill of Rights's "Arms for their Defence" guarantee did not allow the government to disarm "people in the ordinary class of life."<sup>30</sup>

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25. WILLIAM BLIZARD, DISULTORY REFLECTION ON POLICE: WITH AN ESSAY ON THE MEANS OF PREVENTING CRIMES AND AMENDING CRIMINALS 59-60 (London, 1785).

26.

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. & M. st. 2 c. 2, and it is indeed, a public allowance under due restrictions, of the natural rights of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*143-44 (1779) (1765).

27. 4 BLACKSTONE, COMMENTARIES \*82.

28. MALCOLM, *supra* note 18, at 3 (quoting STATE TRACTS: BEING A FURTHER COLLECTION OF SEVERAL CHOICE TREATISES RELATING TO GOVERNMENT FROM THE YEAR 1660 TO 1689, at 225 (London, 1692)).

29. 1 Geo. 4, ch. 47 (Eng.). The Act applied only in two cities and eleven counties that were thought most vulnerable to sedition. *See id.*

30. *Rex v. Dewhurst*, cited in 1 JOHN MACDONELL, ED., REPORTS OF STATE TRIALS, N.S. 529-608 (1820)).

### III. The Late Nineteenth Century

In the final decades of the last century, Great Britain was much like the United States in the 1950s. There were almost no gun laws, and almost no gun crime. The homicide rate per 100,000 population per year was between 1.0 and 1.5, declining as the century wore on.<sup>31</sup> Two technological developments, however, began to work together to create in some minds the need for gun control. The first of these was the revolver. Revolvers had begun to achieve mass popularity when Colonel Samuel Colt showed off his models at London's 1851 Great Exhibition of the Works of Industry in All Nations.<sup>32</sup> Revolver technology advanced rapidly, and by the 1890s, revolver design had progressed about as far as it could, with subsequent developments involving fairly minor tinkering.

As revolvers got cheaper and better, concern arose regarding the increase in firepower available to the public. And in fact, the change from one or two shot weapons to the repeat-firing, five or six shot revolver represented perhaps the greatest advance in small arms civilian firepower that has ever occurred. Compared to the seemingly more benign single-shot muzzle-loaders of the past, the revolver seemed a frightening innovation.<sup>33</sup>

Revolvers were also getting less expensive, and concerns began to grow about the availability to criminals of cheap German revolvers.<sup>34</sup> Cheap guns were, in some eyes, associated with hated minority groups. For example, in the late 1860s, the London *Lloyd's Newspaper* blamed a crime wave on "foreign refuse" with their guns and knives. The newspaper stated that "[t]he revolver's appearance . . . we owe to the importation of reckless characters from America . . . . The Fenian [Irish-American] desperadoes have sown weapons of violence in our poorer districts."<sup>35</sup>

All of these developments have their parallels in modern United States. The current popularity of semi-automatic pistols, with a magazine capacity of thirteen, fifteen, or seventeen rounds, frightens some people who view the old six-shooter as a harmless traditional weapon. Furthermore, the fact that semi-automatics were invented over 100 years ago does not stop the press from portraying them as dangerous new guns, just as the revolvers of the 1850s were portrayed as dangerous new guns in the 1880s.

Prejudice and discrimination against ethnic groups persist. While United States gun control advocates do not complain much about Irish immigrants with guns, they do warn about the dangers of Blacks armed with "ghetto guns." The derisive term for inexpensive handguns, "Saturday Night

31. See CLIVE EMSLEY, *CRIME AND SOCIETY IN ENGLAND 1750-1900*, at 36 (1987).

32. See EDWARD C. EZELL, *HANDGUNS OF THE WORLD* 29 (1981). The Colt factory in London used interchangeable parts and was the first mass production gun factory outside the United States. See *id.* at 31.

33. See COLIN GREENWOOD, *FIREARMS CONTROL: A STUDY OF ARMED CRIME AND FIREARMS CONTROL IN ENGLAND AND WALES* 18 (1971). Breechloaders load from the rear of the gun, not from the muzzle, thus they are usually much quicker to reload. All modern guns, including revolvers, are breechloaders.

34. See EMSLEY, *supra* note 31, at 91-92, 131.

35. WILBER MILLER, *COPS AND BOBBIES: POLICE AUTHORITY IN NEW YORK AND LONDON 1830-1870*, at 115 (1977) (citation omitted).



Specials," has a racist lineage to the term "niggertown Saturday night."<sup>36</sup> The phrase "niggertown Saturday night" apparently mixed with the nineteenth century phrase "suicide special," which is a cheap single action revolver, to form "Saturday night special."

Revolvers were one technological development that began to make some Britons rethink the desirability of the right to bear arms. The second development was the growth of the mass circulation press. Newspapers, like guns, had been around for quite a while, but the late nineteenth century witnessed several printing innovations that made printing of vast quantities of newspapers extremely cheap.

The Walter press, patented in England in 1866, introduced stereotype plates. Printers discovered ways to make sheets of any desired length, thereby allowing rolls of paper to be fed into cylinder presses, and greatly accelerating printing speed. Machines for folding newspapers were brought on-line. By the late nineteenth century, typesetting machines were coming into use. All of these developments made possible the production of low-cost newspapers, which even poor people could buy every day. As audiences expanded, papers became increasingly sensationalist, and the "yellow journalism" of publishers such as the United States' Joseph Pulitzer was born.

Hearst's British counterparts were fervently devoted to sensation, and especially loved lurid crime stories. In 1883 a pair of armed burglaries in the London suburbs set off a round of press hysteria about armed criminals. The press notwithstanding, crime with firearms was rare. As this Essay will detail, the propensity of the press to sensationalize what sociologists call "atrocity tales" to create "moral panics" while demanding greater government regulation is one of the factors dramatically increasing the risk that a nation will descend down a slippery slope; but while media sensationalism can spur action, media attention is not necessarily sufficient by itself to produce results. Eighteen-eighty-three did see the first serious attempt at gun control in many decades, when Parliament considered and rejected a bill to ban the "unreasonable" carrying of a concealed firearm. In 1895, strong pistol controls were rejected by a two to one margin in the House of Commons.

The developments of the British press, and the press attitude towards crime and guns in the late 19th century, have their own parallels in the United States today. Television news is cutting loose its last ties to traditional standards imposed from the days of print journalism. In the "infotainment" produced by organizations such as NBC News, depiction of reality is less important than the production of entertaining and compelling "news" pieces. Thus, when the "assault weapon" panic of 1989 broke out, television journalists paid little attention to whether "assault weapons" actually were the "weapon of choice" of criminals. Instead of being on the reality of gun

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36. See B. Bruce-Briggs, *The Great American Gun War*, THE PUB. INTEREST, Fall 1976, at 50. Cf. *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. 1985). The *Kelley* case imposed strict liability on the manufacturer of a small handgun because the gun was supposedly only useful for crime. See *id.* Evidence of crime utility was based in part on a sales representative's statement: "If your store is anywhere near a ghetto area, these ought to sell real well." *Id.*

crime, the focus was on the sensational footage of guns firing full automatic, while newscasters decried the availability of semi-automatics. Police statistics show that so-called assault weapons are used in about 1% of gun crime.<sup>37</sup> In other contexts, displaying one thing while talking about another would be decried as fraud.

As the nineteenth century came to a close in Britain the press had not as yet persuaded the public to adopt gun controls. Buyers of any type of gun, from derringers to Gatling guns faced no background check, no need for police permission, and no registration. As criminologist Colin Greenwood wrote, "[a]nyone, be he convicted criminal, lunatic, drunkard or child, could legally acquire any type of firearm."<sup>38</sup> Additionally, anyone could carry any gun anywhere. The English gun crime rate was at its all-time low. A somewhat similar situation prevailed on the American frontier in the 1880s where everyone who chose to be, was armed, and "[t]he old, the young, the unwilling, the weak and the female . . . were . . . safe from harm."<sup>39</sup> The frontier crime rates, except for the results of "voluntary" bar fights among dissolute young men, were less than a tenth of the rates in modern-day United States and British cities.

The official attitude about guns was summed up by Prime Minister Robert Gascoyne-Cecil, the Marquess of Salisbury, who in 1900 said he would "laud the day when there is a rifle in every cottage in England." Led by the Duke of Norfolk and the mayors of London and Liverpool, a number of gentlemen formed a cooperative association that year to promote the creation of rifle clubs for working men. The Prime Minister and the rest of the aristocracy viewed the widespread ownership of rifles by the working classes as an asset to national security, especially in light of growing tension with imperial Germany.<sup>40</sup> While shotguns were seen as bird-hunting toys of the landed gentry, rifles were lauded as military arms suitable for everyone. Yet, within a century, the right to bear arms in Britain would be well on the road to extinction. The extinction had little to do with gun ownership itself, but instead related to the British government's growing mistrust of the British people, and the apathetic attitude of British gun owners.

37. For a collection of state and city-level data, see David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. CONTEMP. L. 381, 406-13 (1994).

38. GREENWOOD, *supra* note 33, at 25. The 1870 Gun License Act was repealed in 1967 as part of a comprehensive revision of gun laws. There were a few gun controls of little general interest during the mid-nineteenth century. For example, section 4 of the Vagrancy Act criminalized possession of an offensive weapon with intent to commit a felony.

39. ROGER D. McGRATH, *GUNFIGHTERS, HIGHWAYMEN, AND VIGILANTES* 247 (1984).

40. See Jan A. Stevenson, *Firearms Legislation in Great Britain*, HANDGUNNER, Mar.-Apr. 1988 at 7, 9; REPORT ON THE FIREARMS (AMENDMENT) BILL 41 (Michael Yardley & Jan A. Stevenson, eds., 2d ed. 1988). Until recent decades, the military had the same attitude, viewing civil shooters as potential good shooters for the military, and viewing civilian target shooting facilities as good places for training regular and reserve forces. Cadmus, *Ranges-Inspection and Use*, 35 GUNS REV. 834 (1995). "Cadmus" is a British gun rights author. The original Cadmus, from Greek myth, slew a dragon, was the first man to combine vowels with consonants, and founded the city of Thebes.

#### IV. The Early Twentieth Century through World War II

##### A. The First Step

In 1903, Parliament enacted a gun control law that appeared eminently reasonable. The Pistols Act of 1903 forbade pistol sales to minors and felons and dictated that sales be made only to buyers with a gun license. The license itself could be obtained at the post office, the only requirement being payment of a fee. People who intended to keep the pistol solely in their house did not even need to get the postal license.<sup>41</sup>

The Pistols Act attracted only slight opposition, and passed easily. The law had no discernible statistical effect on crime or accidents. Firearms suicides did fall, but the decline was more than matched by an increase in suicide by poisons and knives.<sup>42</sup> The homicide rate rose after the Pistols Act became law, but it is impossible to attribute this rise to the new law with any certainty. The bill defined pistols as guns having a barrel of nine inches or less, and thus pistols with nine-and-a-half inch barrels were soon popular.

While the Act was, in the short run, harmless to gun owners, the Act was of considerable long-term importance. By allowing the Act to pass, British gun owners had accepted the proposition that the government could set the terms and conditions for gun ownership by law-abiding subjects.<sup>43</sup> As Frederick Schauer points out, for a government body to decide "X and not Y" means that the government body has implicitly asserted a jurisdiction to decide between X and Y. Hence, to decide "X not Y" is to assert, indirectly, an authority in the future to choose "Y not X."<sup>44</sup> Thus, for Parliament to choose very mild gun controls versus strict controls was to assert Parliament's authority to decide the nature of gun control.<sup>45</sup> As this Essay shall discuss in regards to the granting of police authority over gun licensing, establishing the proposition that a government entity has any authority over a subject is an essential, but not sufficient, element for a trip down the slippery slope.

##### B. Dangerous Weapons

The early years of the twentieth century saw an increasingly bitter series of confrontations between capital and labor throughout the English-speaking world. In Britain, the rising militance of the working class was beginning to make the aristocracy doubt whether the people could be trusted with arms. When American journalist Lincoln Steffens visited London in

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41. See 3 Edw. 7, ch. 18 (Eng.).

42. See GREENWOOD, *supra* note 33, at 31.

43. See Roger Andrew Lorton, *Firearms Control in England and Wales: A Review of the Legislation; Its Hopes, Aspirations and Achievements* 12 (1991) (unpublished LL.B. dissertation, Birmingham Polytechnic) (on file with author).

44. Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 367 (1985).

45. An example of this process was seen in 1975, when, during a floor debate, the author of Minnesota's first set of restrictions on mere possession of firearms pleaded with his colleagues to pass his bill even if it had only the two words "gun control" in it. See Letter from Norman Jensvold, who was present during the Senate floor debate, to Joseph Olson (Mar. 10, 1999) (on file with Joseph Olson).

1910, he met leaders of Parliament who interpreted the current bitter labor strikes as a harbinger of impending revolution.<sup>46</sup> The next set of gun control initiatives reflected fears of immigrant anarchists and other subversives.

As the coronation of George V approached, one United States newspaper, the *Boston Advertiser*, warned about the difficulty of protecting the coronation march "so long as there is a generous scattering of automatic pistols among the 70,000 aliens in the Whitechapel district." The paper fretted about aliens in the United States and Britain with their "automatic pistols," which were "far more dangerous" than a bomb. The *Advertiser* defined an "automatic pistol" as a "quick-firing revolver," and called for gun registration, restrictions on ammunition sales, and a ban on carrying any concealed gun, all with the goal of "disarming alien criminals."<sup>47</sup>

What was the "automatic pistol/quick-firing revolver" that so concerned the newspaper? In 1896, the British company of Webley-Fosberry introduced an "automatic revolver."<sup>48</sup> It reloaded with the same principle as a semi-automatic pistol, but held the ammunition in a cylinder, like a revolver. It was an inferior gun. If not gripped tightly, it would misfire. Dirt and dust made the gun fail. Although the gun's most deadly feature was, supposedly, its rapid-fire capability, rapid firing also made the gun malfunction.<sup>49</sup> The so-called automatic revolver that was "more dangerous than the bomb" was more dangerous in the minds of overheated newspaper editorialists than in reality. In this way it is comparable to today's "undetectable plastic gun," which is non-existent, and the "cop-killer teflon bullet," which was actually invented by police officers.<sup>50</sup>

As the Webley-Fosberry and its modern equivalents show, media pressure for new laws does not necessarily have to be based on real-world conditions. That is, an item need not necessarily be particularly dangerous in

46. See Charles Tilly, *Collective Violence in European Perspective*, in *THE HISTORY OF VIOLENCE IN AMERICA* 4, 7 (Hugh Graham & Ted Robert Gurr eds., 1969) (report of the Commission on the Causes and Prevention of Violence in America).

47. This *Advertiser* article was reprinted in J.W.G., *Menace of the Pistol*, 2 AM. INST. CRIM. L. 93 (1911).

48. See A. B. ZHUK, *THE ILLUSTRATED ENCYCLOPEDIA OF HANDGUNS* 64-65 (1995).

49. See R. A. STEINDLER, *THE FIREARMS DICTIONARY* 198 (1970). The Webley-Fosberry was an attempt to reduce recoil by using some of the energy from the explosion of gunpowder to load the next round into the firing chamber. The successful designs that made constructive use of recoil were not the "automatic revolvers," but the self-loading (semiautomatic) pistols invented in the 1890s. The semiautomatic pistols really were, unlike the automatic revolver, an important advance, since they could hold more than six rounds. Also, thanks to lower recoil, they were often more accurate. The media, however, would not discover the "menace" of semiautomatic pistols until 1989, when some of them were labeled "assault weapons."

50. The "plastic gun" that generated concern in the late 1980s was the Glock pistol, which included both plastic and metal components. The metal component weighed more than a pound and made an outline of the pistol easily visible to metal detectors and x-ray screens. Phillip McGuire, an official with the Bureau of Alcohol, Tobacco and Firearms, who would later take a job with Handgun Control, Inc., testified before Congress: "There is still no evidence that we hold that a firearm intrinsically capable of passing undetected through conventional x-ray and metal detector systems exists or is feasible under any current technology immediately available to us." *Testimony of Phillip C. McGuire, Associate Director, Office of Law Enforcement, Bureau of Alcohol, Tobacco and Firearms before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 101st Cong. (July 28, 1987). At that same hearing, Raymond A. Salazar, Director of Civil Aviation Security for the Federal Aviation Administration testified: "We are aware of no current 'non-metal' firearm which is not reasonably detectable by present technology and methods in use at our airports today." Nevertheless, anti-gun organizations and a credulous media waged an aggressive campaign warning about the dangers of undetectable plastic guns.

High-density, "cop-killer bullets" are also known as KTW bullets, after the initials of the three police officers who invented them for use in SWAT teams. The bullets had not been available for sale to the general public since the 1960s, even though NBC television discovered them in 1982 and announced that they were a tremendous threat to police lives. The teflon coating on some bullets is designed to reduce airborne lead particles at indoor ranges, but does nothing to make the bullet penetrate body armor any better. High penetrability comes from the use of dense materials, such as tungsten, instead of lead for the bullet.

order for the media to describe it as dangerous. For example, whatever else may be said about marijuana, we now know that the "Reefer madness" stories from the mass media in the 1920s and 1930s were scientifically inaccurate; marijuana does not impel users to commit violent crimes. However, when the media and public know little about an item, such as Webley-Fosberry revolvers, self-loading firearms, or marijuana, it is easy for reporters to talk themselves and their audience into a panic.

### *C. Dangerous People*

Whatever the actual dangers of the automatic revolver, immigrants scared authorities on both sides of the Atlantic. Crime by Jewish and Italian immigrants spurred New York State to enact the Sullivan Law in 1911, which required a license for handgun buying and carrying, and made licenses difficult to obtain. The sponsor at the Sullivan Law promised homicides would decline drastically. Instead, homicides increased and the *New York Times* found that criminals were "as well armed as ever."<sup>51</sup>

As in modern United States, sensational police confrontations with extremists also helped build support for gun control. In December 1910, three London policemen investigating a burglary at a Houndsditch jewelry shop were murdered by rifle fire. A furious search began for "Peter the Painter," the Russian anarchist believed responsible. The police uncovered one cache of arms in London: a pistol, 150 bullets, and some dangerous chemicals. The discovery led to front-page newspaper stories about anarchist arsenals, which were non-existent, all over the East End of London. The police caught up with London's anarchist network on January 3, 1911, at 100 Sidney Street. The police threw stones through the windows, and the anarchists inside responded with rifle fire. Seven-hundred and fifty policemen, supplemented by a Scots Guardsman unit, besieged Sidney Street. Home Secretary Winston Churchill arrived on the scene as the police were firing artillery and preparing to deploy mines. Banner headlines throughout the British Empire were already detailing the dramatic police confrontation with the anarchist nest. Churchill, accompanied by a police inspector and a Scots Guardsman with a hunting gun, strode up to the door of 100 Sidney Street; the inspector kicked the door down. Inside were the dead bodies of two anarchists. "Peter the Painter" was nowhere in sight. London's three-man anarchist network was destroyed.<sup>52</sup> The "Siege of Sidney Street" turned out to have been vastly overplayed by both the police and the press. A violent fringe of the anarchist movement was, however, a genuine threat; President William McKinley was only one of several world leaders assassinated by anarchists.

51. N.Y. TIMES, May 23, 1913, at 9. See generally *People ex rel. Darling v. Warden*, 139 N.Y.S. 277 (N.Y. App. Div. 1913) (split decision) (upholding Sullivan law, but stating that while a licensing law was within the police power, "If the Legislature had prohibited the keeping of arms, it would have been clearly beyond its power.").

52. See GEORGE DANGERFIELD, *THE STRANGE DEATH OF LIBERAL ENGLAND 1910-1914*, at 89-91 (Perigree/Putnam 1980) (originally published in 1935).

While the "Siege of Sidney Street" convinced New Zealand to tighten its own gun laws, the British Parliament rejected new controls. Parliament turned down the Aliens (Prevention of Crime) Bill, that would have barred aliens from possessing firearms without permission of the local Chief Officer of Police.<sup>53</sup> The 1993 Virginia legislature had less fortitude than the 1911 British Parliament. After a Pakistani national used a Kalashnikov rifle to murder three people outside of CIA headquarters, the Virginia legislature rushed to enact restrictions on gun carrying by legal resident aliens.<sup>54</sup>

British resistance to gun controls finally cracked in 1914 when Great Britain entered The Great War, later to be dubbed World War I. The government imposed comprehensive, stringent controls as "temporary" measures to protect national security during the war. Similarly, the United States continues to live under various "temporary" or "emergency" restrictions on liberty enacted during the First or Second World Wars.<sup>55</sup> Few restrictions on liberty, especially when imposed by fiat, are announced as permanent. Even when Julius Caesar and, later, Octavian, destroyed the Roman Republic by making themselves military dictators for life, they claimed to be exercising only temporary powers because of an emergency.

Randolph Bourne observed that "war is the health of the state," and it was World War I that set in motion the growth of the British government to the size where it could begin to destroy the right to arms, a right that the British people had enjoyed with little hindrance for over two centuries. After war broke out in August 1914, the British government began assuming "emergency" powers for itself. "Defense of the Realm Regulations" were enacted that required a license to buy pistols, rifles, or ammunition at retail. As the war came to a conclusion in 1918, many British gun owners no doubt expected that the wartime regulations would soon be repealed and Britons would again enjoy the right to purchase the firearm of their choice without government permission. But the government had other ideas.

The disaster of World War I had bred the Bolshevik Revolution in Russia. Armies of the new Soviet state swept into Poland, and more and more workers of the world joined strikes called by radical labor leaders who predicted the overthrow of capitalism. Many Communists and other radicals thought the World Revolution was at hand. All over the English-speaking world governments feared the end. The reaction was fierce. In the United States, Attorney General A. Mitchell Palmer launched the "Palmer raids." Aliens were deported without hearings, and United States citizens were searched and arrested without warrants and held without bail. While the United States was torn by strikes and race riots, Canada witnessed the gov-

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53. See GREENWOOD, *supra* note 33, at 33.

54. See VA. CODE ANN. § 18.2-308.2.01 (1998). See also *People v. Rappard*, 28 Cal. App.3d 302 (Cal. Ct. App. 1972).

55. For example, the International Emergency Economic Powers Act (50 U.S.C. §§ 1701-06 (1998)) is being used to prevent the export of high-quality computer encryption software. See Bernadette Barnard, Note, *Leveraging Worldwide Encryption Standards Via U.S. Export Controls: The U.S. Government's Authority to "Safeguard" the Global Information Infrastructure*, 1997 COLUM. BUS. L. REV. 429 (1997). New York City's rent controls, enacted as temporary measures due to a housing shortage in World War II, remain in effect over half a century later.

ernment massacre of peaceful demonstrators at the Winnipeg General Strike of 1919.

In Britain, the government worried about what would happen when the war ended and the gun controls expired. A secret government committee on arms traffic warned of danger from two sources: the "savage or semi-civilized tribesmen in outlying parts of the British Empire" who might obtain surplus war arms, and "the anarchist or 'intellectual' malcontent of the great cities, whose weapon is the bomb and the automatic pistol."<sup>56</sup> At a Cabinet meeting on January 17, 1919, the Chief of the Imperial General Staff raised the threat of "Red Revolution and blood and war at home and abroad." He suggested that the government make sure of its arms. The next month, the Prime Minister was asking which parts of the army would remain loyal. The Cabinet discussed arming university men, stockbrokers, and trusted clerks to fight any revolution.<sup>57</sup> The Minister of Transport, Sir Eric Geddes, predicted "a revolutionary outbreak in Glasgow, Liverpool or London in the early spring, when a definite attempt may be made to seize the reins of government." "It is not inconceivable," Geddes warned, "that a dramatic and successful coup d'etat in some large center of population might win the support of the unthinking mass of labour." Using the Irish gun licensing system as a model, the Cabinet made plans to disarm enemies of the state and to prepare arms for distribution "to friends of the Government."<sup>58</sup>

Although popular revolution was the motive, the Home Secretary presented the government's 1920 gun bill to Parliament as strictly a measure "to prevent criminals and persons of that description from being able to have revolvers and to use them." In fact, the problem of criminal, non-political misuse of firearms remained minuscule.<sup>59</sup> Of course 1920 would not be the last time a government lied in order to promote gun control.

In 1989 in the United States, various police administrators and drug enforcement bureaucrats set off a national panic about "assault weapons" by claiming that semi-automatic rifles were the "weapon of choice" of drug dealers and other criminals. Actually, police statistics regarding gun seizures showed that the guns accounted for only about 1% of gun crime. Most people in the United States swallowed the 1989 lie about "assault weapon" crime, and most Britons in 1920 swallowed the lie about handgun crime. Indeed, the carnage of World War I, which was caused in good part by the outdated tactics of the British and French general staffs, had produced a general revulsion against anything associated with the military, including rifles

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56. REPORT OF THE COMMITTEE ON THE CONTROL OF FIREARMS 2 (1918). See also Greenwood, *supra* note 33, at 38; Stevenson, *supra* note 40, at 10. The "Blackwell Committee" was chaired by Sir Emley Blackwell, Under Secretary of State for the Home Department. The Committee met in secret and never made a report public. The Secretary, F. J. Dryhurst, was formerly Commissioner of the Prison Service. Other members represented the Metropolitan Police, the County and Borough Police Forces, the Board of Customs, the Board of Trade, the War Office, and the Irish Office.

57. See Colin Greenwood, "The British Experience," in *Gun Control Examined* 31, a collection of papers presented at Conference on Gun Control, Melbourne University, Aug. 27-28, 1988.

58. YARDLEY & STEVENSON, *supra* note 40, at 42-44. See also Stevenson, *supra* note 40, at 9 (citing Sir Eric Geddes, Public Record Office CAB 25/20).

59. See Stevenson, *supra* note 40, at 9-10.

and handguns.

Thus the Firearms Act of 1920 sailed through Parliament. Britons who had formerly enjoyed a right to arms were now allowed to possess pistols and rifles only if they proved they had "good reason" for receiving a police permit.<sup>60</sup> Shotguns and airguns, which were perceived as "sporting" weapons, remained exempt from British government control.

Similarly, the horror of use of poison gas during World War I's trench warfare made the Firearms Act's ban on small CS self-defense spray canisters seem unobjectionable.<sup>61</sup> In the hands of British citizens, CS was considered by the central government to be impossibly dangerous, requiring complete prohibition—much more dangerous than a rifle or shotgun. Yet when the CS is in the hands of the government, the central government now mandates that CS be considered benign. When local police authorities protested the Home Secretary's issuance of CS gas and plastic bullets to local police forces and argued that the central government had no authority to force police departments to employ dangerous weapons against their will, the court ruled for the central government on the theory that the Crown's "prerogative power to keep the peace" allowed the Home Secretary to "do all reasonably necessary to preserve the peace of the realm."<sup>62</sup>

The treatment of CS is emblematic of the transformation of British arms policy during the twentieth century. Principles about the use of force were changed from the traditional Anglo-American to the Weberian, with the monopoly of force becoming crucial to the state's definition of its rightful power. Instead of worrying about cheap German handguns among the people, the British would have been better to guard against fancy German ideas among the government.

#### D. The Firearms Act

In the early years of the Firearms Act the law was not enforced with particular stringency, except in Ireland, where revolutionary agitators were demanding independence from British rule, and where colonial laws had already created a gun licensing system.<sup>63</sup> Within Great Britain, a "firearms certificate" for possession of rifles or handguns was readily obtainable. Wanting to possess a firearm for self-defense was considered a "good reason" for being granted a firearms certificate.

The threat of Bolshevik revolution, which had been the impetus for the

60. See Firearms Act, 1920, 10 & 11 Geo. 5, ch. 43 (Eng.). For more on the origins of the Firearms Act, see Clayton Cramer, *Fear and Loathing in Whitehall: Bolshevism and the Firearms Act of 1920* (last visited Jan. 27, 1999) <<http://cs.sonoma.edu/~cramer/firearm-1.htm>>. In Great Britain, "firearms" refers only to rifles and handguns, and not to shotguns; in American usage, shotguns are also considered "firearms." Britons wanting to refer to rifles and pistols and shotguns would use the word "guns." For the sake of consistency, this Essay follows the British usage.

The word "handgun" is now interchangeable with "pistol." Both refer to a short-barreled gun that can be fired with one hand. "Pistol" was the original English term. See Normal F. Cooper, *What Must We Do?* 36 GUNS REV. 732, 732 (1996).

61. See Cadmus, *Section Five*, 33 GUNS REV. 42, 42 (1993).

62. Regina v. Secretary of State for the Home Department, ex parte Northumbria Police Authority, *reprinted in* 2 WKLY. L. REP. 590 (1988).

63. See Greenwood, *supra* note 33, at 34-35.



Firearms Act, had faded quickly as the Communist government of the Soviet Union found it necessary to spend all its energy gaining full control over its own people, rather than exporting revolution. Ordinary firearms crime in Britain, which was the pretext for the Firearms Act, remained minimal. Despite the pacific state of affairs, the government did not move to repeal the unneeded gun controls, but instead began to expand the controls.

In 1934, a government task force, the Bodkin Committee, was formed to study the Firearms Act. The Committee collected statistics on misuse of the guns that were not currently regulated, such as shotguns and airguns, and collected no statistics on the guns under control, namely rifles and handguns. The Committee concluded that there was no persuasive evidence for repeal of any part of the Firearms Act.<sup>64</sup> Since the Bodkin Committee had avoided looking for evidence about how the Firearms Act was actually working, it was not surprising that the Committee found no evidence in favor of decontrol.

Spurred by the Bodkin Committee, the British government in 1936 enacted legislation to outlaw (with a few minor exceptions) possession of short-barreled shotguns and fully automatic firearms.<sup>65</sup> The law was partly patterned after the 1934 National Firearms Act in the United States, which taxed and registered, but did not prohibit, such guns.<sup>66</sup> In 1973 and 1988, when the government was attempting to expand controls still further, gun control advocates claimed that the Bodkin Committee report was clear proof of how well the Firearms Act of 1920 was working, and why its controls should be extended to other guns.<sup>67</sup>

As a result of alcohol prohibition, the United States in the 1920s and early 1930s did have a problem with criminal abuse of machine guns, a fad among the organized crime gangsters who earned lucrative incomes supplying bootleg alcohol, although most such firearms were owned by peaceable citizens. The repeal of Prohibition in 1933 had sent the American murder rate into a nosedive, but in 1934 Congress went ahead and enacted the National Firearms Act anyway.

In Britain, there had been no alcohol prohibition, and hence no crime problem with automatics, or other guns. Before 1920, any British adult could purchase a machine gun; after 1920, any Briton with a Firearms Certificate could purchase a machine gun. During the 1936 British debate, the government could not point to a single instance of a machine gun being misused in Britain,<sup>68</sup> yet the guns were banned anyway. The government

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64. See STATUTORY DEFINITION AND CLASSIFICATION OF FIREARMS AND AMMUNITION COMMITTEE, 1934, Cmd. 4758.

65. See 312 PARL. DEB., H.C. (5th ser.) 167-68 (1936). The laws were consolidated in the Firearms Act, 1937, 1 Edw. 8 & 1 Geo. 6, ch. 12 (Eng.).

66. National Firearms Act of 1934, 48 Stat. 1236-1240 (1935), 26 U.S.C. § 1132 (1935), now codified beginning at 26 U.S.C. § 5801 (1998).

67. See STATUTORY DEFINITION AND CLASSIFICATION OF FIREARMS AND AMMUNITION COMMITTEE, 1934, Cmd. 4758; United Kingdom, Parliament, *The Control of Firearms in Great Britain: A Consultative Document*, 1973, Command 5297, at 3 (misciting Bodkin); Jane Fiddick, *Control of Firearms*, Background Paper no. 207, House of Commons Library Research Division, Jan. 20, 1988, at 2 (misciting Bodkin); Stevenson, *supra* note 40, at 17.

68. See Derek Bernard, *A Little Local Witch-Hunt*, TARGET GUN, Apr. 1989, at 66.

explained its actions by arguing that automatics were crime guns in the United States and there was no legitimate reason for civilians to possess them. The same rationale is used today in the drive to outlaw semi-automatic firearms in the United States. Since some government officials believe that people do not “need” semi-automatic firearms for hunting, the officials believe that such guns should be prohibited, whether or not the guns are frequently used in crime.

“O, reason not the need!” shouted King Lear after his two traitorous daughters, Regan and Goneril, disarmed him by taking away his armed retinue.<sup>69</sup> Goneril and Regan had asked why the King needed even a single armed retainer, since Goneril’s army and Regan’s army would protect him. The King’s “reason not the need” response was his way of saying the he should not have to justify what he wanted; he should not have to convince his daughters that he had a good reason for wanting to be armed. Unfortunately, for British gun owners, as for King Lear, it was too late. King Lear had already turned the power in the kingdom over to Regan and Goneril; British gun owners had agreed that rifle and pistol ownership should be allowed only when the government, not the citizen, believed that there was a “good reason” for it. Thus, the burden of proof in public debate was reversed. The government was not required to show that there was a need to ban short shotguns or automatic rifles; indeed, the misuse of these guns in Great Britain was so unusual that the British government could never have shown a “need” for the bans. Instead, the government faced a much lower burden. Did the government believe that citizens had a “need” for the guns in question? Obviously some law-abiding citizens thought they did, since the citizens had chosen to purchase such guns. For example, short shotguns are easy to maneuver in a confined setting, and hence are very well-suited for home defense against a burglar. Likewise, machine guns are enjoyed for target shooting and collecting, and are useable for home defense.

The Firearms Act of 1920 had not, of course, banned short shotguns or automatic rifles. The former were ignored by the Act, while the latter were subject only to a lenient licensing system. The Firearms Act had, however, moved the baseline for gun control, and had helped to shift public attitudes. The concept of a “right” to arms was giving way to a privilege, based on whether the government determined that the would-be gun-owner had a “need” according to the government’s standard.

Frederick Schauer’s classic article on slippery slopes distinguishes the pure slippery slope argument<sup>70</sup> from its “close relation” that Schauer calls “the argument from excess breadth.”<sup>71</sup> The latter argument points to the danger of adopting a policy on grounds that are too broad.<sup>72</sup> He points to the

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69. WILLIAM SHAKESPEARE, *KING LEAR*, act 2, sc. 4.

70. A classic slippery slope argument posits that we should not do A, even though A is desirable, because our successors will use A as a precedent to do B, and all agree that B is not desirable.

71. Schauer, *supra* note 44, at 366.

72. *See id.* at 365-66.

example of censorship of information about how to build nuclear weapons. If the rationale for censorship is excessively broad—"the information is dangerous to public safety"—then allowing censorship of the nuclear missile information creates a precedent for censorship of many other things.<sup>73</sup> In contrast, if the grounds for a restrictive action are narrow—"this information has a very high risk of directly causing millions of deaths"—then there is much less risk that a desirable action, like the censorship nuclear missile construction information, will lead to undesirable actions, like the censorship of detective novels from which criminals might learn crime techniques.

The 1934 British ban on short shotguns and machine guns was a classic instance of the dangers of an excessively broad rationale. The government decided that nobody outside the government "needed" such items. Thus, the "good reason" requirement of the 1920 Firearms Act set the stage for the 1934 gun ban rationale, that "people outside the government don't need this," which in turn would set the stage for further prohibitions.

Another type of argument that Schauer identifies as a close relation to the classic slippery slope argument is "the argument from added authority." Here, the argument is that "granting additional authority to the decision-maker inevitably increases the likelihood of a wide range of possible future events, one of which might be the danger case."<sup>74</sup> The British Firearms Act of 1920 offers a clear example of the dangers against which Schauer's "added authority" argument warns. Before the Firearms Act, the police had no role in deciding who could own a gun. The Firearms Act instructed them to issue licenses (Firearms Certificates) to all applicants who had a "good reason" for wanting a rifle or pistol. Starting in 1936 the British police began adding a requirement to Firearms Certificates that the guns be stored securely.<sup>75</sup> As shotguns were not licensed, there was no such requirement for them.

While the safe storage requirement might, in the abstract seem reasonable, it was eventually enforced in a highly unreasonable manner by a police bureaucracy often determined to make firearms owners suffer as much harassment as possible.<sup>76</sup> More importantly, Parliament—the voice of the people—did not vote to impose storage requirements on gun-owners. Whatever the merits of the storage rules, they were imposed not by the representatives of the people, but by administrators who were acting without legal authority. Without the licensing system, the police never would have had the opportunity to exercise such illegal power. As the Essay discusses in more

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73. *Id.* at 366.

74. *Id.* at 367. By "the danger case," Schauer means the feared future result of starting down the slippery slope today. For example, "censoring Ulysses ten years from now" could be the "danger case" for "censoring Penthouse today."

75. "The firearms and ammunition to which this certificate relates must at all times when not in actual use be kept in a secure place with a view to preventing access to them by unauthorised [British spelling] persons." *Quoted in* Colin Greenwood, *Firearms Security: Law or Education*, AUSTRALIAN SHOOTERS, Jan. 1989, at 39. Breach of the provision is now punishable by a fine of up to 2,000 pounds and six months in jail. *See id.*

76. In one recent case a person traveling from a range to his home left ammunition hidden in a locked car for forty-five minutes. When the ammunition was stolen, the man was convicted of not keeping the ammunition in a secure place. *See Marsh v. Chief Constable of Avon and Somerset*, reprinted in *INDEPENDENT*, May 8, 1987, discussed in Fiddick, *supra* note 68, at 8.

detail below, once even the most innocuous licensing system is in place, it is more possible (although not necessarily inevitable) that increasingly severe restrictions will be placed on the licensees by administrative fiat. The recognition of this danger is one reason why the First Amendment's prohibition on prior restraints is so wise. The rule prohibiting prior restraint recognizes that any system for licensing the press creates a risk that system will be administratively abused.

### *E. Genuine Danger*

After the fall of France and the Dunkirk evacuation in 1940, Britain found itself short of arms for island defense. The Home Guard was forced to drill with canes, umbrellas, spears, pikes, and clubs. When citizens could find a gun, it was generally a sporting shotgun, which was ill-suited for most types of military use because of its short range and bulky ammunition. British government advertisements in United States newspapers and in magazines such as *American Rifleman* begged readers to "Send A Gun to Defend a British Home—British civilians, faced with threat of invasion, desperately need arms for the defense of their homes." The ads pleaded for "Pistols, Rifles, Revolvers, Shotguns and Binoculars from American civilians who wish to answer the call and aid in defense of British homes."<sup>77</sup> As a result of these ads, pro-Allied organizations in the United States collected weapons; the National Rifle Association shipped 7,000 guns to Britain. Britain also purchased surplus World War I Enfield rifles from the United States Department of War.<sup>78</sup> Before the war, British authorities had refused to allow domestic manufacture of the Thompson submachine gun because it was "a gangster gun,"<sup>79</sup> but when the war broke out, large numbers of American-made Thompsons were shipped to Britain, where they were dubbed "tommie guns."<sup>80</sup>

Prime Minister Winston Churchill's book *Their Finest Hour* details the arrival of the shipments. Churchill personally supervised the deliveries to ensure that they were sent on fast ships, and distributed first to Home Guard members in coastal zones. Churchill thought that the American donations

77. Advertisement, AM. RIFLEMAN, Nov. 1940. The full advertisement states:  
SEND A GUN TO DEFEND A BRITISH HOME.

British civilians, faced with the threat of invasion, desperately need arms for the defense of their homes. The American Committee for Defense of British Homes has organized to collect gifts of pistols, rifles, revolvers, shotguns, binoculars from American civilians who wish to answer the call and aid in the defense of British homes. These arms are being shipped, with the consent of the British Government, to Civilian Committee for Protection of Homes, Birmingham, England . . . . The members of which are Wickham Steed, Edward Hulton, and Lord Davies. You can aid by sending any arms or binoculars you can spare to American Committee for the Defense of British Homes, C. Suydan Cutting, Chairman Room 100, 10 Warren Street, New York, N.Y.

*Id.* See also DUNCAN LONG, STREETSWEEPERS: THE COMPLETE BOOK OF COMBAT SHOTGUNS 6 (1987) (discussing the availability of shotguns).

78. See YARDLEY & STEVENSON, *supra* note 40, at 69; Edwards, *The Disarmament of Great Britain*, AM. RIFLEMAN, Jan. 1988, at 35-37; Neal Knox, *Britain's Crime Rate Soars*, GUN Week, Dec. 30, 1966, at 4.

The firm of Greenwald and Haughton, under contract from the United States government, offered to buy "all automatic pistols from .22 cal. to .45 cal." and all revolvers of size .38 or larger to give to an allied nation in order "to perforate a parasite." Advertisements in THE AMERICAN RIFLEMAN, Aug. 1943, at 50; Feb. 1944, at 50.

79. Home Secretary Sir John Simon had explained the ban by calling the Thompson "the weapon we are informed is used by gangsters on the other side of the water." 312 PARL. Deb., H.C. (5th ser.) 168 (1936).

were "entirely on a different level from anything we have transported across the Atlantic except for the Canadian division itself." Churchill warned an advisor that "the loss of these rifles and field-guns [if the transport ships were sunk by Nazi submarines] would be a disaster of the first order." He later recalled that "[w]hen the ships from America approached our shores with their priceless arms, special trains were waiting in all the ports to receive their cargoes." "The Home Guard in every county, in every town, in every village, sat up all through the night to receive them . . . . By the end of July we were an armed nation . . . a lot of our men and some women had weapons in their hands."<sup>81</sup>

As World War II ended<sup>82</sup> the British government did what it could to prevent the men who had risked their lives in defense of freedom and Britain from holding onto guns acquired during the war. Troop ships returning to England were searched for souvenir or captured rifles and men caught attempting to bring firearms home were punished. Guns that had been donated by American civilians were collected from the Home Guard and destroyed by the British government.<sup>83</sup> In spite of these measures, large quantities of firearms still slipped into Britain, where many of them remain to this day in attics and under floor boards. At least some British gun owners, like their United States counterparts in today's gun-confiscating jurisdictions such as New Jersey and New York City, were beginning to conclude that their government did not trust them, and that their government could not be trusted to deal with them fairly. In 1946, the Home Secretary announced a policy change: henceforth, self-defense would not be considered a good reason for being granted a Firearms Certificate.<sup>84</sup>

The next rounds of legislative action were aimed at knives, rather than guns. The 1953 Prevention of Crime Act outlawed the carrying of an "offensive weapon" and put the burden of proof on anyone found with an "offensive weapon," such as a knife, to prove that he had a reasonable excuse. In 1959, the Home Office pushed for, and won, a ban on self-loading knives. Self-loading knives are knives that use a spring or other mechanism so that they can be opened with one hand. These "flick knives," as they were called in Britain, were not any more of a crime problem than other knives, but the rationale for their ban was the same as for the 1937 ban on certain guns. The

80. Representative William G. Bray, *Guns and Gun Laws—Fact and Fancy*, CONG. REC., July 18, 1968; DUNCAN LONG, ASSAULT PISTOLS, RIFLES AND SUBMACHINEGUNS 35, 43 (1986).

While the British government during World War II was somewhat less worried about the loyalty of the people than the government had been during the previous war, target shooting was sharply reduced in order to conserve ammunition for the military. The Royal Air Force's Air Gunners were, however, encouraged to participate in clay shooting, since the skills necessary to shoot a flying clay disk with a shotgun (e.g., shooting ahead of the target) are much the same as the skills for shooting enemy aircraft with a machine gun. See Norman F. Cooper, *Times Past and Present*, 34 GUNS REV. 358 (1994).

81. WINSTON S. CHURCHILL, *THEIR FINEST HOUR* 237-38 (1949). Nevertheless, even after the guns from the United States arrived, much of the Home Guard was poorly armed. The problem was threefold: the Army had priority in receiving weapons; the government was afraid that Communists might join the Home Guard; and the government was often uncomfortable with ordinary citizens possessing weapons. See generally S.P. MACKENZIE, *THE HOME GUARD* (1995).

82. At this point Prime Minister Winston Churchill had been replaced by Clement Attlee.

83. See London Public Records Office, Home Office 45, 21888. See also Bray, *supra* note 80; WILLIAM R. TONSO, *GUN AND SOCIETY: THE SOCIAL AND EXISTENTIAL ROOTS OF THE AMERICAN ATTACHMENT TO FIREARMS* 125 (1982).

84. See GREENWOOD, *supra* note 33, at 72.

government did not see any reason why a person would need a self-loading knife.<sup>85</sup> Furthermore, just as machine guns had been associated with American gangsters, "flick knives," which are called "switchblades" in the United States, were associated with American juvenile delinquents.

The British government in the 1950s left the subject of gun control alone. Crime was still quite low, and issues such as national health care and the Cold War dominated the political dialogue. Even so, the maintenance of the existing, relatively mild, structure of rifle and pistol licensing would have important consequences. As the Firearms Act remained in force year after year, a smaller and smaller percentage of the population could remember a time in their own lives when a Briton could buy a rifle or pistol because he had a right to do so rather than because he had convinced a police administrator that there was a "good reason" for him to purchase the gun. As the post-1920 generation grew up, the licensing provisions of the Firearms Act began to seem less like a change from previous conditions and more like part of ordinary social circumstances. A similar process is at work in the United States, where only part of the population remembers the days before 1968 when federal registration was not required for people to purchase firearms.<sup>86</sup>

## V. The Turbulent 1960s

As in most of the Western world, the late 1960s in Great Britain was a time of rising crime and civil disorder. In 1965, capital punishment was abolished, except for treason and piracy.<sup>87</sup> Gun crime did not seem to be a problem. Scotland Yard stated "with some confidence" that the objectives of eliminating "the improper and careless custody and use of firearms . . . and making it difficult for criminals to obtain them . . . are effectively achieved."<sup>88</sup> In June 1966, Home Secretary Roy Jenkins told Parliament that after consulting with the Chief Constables and the Home Office, he had concluded (as had his predecessor the year before) that shotgun controls were not worth the trouble, yet six weeks later, Jenkins announced that new shotgun controls were necessary, because shotguns were too easily available to criminals.<sup>89</sup>

Had there been a sudden surge in shotgun crime in the six week period? Not at all, but three policemen at Shephard's Bush had been murdered with

85. See Cadmus, *The Pass-a-Law Syndrome*, 36 GUNS REV. 421, 422 (1996). Actually, there are plenty of reasons why someone would want a self-loading knife. Anyone who wants to open the knife with one hand while holding something in the other could use a self-loading knife. Such persons could include tradesmen, firemen, sportsmen, and persons who have lost the use of one arm or hand.

86. The Gun Control Act of 1968 requires that all persons purchasing firearms from a federally licensed firearms dealer fill out a registration form, the ATF Form 4473 (10-98), which is generally known as the "yellow sheet." See 18 U.S.C. §§ 921-30 (1998).

87. See *The Murder (Abolition of Death Penalty) Act*, 1965, ch. 71 (Eng.).

88. Letter from Commissioner of Police of the Metropolis (Scotland Yard), to *Harvard Law Review* Nov. 9, 1966, quoted in Stanley Mosk, *Gun Control Legislation: Valid and Necessary*, 14 N.Y. L. F. 694, 709 n.54 (1968) (The N.Y. L.F. is now the *New York Law School Review*).

89. See Stevenson, *supra* note 40, at 19.

illegal revolvers. Popular outcry for capital punishment was fervent, and Jenkins, an abolitionist, responded by announcing new shotgun controls, in an attempt to divert attention from the noose.<sup>90</sup>

In retrospect, Mr. Jenkins' shotgun controls made no logical sense. Regulating shotguns would obviously have no impact on criminal use of unlicensed revolvers, the guns used to murder the three policemen. Jenkins claimed that "criminal use of shotguns is increasing rapidly, still more rapidly than that of other weapons." The "rapidly" increasing type of crime associated with shotguns, however, involved mostly poaching or property damage rather than armed robberies or murders. Nevertheless, by showing that he was "doing something" about crime by proposing shotgun controls, Mr. Jenkins effectively achieved his main goal, which was to divert public attention from the death penalty. The Jenkins tactic has been used by many other politicians since then, including former New York Governor Mario Cuomo, who is a proponent of gun prohibition and an opponent of the death penalty.

This brings to light a third factor that may help push a civil right down the slippery slope: the exercise of the right may be unproblematic, but pushes for restriction on the right may satisfy unrelated political needs. The more likely that media or other interest groups are to be hostile to the exercise of the right, the greater the prospect that further infringing on the right may fulfill the political need of distracting attention from other matters.

At Jenkins' request the British government began drafting the legislation that became the Criminal Justice Act of 1967. The new act required a license for the purchase of shotguns.<sup>91</sup> Like the Gun Control Act of 1968 in the United States,<sup>92</sup> Britain's 1967 Act was part of a comprehensive crime package that included a variety of infringements on civil liberties. For example, the British Act abolished the necessity for unanimous jury verdicts in criminal trials, eliminated the requirement for a full hearing of evidence at committal hearings, and restricted press coverage of those hearings.<sup>93</sup>

Under the 1967 system, which is still in force for the most part, a person wishing to obtain his first shotgun needed to obtain a "shotgun certificate." The local police could reject an applicant if they believed that his "possession of a shotgun would endanger public safety." The police were required to grant the certificate unless the applicant had a particular defect in his background such as a criminal record or history of mental illness.<sup>94</sup> An applicant was required to supply a countersignatory, a person who would attest to the accuracy of the information in the application. During an inves-

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90. See Barry Bruce-Briggs, *The Great American Gun War*, THE PUB. INTEREST, Fall 1976, at 60-61; Colin Greenwood, *Does Legislation Reduce Armed Crime?* DAILY TELEGRAPH, Sept. 13, 1966, quoting YARDLEY & STEVENSON, *supra* note 40, at 58-59.

91. See Criminal Justice Act 1967, Part V. The 1967 law was consolidated with previous firearms laws into the Firearms Act, 1968, 16 & 17 Eliz. 2, ch. 27 (Eng.).

92. 18 U.S.C. §§ 921-30 (1998).

93. See YARDLEY & STEVENSON, *supra* note 40, at 59.

94. See Sapsted, *Control of Shotguns Farcical, Say Police*, THE TIMES, July 10, 1987.

tigation period that could last several weeks, the police might visit the applicant's home.<sup>95</sup> In the first decades of the system, about ninety-eight percent of all applications were granted.

Once the £12 shotgun certificate was granted, the law allowed a citizen to purchase as many shotguns as he wished.<sup>96</sup> Private transfers among certificate holders were legal and uncontrolled.<sup>97</sup> As with the Firearms Act of 1920, the statutory language of the 1967 shotgun law was eminently reasonable, and unobjectionable except to a civil liberties purist.

The 1976 law contained one other provision that illustrated a key strategy of how to push something down a slippery slope: it is easier to legislate against people who cannot vote, or who are not yet born, than against adults who want to retain their rights. Reducing the number of people who will, one day in the future, care about exercising a particular right is a good way to ensure that, on that future day, new restrictions on the right will be politically easier to enact. Thus, the 1967 law did nothing to take away guns from law-abiding adults, but the Act did severely restrict gun transfers to minors. It became illegal for a father to give even an airgun as a gift to his thirteen-year-old son.<sup>98</sup> The fewer young people who enjoy the exercise of a civil liberty such as the shooting sports, the fewer adults there will eventually be to defend that civil liberty.<sup>99</sup>

This conditioning young people not to believe they have rights can occur in other contexts, of course. For example, the current American practice of denying American schoolchildren constitutional protection from locker searches,<sup>100</sup> dog sniffs, metal detectors, and random drug testing<sup>101</sup> is a good way to raise a generation with little appreciation for the Fourth Amendment.

## VI. The British Gun Control System in Practice: Administrative Abuse

As is typical with many gun control laws, the shotgun certificate system was enforced in a moderate and reasonable way by the government in the law's first years. Similarly, the rifle and handgun licensing system, introduced in 1920, had been enforced in a generally moderate way in the 1920s

95. *£ and No Questions Asked*, THE MAIL (London), Sept. 2, 1984.

Some police forces, such as West Midlands or Merseyside, conduct thorough investigations and require personal interviews even for renewals; others, such as North Wales, move more rapidly. *See Police Lack Resources to Make Checks for Licenses*, SUNDAY TIMES (London), Aug. 23, 1987, at 14.

96. *See Ninja gun gangs are invading Britain—MP*, LONDON STANDARD, May 29, 1986, at 15.

97. *See* HOME OFFICE, FIREARMS: WHAT YOU NEED TO KNOW ABOUT THE LAW 2 (1984).

98. *See generally* Firearms Act 1968, *supra* note 91. Gifts of any gun to a person under fourteen are illegal. Gifts of a shotgun to a person under fifteen are illegal. *See* GODFREY SANDYS-WINCH, GUN LAW 118-22 (1990).

99. Prime Minister Tony Blair's "New Labour" party now calls for taking the next step: making it illegal for a person under the age of eighteen to use a gun, even under immediate adult supervision. *See* THE HON. LORD CULLEN, THE PUBLIC INQUIRY INTO THE SHOOTINGS AT Dunblane Primary School 13 (Mar. 1996), *cited at* <<http://www.official-documents.co.uk/document/scottish/dunblane/dunblane.htm>>. A few American states, such as Massachusetts and New York, have similarly restrictive rules.

100. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985).

101. *See* Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).



and 1930s. However, as the public grew accustomed to the idea of rifles and handguns being licensed, it became possible to begin to enforce the licensing requirements with greater and greater stringency.

Severe enforcement of the rifle and handgun licensing system would not have worked in 1922. Too many gun owners would have been outraged by the rapid move from a free society to one of repressive controls. By initially enforcing the 1920 legislation with moderation, and then with gradually increasing severity, the British government acclimated British gun owners to higher and higher levels of control. The British government used the same principle as do people who are cooking frogs. If a cook throws a frog in a pot of boiling water, he will jump out, but if the cook puts a frog in a pot of moderately warm water, and gradually raises the temperature, the frog will slowly lose consciousness, and be unable to escape by the time the water gets to a boil.

The frog-cooking principle helps explain why the American group Handgun Control, Inc. (HCI), and the other anti-gun lobbies are so desperate to pass any kind of gun control, even controls that most observers agree will accomplish very little. By lobbying for the enactment of, for example, the Brady Bill, HCI established the principle of a national gun licensing system. Once a lenient national handgun licensing system was established in 1993, the foundation was laid so that the licensing system can gradually be tightened. The push has already begun, as President Clinton echoes HCI's demand that Congress close the "loophole" in the Brady Act that allows private individuals, those persons not in the gun business, to sell firearms to each other without going through the federal Brady background check.

The British "firearms certificate" system of 1920 had required that a person who wished to possess a rifle or handgun prove he had "a good reason."<sup>102</sup> In the early years of the system, self-defense had been considered "a good reason,"<sup>103</sup> but, by the 1960s, it was a well-established police practice that only "sporting" purposes, and not self-defense could justify issuance of a rifle or handgun license. Parliament had never voted to outlaw defensive gun ownership, but self-defense fell victim to what Schauer calls "the consequences of linguistic imprecision."<sup>104</sup> When a legal rule is expressed in imprecise terms there is a heightened risk that subsequent interpreters of the rule may apply the rule differently than the formulators of the rule would have.<sup>105</sup> Thus, while self-defense was a "good reason" in 1921, in later decades the government had decided that a "good reason" did not include

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102. See HOME OFFICE, FIREARMS, WHAT YOU NEED TO KNOW ABOUT THE LAW 1, 2 (1984).

British felons sentenced to a term of three or more years are permanently barred from owning firearms (rifles and pistols). People sentenced to terms of three months to three years face a five-year prohibition. See TONY JACKSON, LEGITIMATE PURSUIT: THE CASE FOR THE SPORTING GUN 40 (1988) (published in association with the British Association for Shooting and Conservation).

103. See *Greenly v. Lawrence*, 1 All E.R. 241 (K. B. 1949) (upholding lower court's reversal of police denial of application to renew firearms certificate for revolver possessed for self-defense). See also Fiddick, *supra* note 67, at 3; SANDYS-WINCH, *supra* note 98, at 30.

104. Schauer, *supra* note 44, at 370.

105. See *id.* at 373.

self-defense. In practice, being a certified member of a government-approved target shooting club became the only way a person could legally purchase a pistol.<sup>106</sup>

Under regulations implementing Britain's 1997 Firearms (Amendment) Act, gun club members must now register every time they use a range, and must record which particular gun they use. If the gun-owner does not use some of his legally-registered guns at the range often enough, his permission to own those guns will be revoked.<sup>107</sup>

Having control over rifle and handgun owners through a licensing system, the police began inventing their own conditions to put on licenses. The police practice was not entirely legal, but it was generally accepted by a compliant public. Similar practices occur in United States jurisdictions such as New York city, where licensing authorities sometimes add their own, extra-legal, restrictions to handgun licenses. In the 1980s, then-New York Police Commissioner Benjamin Ward told his firearms licensing staff to refuse to issue any licenses for the Glock pistol. The prohibition ended when the media found out that Commissioner Ward himself carried a Glock pistol.

When the safe storage requirement was introduced for rifles and handguns in the 1930s, it was enforced in a reasonable manner by the police. Leaving one's handgun on the front porch was not acceptable; keeping it on a dark closet shelf was perfectly fine. Similarly, in the few United States jurisdictions that have imposed storage requirements in recent years, the law is usually enforced in a reasonable manner—at least for now.

From the 1930s through the 1960s, the security requirement simply meant that Firearms Certificate holders were told of their responsibility for secure storage. Starting in the early 1970s, the police began performing home inspections as part of the Firearms Certificate issuance in order to assess the applicant's security.<sup>108</sup> After the 1996 Dunblane shootings, some police forces began performing spot checks on persons who already held Firearms Certificates. Apparently the home searches were done to make sure that the firearms really were locked up.

Parliament never granted the police home inspection authority, nor did Parliament enact legislation saying that a hardened safe is the only acceptable storage method. However, that is what the police in many jurisdictions require anyway. In fact, many gun owners who bought safes that the police said were acceptable are now being forced to buy new safes because the local police have arbitrarily changed the standards. In many districts, an "acceptable safe" is now one that can withstand a half-hour attack by a burglar who arrives with a full set of safe-opening tools.

Sometimes the police require the purchase of two safes: the first one for the gun and the second one for separate storage of ammunition. A Briton

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106. See Francis Cowper, *Massacre in a Market Town*, N.Y. L. J., Oct. 5, 1987, at 2.

107. See Home Office, *Firearms: Approval of Rifle and Muzzle-loading Pistol Clubs* (1998) <<http://www.homeoffice.gov.uk/ppd.oppu/club981.htm>>.

108. See Cadmus, *Abuse of Authority*, 36 GUNS REV. 25, 26 (1996).

buying a low-powered, £5 rimfire rifle may have to spend £100 on a safe. Likewise, a person with five handguns (before the 1997 ban) might have been ordered to add a £1000 electronic security system.<sup>109</sup> Added to the cost of the illegal requirement for hardened safes is the escalating cost of Firearms or Shotgun Certificates. Home inspections are expensive for the police, and thus the cost of Firearms Certificates or Shotgun Certificates has been raised again and again, far above the rate of inflation, in order to cover the costs of the intrusive inspections, as well as the cost of many gross inefficiencies in police processing of applications.<sup>110</sup> The net effect of the heavy security costs is to reduce legal gun ownership by the less wealthy classes, as in the days of Henry VIII, Charles I, who was later beheaded during the English Civil War, and James II, who was driven out of the country by the Glorious Revolution.

The increasing severity of the application of the gun licensing system is no accident. A 1970 internal government document, the McKay Report was turned into a 1973 British government Green Paper, which proposed a host of new controls.<sup>111</sup> The British shooting lobbies, however, mobilized and the Green Paper was withdrawn.<sup>112</sup> Law professor Richard Harding, Australia's then-leading academic advocate of gun control, criticized the Green Paper as "statistically defective . . . [and] . . . scientifically quite useless."<sup>113</sup> Harding was looking at whether the proposed laws would reduce gun crime, gun suicide, or other gun misuse. The proponents of the Green Paper, on the other hand, did not care whether more gun control would reduce gun misuse. The earlier, secret draft of the Green Paper (the McKay Report) had stated that "a reduction in the number of firearms in private hands is a desirable end in itself."<sup>114</sup>

The Green Paper was withdrawn thanks to strong pressure from British gun-owners—and never turned into a formal proposal for new law (a White Paper). However, the Green Paper still set the government's agenda for the next two decades. Some parts were saved for introduction when political circumstances were right, for example after a notorious gun crime. Other parts soon began to be enforced immediately, by police fiat.

One Green Paper item would have required prospective rifle hunters to receive written invitation from the owner of the land where they would shoot, and then take the letter to the police. The police would investigate the safety of the hunt and other factors before granting permission. Several Chief Constables adopted this proposal and others from the Green Paper as "force policy" and enforced them as if they were law.<sup>115</sup> A certificate for rifle

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109. See Lorton, *supra* note 43, at 143. See also Greenwood, *supra* note 75, at 40.

110. See Fees, 31 GUNS REV. 9 (1991). According to a study by the accounting firm Cooper and Lybrand Deloitte, a reasonably efficient firearm certificate licensing system should cost no more than £ 35 to administer. See *id.*

111. *The Control of Firearms: A Consultative Document*, Green Paper, Command 5297 (London: Her Majesty's Stationery Office, May 1973).

112. In 1973, members of Parliament sent 1,174 suggestions for improvement in the proposed bill to the Home Office, and 4,573 members of the public wrote to the Home Office to oppose all or part of the bill.

113. Richard Harding, *Firearms Use in Crime*, 18 CRIM. L. REV. 772 (1979).

114. Quoted in Colin Greenwood, *The Sun Sets on British Gun Owners*, AMERICAN RIFLEMAN, May 1989, at 26.

possession now often includes "territorial conditions" specifying exactly where the person may hunt.<sup>116</sup> While it is not legally necessary for shooters to have written permission to hunt on a particular piece of land, police have been stopping shooters, demanding written proof of permission, and threatening to confiscate guns from persons who cannot produce the proof.<sup>117</sup>

Police abuses appear in every aspect of gun licensing. As Police Review magazine noted: "There is an easily identifiable police attitude towards the possession of guns by members of the public. Every possible difficulty should be put in their way." The stated police position is "to reduce to an absolute minimum the number of firearms, including shotguns, in hands of members of the public."<sup>118</sup> Thus, without legal authority, the police have begun to phase out firearms collections by refusing new applications.<sup>119</sup> Police departments have incorrectly told hunters that certain legal restrictions on hunting with semi-automatics also apply to hunting with pump-action guns.<sup>120</sup> The police have also, again without legal authority, required applicants for shotguns capable of holding more than two shells to prove a special need for the gun.<sup>121</sup> Furthermore, if a policeman has a personal interest in the shooting sports, that interest may disqualify him from being assigned to any role in the police gun licensing program. Policemen who know virtually nothing about guns, but who can be counted on to have a hostile attitude towards gun owners, are often picked for the gun licensing jobs.

Parliament has no interest in investigating police abuses of the gun licensing laws. One reason is that many of the abuses are instigated by the Home Office, which is controlled by the leaders of the party in power in Parliament. The courts are submissive to police "discretion." As a formal matter, applicants may appeal police denials of permit application, but the courts are generally deferential to police decisions. Hearsay evidence is admissible against the applicant. An appellant does not have a right to present evidence on his own behalf, nor does an applicant who has been denied have a right to find out the basis for the denial until the trial begins.<sup>122</sup> The Labour Party, now in power, argues that rejected applicants should never be told the basis of the denial.

The only practical way that British gun owners could have avoided abuse of the licensing laws would have been to resist the first proposed laws

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115. See Green Paper, *supra* note 111, at 25.

116. See Cadmus, *Territorial Conditions*, 19 GUNS REV. 38 (1979).

117. See George Wallace, *Shotguns and the Law*, SHOOTING MAGAZINE, Oct. 1989, at 28. See also Mid Glamorgan, *Police Policies*, in *Letters to the Editor*, 31 GUNS REV. 56 (1991).

118. Quoted in Colin Greenwood *Reviews Police Policy*, SHOOTING TIMES & COUNTRY MAG., Dec. 27, 1979; Cadmus, *A Question of Numbers*, 18 GUN REV. 665 (1978) (police statement in letters to gun owners who were attempting to renew certificates).

119. The proposal (never enacted into law) to ban new gun collections or additions to old collections was made in the Green Paper, *supra* note 112, at 17. For a prospective collector's difficulty with the police, see *Hutchison v. Chief Constable of Grampian*, 1977 S.L.T. 98 (Sh. Ct. 1977).

120. See *Unmodified Pumps and Autos*, 29 GUNS REV. 825 (1989).

121. See Cadmus, *Magazine Mischief*, 30 GUNS REV. 645 (1990).

122. See Richard Law, *Shooters Rights*, GUNS & SHOOTING, Oct. 1993, at 54.

that allowed the police to determine who could get a gun license. However, the gun owners never would have dreamed of resisting, because such a law seemed so "reasonable." Having meekly accepted the wishes of the police and the ruling party for "reasonable" controls, by the early 1970's British rifle and handgun owners found themselves in a boiling pot of severe controls from which escape was no longer possible. British shotgun owners, ignoring the fate of their rifle and handgun-owning brethren, jumped into their own pot of then-lukewarm water when they accepted the 1966 shotgun licensing proposals.

### VII. Momentum for Prohibition

Gun control in Great Britain now proceeds on two fronts. When a sensational crime takes place, proposals for gun confiscations and for major new restrictions on the licensing system are introduced. During more tranquil times, fees are raised and increased controls are applied to relatively smaller issues.

An example of tranquil-period control was the Firearms Act of 1982, which introduced restrictive licensing for imitation firearms that could be converted to fire live ammunition. The original proposal had been to implement the 1973 Green Paper's outright ban on realistic imitation or toy firearms. The sponsor of the new law against imitation firearms promised that it would help stem "the rising tide of crime and terrorism," although he pointed to no crime or terrorist act committed with a converted imitation weapon. A new Crossbows Act outlawed purchase by persons under seventeen.<sup>123</sup>

Under new "safety" regulations regarding explosives, persons who possess modern gunpowder or blackpowder are now subject to unannounced, warrantless inspections of their home at any time to make sure that the powder is properly stored. The government, of course, promises that its inspections will not be unreasonable, but "reasonableness" is often in the eye of the beholder.<sup>124</sup>

While gun crime is not as common as in the United States, gun crime incidents inevitably attract sensational media attention that becomes the basis for further tightening of controls. In the fall of 1989, for example, a person who had been rejected for membership in a firearms club stole a handgun from the locked trunk of a club member and shot a Manchester policeman. In another case a probationary member of a firearms club, learning that he had a fatal disease, killed one club member, stole a gun from the club, and shot a personal enemy. The Home Secretary, at the urging of the

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123. Some Britons favor putting all bows under a licensing system identical to that for guns. The crossbow, which has historically associated with highwaymen, will likely be controlled first, since long bows, which have been associated with English military valor at Agincourt and other medieval battles, have a better pedigree.

124. In the United States, Handgun Control, Inc., has proposed "Brady II" legislation that would make many American gun-owning homes subject to four unannounced warrantless inspections per year.

Manchester police department, issued a new set of restrictions on firearms clubs, including sharp limits on bringing guests to a range to shoot a firearm.<sup>125</sup> The practical effect of the new restrictions was to reduce the entry of new members into many firearms clubs.<sup>126</sup>

Thanks to decades of such restrictions aimed at restricting entry into the shooting sports, the vast majority of the public has no familiarity with guns, other than what the media choose to let them know.<sup>127</sup> Legal British gun owners now constitute only four percent of total households,<sup>128</sup> with perhaps another small percentage of the population possessing illegal, unregistered guns.<sup>129</sup> Given that many Britons have no personal acquaintance with anyone who they know to be a sporting shooter, it is not surprising that seventy-six percent of the population supports banning all guns.<sup>130</sup> Thus, the people who used long guns in the field sports—who confidently expected that whatever controls government imposed on the rabble in the cities who wanted handguns, genteel deer rifles and hand-made shotguns would be left alone—have been proven disastrously wrong.

Strong rights usually need a strong sociological foundation. Approximately half of American homes contain a gun, and a quarter contain a handgun. Thus, except in a few cities like New York where gun ownership is rare, gun bans in the United States are nearly impossible to enact; too many voters would be unhappy. Consequently gun prohibition in the United States must focus on very small segments of the gun-owning population. That is why “assault weapon” bans, which cover only about one or two percent of the total firearms stock, are so much easier to enact than handgun bans. Even with “assault weapons,” it is usually necessary to exempt the Ruger Mini-14 and Mini-30 rifles since these rifles, while functionally identical to banned guns, have too large an ownership base.<sup>131</sup>

A few sensational burglaries in the 1880s had created the first calls for restrictive British gun laws. A century later, some sensational crimes would initiate the final stages of British gun prohibition. In-between the 1880s and the 1980s, an initially reasonable and then gradually more restrictive licensing system had reduced the number of gun owners so far that they had little

125. See Home Office, *Gun Clubs: Home Secretary Plans New Controls* (press release), Nov. 14, 1989.

126. Persons who hold a Firearms Certificate do not need government permission in order to form a private club and shoot together at a target range they build, but government approval is necessary if club members wish to be able to shoot each others' rifles at the range, or occasionally to invite guests who do not have a Firearms Certificate. Cadmus, *Abuse of Authority*, 36 GUNS REV. 25, 25 (1996).

127. See generally, e.g. Pat Kane, *We Have to Be Careful Out There*, SUN. TIMES, May 22, 1994 (“a fascination with guns around the darker fringes of the male psyche . . . men of this generation are so fundamentally insecure about their personal power that guns could seem a ready option”); Lynne Truss, THE TIMES, May 24, 1994 (“It's the chaps who fire relentlessly at targets that it's hard to understand, who seem most creepy and dangerous.”); *Dressed to Kill—Just for Thrills*, THE OBSERVER, Sept. 12, 1994.

128. See Martin Killias, *Gun Ownership and Violent Crime: The Swiss Experience*, 1 SEC. J. 171 (1990).

129. See KOPEL, *supra* note 2, at 89-90 (using gun seizure, gun surrender, and gun registration data to estimate size of illegal gun supply and gun ownership in Great Britain).

130. See Gallup Poll from 1988, discussed in R.A.I. Munday, On Liberty (unpublished essay).

131. See Memorandum from S.C. Helsley, Assistant Director, Investigation and Enforcement Branch, California Department of Justice, to G.W. Clemons, Director, Division of Law Enforcement, California Department of Justice 1 (Feb. 13, 1991) (on file with authors). See generally Bruce H. Kobayashi & Joseph E. Olson, *In Re 101 California Street: A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of “Assault Weapons,”* 8 STAN. L. & POL'Y REV. 41 (1997).

political clout. The gun-owners were of much less political significance than the media, which had become venomously anti-gun.

### A. Hungerford

On the morning of August 19, 1987, a licensed gun owner named Michael Ryan dressed up like Sylvester Stallone's "Rambo" character and shot a woman thirteen times with a handgun.<sup>132</sup> After shooting at a filling station attendant, he drove to his home in the small market town of Hungerford, where he killed his mother and his dog. In the next hour, he went into town and slaughtered fourteen more people with his handgun and his Chinese-made Kalashnikov rifle. Ryan disappeared for a few hours, reappeared at 4 p.m. in a school, and killed himself three hours later.<sup>133</sup> A few days later, a double murder was perpetrated at Bristol, this one with a shotgun.<sup>134</sup>

The media's reaction, especially the print media's, was intense. The tabloid press ran editorials instructing the public how to spot potential mass murderers—advising suspicion of anyone who lived alone or was generally a "loner," who lived with his mother, or who was a bit quiet.<sup>135</sup> The tabloid press and the respectable press both pushed heavily for more stringent gun laws.<sup>136</sup> Pressure also mounted for tighter censorship of violent television.

The Hungerford atrocity was the only instance in which a self-loading rifle had been used in a British homicide. Punishing every owner of an object because one person misused the object might seem unfair, but two factors worked in favor of prohibition. First, the cabinet leadership observed that the number of owners of self-loading rifles was relatively small, so no important number of voters would be offended. Second, shotgun owners, who are by far the largest group of gun owners, generally decided that they did not care what the government did to someone else's rifles.<sup>137</sup>

Parliament responded. Semi-automatic centerfire rifles, which had been legally owned for nearly a century, were banned.<sup>138</sup> Pump-action rifles were banned as well, since it was argued that these guns could be substituted for semi-automatics. Practical Rifle Shooting, the fastest-growing sport in Britain, vanished temporarily, although participants eventually switched to bolt-action rifles.<sup>139</sup>

132. It was not surprising that a murderous psychopath would choose to dress up like "Rambo," the machine-gun spraying character popularized by Sylvester Stallone. Ironically, Stallone, who now lives in Great Britain, touts gun prohibition and criticizes gun policies in the United States for being uncivilized. Perhaps before demanding a government crackdown on law-abiding American gun owners, Mr. Stallone ought to apologize for his own role in spurring mass murders by the mentally deranged, including at Hungerford.

133. See Malcolm P.I. Weller, *The Anatomy of Violence—Part I*, NEW L.J. Sept. 11, 1987, at 858.

134. See TONY JACKSON, *LEGITIMATE PURSUIT* 48 (1988).

135. See Woody Haut, *Hysteria, the Free Market, and the Hungerford Massacre*, ROLLING STOCK No. 14 (1987), at 15.

136. See JACKSON, *supra* note 134, at 92, 99 (quoting *Daily Telegraph*, *Daily Mirror*, *Daily Express*, *Yorkshire Evening Press*).

137. See Cadmus, *Section Five*, 33 GUNS REV. 42 (1993).

138. Opponents of the ban had argued for a special exemption for disabled people, since semiautomatics have low recoil, and are hence easier to shoot for persons with less upper body strength. One pro-control Lord replied that a handicapped person "would probably have a harder job to hold on to the rifle than an able bodied person if someone wanted to steal it." Lord Atlee worried about the possibility of "a disabled person who was also mentally unstable." House of Lords, *Official Report*, Oct. 19, 1988, at cols. 1134, 1131.

The shotgunners, however, made a disastrous error. The Association of Chiefs of Police had long been pushing to bring shotguns into the restrictive "Section 1" of the Firearms Act, which strictly controlled rifles and pistols. The ACPO worked out a deal with the Thatcher administration to take a major step in the ACPO's direction. As part of the legislation responding to a crime with a rifle, controls on shotguns were made significantly more stringent. There was little criminological rationale for the extra restrictions on shotguns; indeed, the extra police personnel required to administer the licenses would have to be diverted from other tasks. A Home Office Research Study written the year before Hungerford had concluded:

To make shotguns subject to the same controls as pistols . . . would have considerable resource implications for the police . . . . Nor is there any real optimism that anything would be achieved by such a move since pistols . . . are already subject to the very strict controls and yet . . . are used in more cases of armed crime than shotguns.<sup>140</sup>

As a result of the 1988 law, shotguns that can hold more than two shells at once now require a Firearms Certificate, the same as rifles and handguns.<sup>141</sup> Moreover, all shotguns must now be registered. Shotgun sales between private parties must be reported to the police. Buyers of shot shells must produce a shotgun certificate. Applicants for a shotgun certificate must obtain a countersignature by a person who has known the applicant for two years and is "a member of Parliament, justice of the peace, minister of religion, doctor, lawyer, established civil servant, bank officer or person of similar standing."<sup>142</sup>

Most importantly, the law specified that an applicant for a Shotgun Certificate, which was required for shotguns capable of holding only one or two shells, could be denied if the applicant did not have a "good reason" for wanting to own shotgun. Although the statute placed the burden on proof on the police, to show that there was not a good reason, police practice immediately shifted the burden onto the applicant to show that she did have a good reason. Self-defense, of course, was deemed not to be good reason. Persons who were active members of shooting clubs, recreational hunters, and farmers engaged in pest control were all deemed by the police to have demonstrated good reason, but a person who merely wanted to retain legal possession of a family heirloom was not considered by the police to have a

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139. See Capt. Bruce Breckenridge, *A Shooting Sport is Dead*, AUSTRALIAN GUNSPORTS, Summer 1990, at 60.

140. Home Office Research Study No. 89 of 1986, *quoted in* JERSEY PISTOL CLUB NEWS, Jan.-Mar. 1991, at 5.

141. See Firearms (Amendment) Act, 1988, ch. 16, § 2(1)(2) (Eng.).

142. See SANDYS-WINCH, *supra* note 98, at 29 (citation omitted). See also George Wallace, *Countersignatory Rears Ugly Head*, SHOOTING TIMES & COUNTRY MAGAZINE, Oct. 12-18, 1989, at 8. A somewhat weaker countersignature requirement had already been in force for shotguns. See Fiddick, *supra* note 67, at 10. That requirement had been imposed by the police without statutory authority. A 1984 Police/Home Office working group had found the countersignature useless, and advised abolition. See Cadmus, *Conspiracy to Disarm*, 31 GUNS REV. 926 (1991).



good reason.<sup>143</sup> By the time two cycles of renewals for the Shotgun Certificates, which were only valid for three years, had been completed, the number of legal owners of shotguns had fallen by a quarter. This sharply reversed the steady growth of gun ownership in the previous two decades.<sup>144</sup>

While the relatively liberal pre-1988 shotgun system had allowed significant growth in the number of legal shotgun owners, the greater police discretion over rifles and pistol licenses had allowed police to reduce continually the number of legal owners of rifles or pistols. The 256,000 holders of Firearms Certificates in 1968 had been cut to 173,000 by 1994.<sup>145</sup> Approximately one-third of the group of Firearms Certificate holders owned handguns.

The most important remaining difference between Firearms Certificates for rifles and pistols and Shotgun Certificates was that holders of the latter did not need police permission for every new acquisition. Once a person was granted a Shotgun Certificate, he could still acquire as many shotguns as he wanted, although he had to report each acquisition to the government. In contrast, Firearms Certificate holders have been required, ever since the original Firearms Act of 1920, to receive a police-granted "variance" for each new acquisition. Generally speaking, the police are skeptical about claims that Firearms Certificate holders have a "good reason" for wanting additional guns. Consequently, if a target shooter has one rifle in the .308 caliber, he will not be allowed to acquire a second rifle in the same caliber.<sup>146</sup> To bring all shotguns under Section one of the Firearms Act, a step which has not yet been taken, would have huge implications for shotgun acquisition. A person who legally owned one 12-gauge shotgun would not be allowed to own more than one.

Home Secretary Douglas Hurd told an audience that most the provisions in the 1988 Firearm Act had been prepared long before Hungerford, and the government had simply been waiting for the right moment to push them.<sup>147</sup>

### B. Dunblane

The Hungerford cycle was repeated in 1996 when a pederast<sup>148</sup> named Thomas Hamilton used handguns to murder sixteen children and a teacher in Dunblane, Scotland. The man was well known as mentally unstable.<sup>149</sup> He

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143. See Cadmus, *Good Reason Abuse*, 29 GUNS REV. 862 (1989).

A police decision regarding good reason will not be overturned by the courts unless it is arbitrary and capricious. See *Hutcheson v. Chief Constable of Grampian*, 1977 S.L.T. 98 (Sheriff Ct.).

Home Office guidance states that the good reason language for shotguns "does NOT require the applicant to make out a good case for being granted a certificate but rather extends the chief officer's ground for refusing one." *Firearms Law—Guidance to Police*, ¶ 7.6, quoted in Lorton, *supra* note 43, at 72.

144. In 1969, there were 701,562 Shotgun Certificates. By 1988, the number had risen to 971,102. By 1994, the number had declined to 740,441. See Cadmus, *The Villains*, 35 GUNS REV. 925 (1995) (citing data from the Home Office).

145. See *id.*

146. See Cadmus, *The Dangerously Ugly*, 33 GUNS REV. 926 (1993).

147. See Richard Law, *Shooters Rights*, GUNS & SHOOTING, Sept. 1993, at 54 (discussing Hurd's speech to students at St. Edwards, Oxford).

148. See CULLEN, *supra* note 99, at ch. 5-6.

had been refused membership in several gun clubs. Citizens had written to the police asking them to revoke the man's gun license. Under Great Britain's already restrictive gun laws, the police could easily have taken away this man's guns. Indeed, the police had already investigated him seven times, but had done nothing.

The tabloid press went wild with angry stories about gun-owners, portraying anyone who would own a gun as sexually inadequate and mentally ill. The Labour Party immediately called for a ban on all handguns over .22 calibre, using the same rationale that had been employed in earlier gun bans: "We can think of no good reason why a larger calibre handgun should ever lawfully be held for sporting purposes."<sup>150</sup> The fact that at least 40,000 Britons engaged in target shooting with guns over .22 caliber apparently did not qualify as a "good reason."<sup>151</sup> Thus, "good reason" continued its metamorphosis. In 1921, "good reason" had meant "the applicant has no nefarious purpose." In 1996, "good reason" meant "no reason can be good enough, if the gun is a handgun."

The Tory government, headed by John Major, convened a Dunblane Public Enquiry. The Enquiry received presentations on firearms policy from groups and experts on all sides of the gun issue. The most powerful submission, however, based on what the report concluded, came from the British Home Office. The Home Office presented a report citing claims from two international studies that high gun ownership rates—even legal, regulated gun ownership—caused high rates of criminal violence. These claims were seriously flawed; in Great Britain, within the United States, within Australia, and within continental Europe, the regions with the highest rates of legal gun ownership (such as rural England, the Rocky Mountain states, Queensland, and Switzerland) tend to have the lowest violence rates.<sup>152</sup> But the Dunblane Commission, misled by the Home Office, came back with a report that recommended dozens of ways to tighten the already-restrictive gun licensing system, and impose more controls on licensed gun owners.

The Home Office's deception of the Dunblane Enquiry highlights another condition that may increase slippery slope risks: the government's ability to produce "data" that "prove" the need for more government power. Deliberately misleading data from the government was hardly unique to the Dunblane Enquiry. In the United States, we have J. Edgar Hoover's production of false data about interstate car theft to boost FBI funding,<sup>153</sup> deceptive anti-gun research created by the federal Centers for Disease Control,<sup>154</sup> and a breathtaking variety of lies in support of the "War on Drugs"<sup>155</sup> to name just

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149. See Saray Lyall, *Scottish School Killer Had Stormy Past*, N.Y. TIMES, Mar. 15, 1996, at A6.

150. George Robertson & Jack Straw, *Control of Guns: The Labour Party's Evidence to the Cullen Inquiry* (May 1996), available at <<http://www.cybersurf.co.uk/~johnny/dunblane/labour.html>>.

151. See Office of Legislative Affairs, *Lord Cullen's Inquiry into the Circumstances Leading up to and Surrounding Events at Dunblane Primary School on Wednesday, 13 March 1996*, at 11.

152. See R.A.I. Munday, *Does the Level of Firearms Ownership Affect Levels of Violence?* (Submitted to the Dunblane Enquiry 1996); Peter H. Jackson et al., *Was the Dunblane Inquiry Misled?* (Nov. 9, 1996), available at <<http://www.cybersurf.co.uk/~johnny/dunblane/misled.html>>.

153. See DAVID BURNHAM, *ABOVE THE LAW* 86-87 (1996).

a few. Television, of course, can also be deceptive. In 1993, NBC News was caught red-handed rigging pickup trucks to explode and burn in order to support a news program.<sup>156</sup> Since the term "assault weapon" came into the media vocabulary, the technique of showing footage of machine guns firing in fully-automatic mode while the voice-over discusses other types of firearms has become routine. This practice continues even after the station acknowledges that the image is false or the result of outright fakery.<sup>157</sup>

While the Dunblane Enquiry did recommend many new controls, the Enquiry did not recommend banning all handguns.<sup>158</sup> Prime Minister John Major's Conservative government had decided to accept what it knew would be the Cullen recommendations, tightening the licensing system still more, but not banning handguns. However, then Labour Party leaders brought Dunblane spokesperson Anne Pearston to a rally, and, in effect, denounced opponents of a handgun ban as accomplices in the murder of school children. Prime Minister Major, who was already doing badly in the polls, crumbled. He promptly announced that the Conservative government would ban handguns above .22 caliber, and .22 caliber handguns would have to be stored at shooting clubs, not in homes.<sup>159</sup>

A few months later, Labour Party leader Tony Blair was swept into office in a landslide. One of his first acts was to complete the handgun ban by removing the exemption for .22s.<sup>160</sup> The Home Office was unable to produce any statistics regarding the use of .22 pistols in crime.<sup>161</sup> Prior data showed that the Firearms Certificate system worked about as well as any human system could to keep criminals from lawfully acquiring guns, or from stealing them from lawful owners. A study by the London Metropolitan Police Inspector of 657 armed robberies in the London area from January 1988 to June 1991 found that half the robberies were perpetrated with imitation firearms. Of the remaining 328 real weapons, only one involved a gun which had ever been within the Firearms Certificate system.<sup>162</sup> Dunblane was the only British mass murder in this century with a lawfully registered pistol. But gun ownership in general, and pistols in particular, had become rare, and consequently anathematized, once a few generations had

154. See, e.g., Don B. Kates et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?* 62 TENN. L. REV. 513 (1995).

155. See, e.g., LYNN ZIMMER & JOHN P. MORGAN, *MARIJUANA MYTHS, MARIJUANA FACTS: A REVIEW OF THE SCIENTIFIC EVIDENCE* (1997).

156. See Brian Dylan, *After the Blowup*, U.S.A. TODAY, Feb. 11, 1993, at 1.

157. See Scott Baltic, *Bang Bang! You're Wrong!*, COLUM. JOURNALISM REV., FEB. 1994, at 11 (criticizing the media for gross inaccuracy in the assault weapon debate). See also *Wound Ballistics Expert Exposes Media AK Fakery*, GUN WEEK, May 5, 1989, at 1 (describing phony footage of AK-47 assault rifles staged for television news program); Joseph Tartaro, *The Great Assault Weapons Hoax*, 20 U. DAYTON L. REV. 619 (1995).

158. See THE HON. LORD CULLEN, *THE PUBLIC INQUIRY INTO THE SHOOTINGS AT DUNBLANE PRIMARY SCHOOL*, Mar. 1996, at 13 <<http://www.official-documents.co.uk/document/scottish/dunblane/dunblane.htm>>.

159. See Norman Cooper, *Time to Remove the Gloves*, 37 GUNS REV. 56 (1997) (Sir Patrick Lawrence, former Chair of the Conservative Party, told Cooper that the Anne Pearston rally caused Major's switch). The ban was implemented by the Firearms (Amendment) Act 1997, 1997, ch. 5 (Eng.).

160. See Firearms (Amendment) (no. 2) Act, 1997, ch. 64 (Eng.). Labour's original proposal to the Cullen Inquiry was that single-shot .22s, which need to be reloaded after each shot, should remain legal, but the Party's aggressive use of focus groups and polling had apparently convinced Blair to go further.

161. See Dominic Grieve, *Hansard*, June 11, 1997, at pt. 43, col. 1232.

162. See Hawkins, *Hansard*, June 11, 1997, at pt. 39, col. 1212.

grown up under the regime created by the Firearms Act of 1920. A two-to-one majority in Parliament found it commonsense that the crime of one person should lead to the collective punishment of 57,000 others.

Since 1921, all lawfully-owned handguns in Great Britain are registered with the government, so handgun owners have little choice but to surrender their guns in exchange for payment months later according to government schedule. Gun registration has laid a foundation for confiscation not only in Great Britain, but also in New York City, where the 1967 registration system for long guns was used in the early 1990s to confiscate lawfully owned semiautomatic rifles. Nevertheless, United States gun control advocates continue to insist that the United States gun rights advocates are "paranoid" for resisting registration because it might lead to confiscation. The gun control advocates reason that they do not intend to confiscate registered guns. However, the gun control advocates fail to consider what their successors might advocate. The British Parliament who created the gun registration system in 1920 had no intention of banning handguns. But that 1920 Parliament failed to foresee the danger that a registration system, even if created with the best intentions, could later be used for confiscation. Thus, it is eminently sensible for civil liberties advocates in the United States to resist registration of persons who exercise constitutional rights, not because registration is excessively burdensome in itself, but because registration amounts to greasing the slippery slope.<sup>163</sup>

### C. *The Next Steps*

The handgun ban by no means has satiated the anti-gun appetite in Great Britain. When Scottish handgun owners dutifully surrendered their handguns many of them applied for permits to own rifles or antique handguns that remained legal. The Scottish Home Affairs Minister announced that he wanted "to send a very powerful message" against acquisition of alternative "weapons [that] are currently legal." He announced that the Scottish government would begin considering whether to tighten controls on shotguns.<sup>164</sup> Consequently, while British gun owners gracefully gave away the right to own guns for protection, they are now finding their privilege to own guns for sport under greater attack than ever. Britain's leading anti-hunting group, the League Against Cruel Sports, points to the "hundreds" of people killed by guns and "thousands" of guns used in robberies and demands a ban on all guns.<sup>165</sup> The Blair government has announced plans to study whether airguns<sup>166</sup> should be brought into the gun licensing system,

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163. *But see* *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (holding that postal regulations requiring those who receive "foreign Communist propaganda" by mail to complete a short registration form is an excessive burden on the exercise of First Amendment rights).

164. James Rougrie, *Shotguns Review on Cards, Says McLeish*, THE SCOTSMAN, Nov. 4, 1997, at 6, *quoted at* <<http://www.cybersurf.co.uk/~johnny/dunblane/scot4nov.html>>.

165. TONY JACKSON, *LEGITIMATE PURSUIT: THE CASE FOR THE SPORTING GUN* 94 (1988).

166. Airguns are powered by compressed air, rather than by gunpowder and they fire a small pellet or a BB.

and whether the age limit on gun possession should be raised, which would prevent most teenagers from using firearms, even under adult supervision. A ban on all rifles above .22 caliber except for deer hunting is expected, along with a requirement that shotgun owners receive government permission each time they acquire a shotgun, as rifle owners currently must.<sup>167</sup>

A ban on all real guns will probably not suffice, however. Many British gun owners now own deactivated "replica" guns that cannot be fired. The guns are merely decorative pieces, and are less dangerous than a cricket bat. For some gun owners, deactivation was the only way they could retain possession of a prized semiautomatic. Other gun owners simply found the hassles of the police licensing system too much to overcome, and had their family heirloom guns deactivated into non-firing ex-weapons. With deactivation, at least, the family could retain the gun without need to spend vast sums on police security requirements. This last "loophole," however, in the British gun laws may be closed in a few years, as the police are now lobbying to require that owners of deactivated or replica guns get the same license that would be required for guns which can fire ammunition.

Have all these controls and abusive enforcement of controls actually made Britain safer? Armed crime in Britain is higher than it has been in at least two centuries. Armed crime is literally one hundred times more common than at the turn of the century when Britain had no weapons controls. Crime victimization surveys show that, per capita, assault in England and Wales occurs between two and three times more often than in the United States. These same surveys demonstrate that robbery occurs 1.4 times more, and burglary occurs 1.7 times more.<sup>168</sup> In contrast to criminologists in the United States, British criminologists have displayed little interest in studying whether their nation's gun laws do any good. Accordingly, definitive statements about cause and effect should be avoided. One can, however, say that as British gun laws have grown more severe, the country has grown more dangerous.

### VIII. The Campaign against Self-Defense

A.V. Dicey's classic *The Law of the Constitution*, "the most celebrated exposition of the rule of law,"<sup>169</sup> explained that the British common law of self-defense allowed deadly force to be used only as last resort in great peril. Dicey used a lawful shooting to illustrate the rule:

A is struck by a ruffian, X; A has a revolver in his pocket. He must not then and there fire upon X, but, to avoid crime, must first

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167. See Jason Bennetto, *Purge on Rifles and Shotguns*, THE INDEPENDENT, July 17, 1997, at 1.

168. See PATRICK A. LANGAN & DAVID P. FARRINGTON, CRIME AND JUSTICE IN THE UNITED STATES AND IN ENGLAND AND WALES, 1981-96 (1998).

169. Richard A. Epstein, *Symposium: The Legacy of Goldberg v. Kelly: a Twenty Year Perspective: No New Property*, 56 BROOKLYN L. REV. 747, 765 n.33 (1990).

retreat as far as he can. X pursues; A is driven up against a wall. Then, and not till then, A, if he has no other means of repelling attack, may justifiably fire at X.<sup>170</sup>

Moreover, because citizens were legally bound to prevent the commission of certain particularly dangerous felonies committed in their presence by strangers, the killing of a nighttime burglar without first retreating was lawful, wrote Dicey.<sup>171</sup> Dicey illustrated the prevention-of-felony rule by quoting a judge's advice that the proper action to take upon discovering a nighttime burglar was to shoot him in the heart with a double-barreled shotgun.<sup>172</sup>

Today, as a result of Parliament's 1967 abrogation of the common law rules on justifiable use of deadly force, should a person use a firearm for protection against a violent home intruder, he will be arrested, and a case will be brought against him by the Crown Prosecution Service.<sup>173</sup> In one notorious case, an elderly lady tried to frighten off a gang of thugs by firing a blank from her imitation firearm. She was arrested and charged with the crime of putting someone in fear with an imitation firearm.<sup>174</sup>

With gun ownership for self-protection now completely illegal (unless one works for the government), Britons have begun switching to other forms of protection. The government considers this an intolerable affront. Having, through administrative interpretation, delegitimized gun ownership for self-defense, the British government has been able to outlaw a variety of defensive items. For example, non-lethal chemical defense sprays, such as Mace, are now illegal in Britain, as are electric stun devices.<sup>175</sup>

Some Britons are turning to guard dogs.<sup>176</sup> Unfortunately dogs, unlike guns and knives, have a will of their own and sometimes attack innocent people on their own volition. The number of people injured by dogs has been rising, and the press is calling for bans on Rottweilers, Dobermans, and other "devil dogs." Under 1991 legislation, all pit bulls must be neutered or euthanized.

Other citizens choose to protect themselves with knives, but carrying a knife for defensive protection is considered illegal possession of an offensive weapon. One American tourist learned about this Orwellian offensive weapon law the hard way. After she used a pen knife to stab some men who were attacking her, a British court convicted her of carrying an offensive weapon. Her intention to use the pen knife for lawful defensive purposes

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170. A.V. DICEY, *THE LAW OF THE CONSTITUTION* 345 (8th ed. 1915). The more liberal American rule, which does not generally impose a duty to retreat, is discussed in RICHARD MAXWELL BROWN, *NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY* (1991). See also MODEL PENAL CODE §3.04(2)(b)(ii)(A).

171. Dicey, *supra* note 170 at 347.

172. See *id.* at 347-348, n. 45.

173. See Cadmus, *Arms for Self Preservation and Defense: Part II*, 35 GUNS REV. 750 (1995).

174. See *id.*

175. See, e.g., Firearms Act (1968), § 5(b) (outlawing "any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing").

176. See *International Briefs*, ANIMAL'S AGENDA, Dec. 1989, at 29.

converted the pen knife, under British legal newspeak, into an illegal "offensive weapon."<sup>177</sup> In 1996, knife-carrying was made presumptively illegal, even without the "offensive" intent to use the weapon defensively. A person accused of the crime is allowed "to prove that he had a good reason or lawful authority for having" the knife when he did.

Early one evening in March 1987, Eric Butler, a fifty-six-year-old executive with B.P. Chemicals, was attacked while riding the London subway. Two men came after Butler and, as one witness described, began "strangling him and smashing his head against the door; his face was red and his eyes were popping out." No passenger on the subway moved to help him. "My air supply was being cut off," Butler later testified, "my eyes became blurred and I feared for my life." Concealed inside Butler's walking stick was a three-foot blade. Butler unsheathed the blade; "I lunged at the man wildly with my swordstick. I resorted to it as my last means of defense." He stabbed an attacker's stomach. The attackers were charged with unlawful wounding. Butler was tried and convicted of carrying an offensive weapon. The court gave him a suspended sentence, but denounced the "breach of the law which has become so prevalent in London in recent months that one has to look for a deterrent."<sup>178</sup> Butler's self-defense was the only known instance of use of a swordstick in a "crime."<sup>179</sup> Home Secretary Douglas Hurd, using powers granted under the 1988 Criminal Justice Act, immediately outlawed possession of swordsticks.<sup>180</sup> The Act has also been used to ban blowpipes and other exotica which, while hardly a crime problem, were determined by the Home Secretary not be the sorts of things which he thought any Briton could have a good reason to possess.<sup>181</sup>

No prosecution for defending oneself is too absurd. Consider a report from the *Evening Standard* newspaper in London, dated October 31, 1996:

A man who uses a knife as a tool of his trade was jailed today after police found him carrying three of them in his car. Dean Payne, 26, is the first person to be jailed under a new law making the carrying of a knife punishable by imprisonment. Payne told...magistrates that he had to provide his own knife for his job cutting straps around newspaper bundles at the distribution plant where he works . . . . Police found the three knives—a lock knife, a small printer's knife, and a Stanley knife—in a routine search of his car. . . . The court agreed he had no intention of using the knives for "offensive" purposes but jailed him for two weeks anyway.

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177. See Criminal Justice Act 1988, ch. 33, § 139 (Eng.); Gilbert A. Lewthwaite, *Britain's Conservative Party Hopes to Outlaw Knife-carrying in Anti-crime Drive*, THE SUN, Oct. 8, 1987, at 25; Gail Tabor, *British Justice 'a Travesty'; Arizonan Won't Visit Again*, ARIZONA REP., Nov. 10, 1991, at B1, B6.

178. See Francis Cowper, *London's Parallel to the Goetz Case*, N.Y.L.J., Oct. 20, 1987, at 2.

179. See Cadmus, *supra* note 85, at 422.

180. See Criminal Justice Act 1988 (Offensive Weapons) Order 1988 (barring sale or transfer of swordsticks and martial arts weapons).

181. See Cadmus, *supra* note 85, at 422.

....

[The magistrate said] "I have to view your conduct in light of the great public fear of people going around with knives...I consider the only proper punishment is one depriving you of your liberty."

At the dawn of the twentieth century, Great Britain was the great exemplar of liberty to continental Europe, but the sun has set on Britain's tradition of civil liberty. The police search people's cars routinely. Public hysteria against weapons is so extreme that working men are sentenced to jail for possessing the simple tools of their trade. The prosecutions of a newspaper delivery men who carries some knives, or a business executive who saved his own life, would likely have horrified the British gun control advocates of the early twentieth century. There is no evidence that most of these gun control advocates, who only wanted to keep firearms out of the hands of anti-government revolutionaries, ever wanted to make it illegal for tradesmen to carry tools, or for women to stab violent predators. The gun control advocates of 1905-1920 could distinguish a Communist with a rifle from a tourist with a pen-knife. But while the early weapons control advocates made such a distinction, they could not bind their successors to do so as well. Nor could the early weapons controllers understand the social changes that they would unleash when they gave the right to arms the first push down the slippery slope.

Similarly, in the United States, few Congressmen who voted for the first federal controls on how Americans could consume medicine<sup>182</sup> could have foreseen the "War on Drugs" that they were unleashing. Who could have predicted that a law requiring a prescription for morphine would pave the way for masked soldiers to break into a person's home because an anonymous tipster claimed that there were hemp plants, which were entirely legal in 1914, in the home? Who could have predicted that the Harrison Narcotics Act would pave the way for a Food and Drug Administration that would deny terminally-ill patients the medicine of their choice because the FDA had not satisfied itself that the medicine, available throughout Western Europe, was "safe and effective?" Who could have predicted that doctors would not be able to prescribe the most effective pain-killers, opiates, to the terminally ill who were suffering extreme pain? Who could have predicted that legislative action on opiate prescriptions would pave the way for a federal administrative agency to claim the right to outlaw speech about tobacco? Predictions of such events, had they been raised in 1914 on the floor of Congress, would have seemed absurd.

However, as too many Britons and citizens of the United States have learned the hard way in this century, extreme consequences may flow from

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182. See The Harrison Narcotics Act, 38 Stat. 785, 786 (1914).



apparently small steps. The Firearms Act of 1920 was just a licensing law; the Harrison Narcotics Act was just a prescription system; and the serpent only asked Eve to eat an apple.<sup>183</sup>

### IX. Other Civil Liberties

The late Richard Hofstadter, one of America's greatest historians and a critic of America's gun culture, condemned the "pathetic stubbornness" of Americans who cling to the notion that the right to bear arms protects liberty. Hofstadter ably expresses the position that the protections of the Bill of Rights are easily severable. One may discard certain sticks from the bundle of rights, without impairing the remaining rights. For example, from 1960 to 1970, Second Amendment rights declined as the first federal gun laws applying to ordinary gun-owners purchasing rifles, pistols, and shotguns were enacted, and many state or local governments enacted additional laws. The Tenth Amendment also suffered major blows as the federal government began acting on subjects traditionally reserved to the states. However, other civil liberties became stronger. For example, free speech enjoyed its strongest judicial protection ever; the Warren Court applied most of the criminal procedure guarantees in the Bill of Rights to state courts; and Congress, through the Civil Rights Act of 1964 and other legislation, began serious enforcement of the Fourteenth Amendment's Equal Protection clause.

The contrary view acknowledges that some rights may flourish, while others wither, but maintains that in the long run, all civil liberties are mutually protective. In an eighteenth century context, for example, strong jury rights were seen as important to protect free speech, so as to prevent the government from bringing abusive prosecutions for seditious libel.<sup>184</sup> Likewise, strong property rights increase the number of people who are financially independent, and thereby better able to challenge the government in print or in court. Strong limits on central government power, such as a vigorous Tenth Amendment, protect Fourth Amendment values such as freedom from unreasonable searches, by limiting the sphere of federal police action.

Obviously there is some intuitive plausibility both to the Hofstadter "severability" view and to the "mutual protection" view. By 1999, however, one thing has become obvious. Great Britain cannot be cited as a successful exemplar of the severability theory. To the contrary, all civil liberties in Great Britain have suffered a perilous decline from their previous heights. The nation that once had the best civil liberties record in Western Europe now has one of the worst. The evisceration of the right to arms has not, of course, been the primary cause of the decline, although, as this Essay will discuss later, it has played a not inconsiderable role. More generally, the decline of all British civil liberties appears to stem from some of the same

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183. See *Genesis* 3:1-6.

184. See CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 32-34 (1998).

conditions that have afflicted the British right to arms.

### A. Freedom of Speech and of the Press

Journalist Duncan Campbell writes: "Britain has never been free in the way that most people—particularly foreigners—think. It has been getting more constricted throughout the 1980s . . . ." The 1980s were the same period when British gun control began to move from strict control to prohibition.<sup>185</sup>

Some Americans did notice that the British government banned the book *Spycatcher* on national security grounds. Upholding the ban, one Law Lord wrote that, in the United States, "[t]he courts, by virtue of the First Amendment, are, I understand, powerless to control the press. Fortunately, the press in this country is, as yet, not above the law . . . ."<sup>186</sup> When *Spycatcher* was published in the United States, the British courts finally voided the government's censorship as nugatory. Campbell notes the irony that the United States Constitution's First Amendment became "in this matter at least, the sole legal protector of free speech and a comparatively free press in Britain."<sup>187</sup>

Conversely, British law is being used to undermine American free speech principles. A libel suit by former Greek Prime Minister Andreas Papandreou against *Time* magazine was brought not in Greece or in the United States, but in England. Papandreou's lawyer explained that "the English law of libel is much more favorable than the American law of libel," and that Britain does not require libel plaintiffs who are public figures to prove that the publication was made with "actual malice."

Prior restraint of speech in the United States is allowed only in the most urgent of circumstances.<sup>188</sup> In England, the government may apply for a prior restraint of speech *ex parte*, asking a court to censor a newspaper without the newspaper even having notice or the opportunity to present an argument.<sup>189</sup> The prohibition of such prior restraints was one of the primary goals of the authors of the First Amendment. Thus, one of Blackstone's fundamental rules of civil liberty—the prohibition on prior restraints<sup>190</sup>—has disappeared as Britain in the 1990s regresses to a standard below that of the 1760s.

The final years of an American presidency are routinely punctuated with tattle-tale books written by disgruntled former staffers. The books typically contain embarrassing revelations about the President and his entourage, such as the fact that President Reagan's schedule was sometimes

185. Duncan Campbell, *The Thatcher Government vs. the British Press*, COLUMBIA JOURNALISM REV., May/June 1989, at 33. Campbell is associate editor of *New Statesman and Society* magazine.

186. Attorney-General v. Guardian Newspapers Ltd., 3 All E.R. 316 (Lord Ackner 1987).

187. Campbell, *supra* note 185, at 34.

188. As the United States Supreme Court has stated, "liberty of the press . . . has meant, principally although not exclusively, immunity from previous restraints or censorship." *Near v. Minnesota*, 283 U.S. 697, 716 (1931). See also *New York Times Co. v. United States*, 403 U.S. 713 (1971).

189. See Campbell, *supra* note 185, at 36.

190. See 4 BLACKSTONE *supra* note 26 at \* 151. "The liberty of the press . . . consists in laying no *previous* restraints upon publication . . . ." *Id.* (emphasis in original).

controlled by an astrologer consulted by Mrs. Reagan.<sup>191</sup> In Britain, however, Queen Elizabeth II sought, and won, from Britain's highest court an injunction forbidding the publication of a book by a royal servant revealing that the Queen had once tripped over a drunken page and ended up beneath him.<sup>192</sup>

Free speech in Great Britain is also constrained by the Official Secrets Act, which outlaws the unauthorized receipt of information from any government agency, and allows government to forbid publication of any "secret" it pleases.<sup>193</sup> Notably, the Official Secrets Act was enacted in 1911, a year in which Britain was suffering from anti-foreign, anti-gun national security hysteria.<sup>194</sup> The Official Secrets Act was expanded in 1920 and again in 1988, both years when gun controls were expanded. While the American government carries the burden of proving that a document was appropriately classified as secret, the British subject carries the burden of proving that a document should not be secret.<sup>195</sup> America's Freedom of Information Act makes United States government files more open to public scrutiny than those of any other government in the world. Sarah McCabe, a founder of Oxford's Centre for Criminological Research, contrasts "the foolish obsession [with secrecy]" of the British government "with the openness, in superficial matters at least, of the security services in the United States."<sup>196</sup> A hundred other British laws also prohibit the disclosure of information by civil servants.<sup>197</sup> The laws create a chilling effect so that the press is afraid to publish, even when a daring civil servant does leak information.<sup>198</sup> Former Prime Minister Edward Heath worries that the Official Secrets Act of 1989 has made it impossible for government scandals equivalent to the Iran-Contra affair to be exposed.<sup>199</sup>

In the fall of 1988, at the same time that Prime Minister Thatcher pushed through the new restrictions on guns, her government enacted other laws restricting civil liberties. She forbade television stations to broadcast in-person statements by supporters of a legal political party, Sinn Fein.<sup>200</sup> The ban even applied to rebroadcasts of archive films taped many decades ago.<sup>201</sup> A confidential British Broadcasting Corporation memo announced the government's intention to keep journalists from broadcasting any state-

191. See generally DONALD REGAN, *FOR THE RECORD: FROM WALL STREET TO WASHINGTON* (1988).

192. See *Passages*, MACLEAN's, Aug. 6, 1990, at 6.

193. See Official Secrets Act 1911, 1 & 2 Geo. 5, ch. 2 (Eng.).

194. The period was also marked by a mostly unfounded German spy hysteria. See K.D. EWING & G.A. GEARTY, *FREEDOM UNDER THATCHER: CIVIL LIBERTIES IN MODERN BRITAIN* 137 (1990).

195. See TERENCE DEQUESNE & EDWARD GOODMAN, *BRITAIN: AN UNFREE COUNTRY* 24 (1986).

196. See *CIVIL LIBERTIES IN CONFLICT* 205 n.20 (Larry Gostin ed. 1988) (citing Sarah McCabe, *National Security and Freedom of Information*, at 185). See also A.W. Brian Simpson, *Detention Without Trial in the Second World War: Comparing the British and American Experiences*, 16 FLA. ST. U. L. REV. 225, 228 (1988) (noting that British government files are routinely closed for thirty years, and sometimes closed for longer periods with no public accountability.)

197. See PADDY HILLYARD & JANIE PERCY-SMITH, *THE COERCIVE STATE* 115 (1988).

198. See *id.* at 118-19.

199. See EWING & GEARTY, *supra* note 194, at 205 (citing Parliamentary debates).

200. See Campbell, *supra* note 185, at 35.

201. For example, the ban applied to footage of Eamon de Valera, former president and Taoiseach of the Republic of Ireland, during the early 1920s when de Valera was leading the Irish war of liberation against Britain. See EWING & GEARTY, *supra* note 194, at 246.

ment by United States Senator Edward Kennedy supporting Sinn Fein.<sup>202</sup>

While the First Amendment protects the rights of even repulsive organizations like the American Nazi Party to speak and demonstrate, it is illegal in Britain to so much as publicly express racist views.<sup>203</sup> The Obscene Publications Act and the Misuse of Drugs Act have been used as justification for the police to seize masterpieces such as William S. Burroughs' *Junky*, Hunter Thompson's *Fear and Loathing in Las Vegas*, and Tom Wolfe's *The Electric Kool-Aid Acid Test*.<sup>204</sup> British courts have never recognized a right to assemble or demonstrate.<sup>205</sup>

The British press voluntarily submits to self-censorship unimaginable in America. A joint press/government committee sends "D-notices" to editors requesting self-censorship on specified national security subjects. The press almost always obeys.<sup>206</sup> The BBC banned Paul McCartney's *Give Ireland Back to the Irish*, and a song by another group urging the release from prison of the Guildford Four.<sup>207</sup> During the American-led war against Iraq, Julian Lennon's anthem *Give Peace a Chance*, ubiquitous on the American airwaves, was banned by the BBC. Two civil libertarians gloomily summarize: "As our allies become more open, Britain grows yet more secretive and censorious. Perhaps the real British vice is passivity, a willingness to tolerate constraints which others would find unbearable."<sup>208</sup> It is interesting to contrast the bold assertiveness of the American press, which appears determined to defend freedom of the press under all circumstances, with the submissiveness of their British cousins. The same contrast of fierce independence versus submission likewise appears when one contrasts American and British gun owners, as will be discussed below.

202. Labour Member of Parliament Ken Livingstone denounced the plan to "prevent access to radio and TV by those who are critical of government policy in Ireland." Campbell, *supra* note 185, at 35. On the other hand, South African President P.W. Botha applauded the move, and suggested that South Africa emulate the British plan. *See id.*

203. *See* DUQUESNE & GOODMAN, *supra* note 195, at 119. The ban on racist speech does not mean that all malicious public expression of is bigotry prohibited. For example, vicious statements that would be illegal if made about people of color are considered admirable if made about people who own guns. While the details of bigotry change from one historical period to another, the underlying spirits of ignorance, self-righteousness, and hatred remain constant.

For example, television personality Jonathan Ross called gun club members "a shambling bunch of no-hopers." Jonathan Ross, SUNDAY EXPRESS, July 7, 1996. Boy George, the transvestite pop singer, asserted, "Guns are vile things and people who belong to gun clubs are seriously weird. . . . Only the police and criminals need guns." For a character like Boy George to deride other people by calling them "seriously weird" is an impressive display ofchutzpah. *See generally* *The Boy George Homepage*, <<http://www-personal.umich.edu/~geena/boygeorge.html>>. Boy George had earlier earned notoriety for participating in a government campaign denouncing heroin at the same time that he was secretly using heroin. *See Junk Rock: Boy George's Fall from Grace*, <<http://www-personal.umich.edu/~geena/ktbstuff/articles/drugs.html>>.

Boy George's "seriously weird" comments brings to the fore one aspect of the psychological basis of some self-righteous crusaders. Do some crusaders in favor of laws to criminalize homosexuality have private insecurities about their own sexuality? Do some crusaders who do not trust other people to own guns have private fears about their own ability to control violent impulses?

204. *See* DUQUESNE & GOODMAN, *supra* note 195, at 143, 165.

205. *See* EWING & GEARTY, *supra* note 194, at 85-86.

206. *See id.* at 165.

207. *See id.* at 248 (citing INDEPENDENT, Nov. 11, 1988; INDEPENDENT, Feb. 13, 1989). The Guildford Four, convicted of perpetrating an IRA bombing, were set free after many years in prison when it was admitted that the police had fabricated evidence and had extracted confessions by beating them. The story is told, with some fictional alterations, in the movie *In the Name of the Father*.

208. DUQUESNE & GOODMAN, *supra* note 195, at 33.

### B. Terrorism

National security concerns do more than keep British citizens from learning about their government. The Security Service Act of 1989 provides: "No entry on or interference with property shall be unlawful if it is authorized by a warrant issued by the secretary of state." If committed pursuant to an order from a secretary of state, acts such as theft, damage to property, arson, procuring information for blackmail, and leaving planted evidence are not crimes.<sup>209</sup> In the United States, no official of the Executive Branch can authorize such actions. Only a court can authorize a government breaking and entering, and only if the government presents particular proof of necessity.<sup>210</sup>

Security continues to eat away at other traditional rights of British subjects. In Northern Ireland the jury has been "suspended" for political violence cases. Confessions are admitted without corroboration. Confessions are extracted through "the five techniques:" wall-standing, hooding, continuous noise, deprivation of food, and deprivation of sleep.<sup>211</sup> Convictions may be based solely on the testimony of "supergrasses" (police informers).<sup>212</sup>

The British justice system's response to Irish Republican Army terrorism within Britain has been particularly disturbing. In 1974, terrorists bombed pubs in Birmingham, killing twenty-one people. Home Secretary Roy Jenkins, author of the 1967 shotgun controls, introduced the Prevention of Terrorism (Temporary Provisions) Bill. Approved without objection in Parliament, the Bill was supposed to expire in one year, but has been renewed every year. Under the Bill, the police may stop and search without a warrant any person suspected of terrorism. They may arrest any person they "reasonably suspect" supports an illegal organization, or any person who has participated in terrorist activity. An arrested person may be detained up to forty-eight hours and then for five more days upon the authority of a Secretary of State. Of the 6,246 people detained between 1974 and 1986, eight-seven percent were never charged with any offense. Many detainees reported that they were intimidated during detention and prevented from contacting their families. The Bill also makes it illegal even to organize a private or public meeting addressed by a member of a proscribed organization, or to wear clothes indicating support of such an organization.<sup>213</sup>

The Act allows the Secretary of State to issue an "exclusion order" bar-

209. See Campbell, *supra* note 185, at 37 (citing The Official Secrets Act §3(1)).

210. See *id.*

211. See Ireland v. United Kingdom, 2 EUROPEAN HUMAN RIGHTS REP. 25 (1978).

212. See Barry James, *Justice in England Undergoes Stress*, L.A. TIMES, Apr. 7, 1985. The "five techniques" were condemned by the European Court of Human Rights as inhuman and degrading. See Ireland v. United Kingdom, 2 EUROPEAN HUMAN RIGHTS REP. 25 (1978).

213. See HILLYARD & PERCY-SMITH, *supra* note 197, at 257-58, 272. See also EWING & Gearty, *supra* note 194, at 216. The Irish Bishops' Commission for Prisoners distributes a leaflet to Irish emigrants to Britain that warns young people that, if arrested, they should expect "rough, accusational anti-Irish treatment" and should be prepared for "disorientation resulting from solitary confinement . . . and lack of contact with anyone except the police." The leaflet advises Irish to "sign nothing" without first consulting a lawyer. Mary Holland, *Ireland Laments Her Innocents Imprisoned Abroad*, OBSERVER, Oct. 22, 1989, at 2.

ring a person from ever entering a particular part of the United Kingdom, such as Northern Ireland or Wales. Persons subject to this form of internal exile have no right to know the evidence against them, to cross-examine or confront their accusers, or even to have a formal public hearing.<sup>214</sup>

The European Court of Human Rights ruled the Prevention of Terrorism Act to be in violation of Article Five, Section Three of the European Convention on Human Rights, which requires suspects to be "promptly" brought before a judge.<sup>215</sup> Nevertheless, the British government refuses to abandon its preventive detention policy, and evades the European Court's ruling by invoking the Convention's Article 15 provision for countries to ignore the Convention on Human Rights "in time of war or other emergency threatening the life of the nation."<sup>216</sup>

The Birmingham bombings that led to the Prevention of Terrorism Act resulted in the conviction of a group of defendants called the "Birmingham Six." The defendants confessed while being held incommunicado by the police. The various confessions were so factually inconsistent that they could not have been true.<sup>217</sup> The forensic scientist whose testimony convicted the Birmingham Six later admitted that he lied in court. Amnesty International charged that the defendants' confessions were extracted under torture. Civil libertarians fear that the Birmingham case is only one of many instances of police obtaining coerced confessions.<sup>218</sup>

Of course United States police have sometimes framed people and manufactured evidence. What is stunning about the Birmingham Six case is the rationale used by Britain's highest judicial body to deny the appeal:

If the six men win, it will mean that the police were guilty of perjury . . . violence and threats, and the confessions were involuntary and improperly admitted and that the convictions were erroneous. The Home Secretary would have to recommend that they be pardoned or remit the case to the Court of Appeal. This is such an appalling vista that any sensible person in the land would say: It cannot be right that these actions should go any further. They should be struck out.<sup>219</sup>

214. See HILLYARD & PERCY-SMITH, *supra* note 197, at 273. See also *Regina v. Secretary of States for the Home Department, ex parte Stitt*, quoted in EWING & GEARTY, *supra* note 194, at 217 (requiring reasons for exclusion "would be fraught with difficulty").

215. See *Brogan v. United Kingdom*, 11 EUROPEAN HUMAN RIGHTS REP. 117 (1989).

216. See generally Kevin Dawson, *Pressure Mounts to Reopen Birmingham Case*, THE SUNDAY TRIBUNE, Oct. 22, 1989, at A15; James Carvel, *PM Clings to Detention Powers*, THE GUARDIAN, Oct. 21, 1989, at 1.

217. The first time the Prevention of Terrorism Act was used was after another pub bombing in the English town of Guildford. Four people were arrested, held incommunicado in prison for a week, and coerced into false confessions by administration of drugs and by threats against their families. While the "Guildford Four" were being held, the police used the time to fabricate evidence against them. Although members of the Irish Republican Army already in prison confessed to the Guildford bombings, the Guildford Four were tried, convicted, and sentenced to life in prison. Several leading English statesmen, including Roy Jenkins, felt that the men had been framed. A campaign to free them continued for fifteen years, until, upon discovery of police notes of fabrication of evidence, the Guildford Four were released from prison. See generally R. C. Longworth, *Perjury, Abuse of Prisoners Lead to Criticism of British Police*, C.J. INT'L., Sept. 1990, at 19.

218. See EWING & GEARTY, *supra* note 194, at 18-19. Among the better-known cases involving Irish defendants allegedly tortured into confession by the police are the Guildford Four, the Maguire Seven, and U.D.R. Four. See Craig R. Whitney, *Faith in British Justice System is Shaken by Abuses and False Jailings*, N.Y. TIMES, June 2, 1991, at 1, 12.

In essence, the court said that it would be better to imprison innocent men for illegal convictions than for the British police to be brought into disrepute. The British government finally released the Birmingham Six after they had spent more than sixteen years in prison.

Under 1998 legislation pushed through Parliament and signed into law in only two days,<sup>220</sup> in "terrorism" cases:

- the oral statement of a police officer above the rank of superintendent that, in his opinion, the suspect is a terrorist, is admissible as evidence of the matter stated and the suspect can be arraigned. However, the suspect cannot be convicted *solely* on the basis of the police statement.<sup>221</sup>
- a court or jury may draw inferences from a suspect's failure to mention a fact which is material to the offense and which he could reasonably be expected to mention in response to police questioning, provided the suspect has been permitted to consult an attorney. But the suspect cannot be convicted *solely* on the basis of the inferences.<sup>222</sup>
- upon conviction of a terrorism offense, money or other property in a suspect's possession or under his control at the time of the offense may, upon be forfeited if it has been used in furtherance of or in connection with the crime or the court believes it may be so used in the future.<sup>223</sup>

Former Tory minister Alan Clark called the legislation "focus-group facism" resulting from "gesture politics."<sup>224</sup> Lord Lloyd of Berwick, the Law Lord who advises the government on emergency powers legislation was critical of the legislation, although he did not oppose it. He warned that "convictions based largely on the opinion of a senior police officer would not stand up in appeals courts or in Europe."<sup>225</sup>

It should be no surprise, then, that the United Kingdom has been found culpable of human rights violations under the European Convention on Human Rights more often than any other member of the Council of European States except Italy.<sup>226</sup>

### C. Judicial Review and the Courts

In certain situations, Britain's highest court is the final court of appeal for Commonwealth countries. Unfortunately for citizens of those Commonwealth nations, the court's record on civil liberties issues is deplorable.<sup>227</sup> In

219. *McIlkenney v. Chief Constable of West Midlands Police Force*, 2 W.L.R. 872 (C.A. 1980).

220. Seventeen members of the ruling party in Parliament objected to the lack of time for discussion but not to the substance of the bill. *BBC News* (last visited Feb. 7, 1999) <[http://news.bbc.co.uk/hi/english/uk\\_politics/newsid\\_163000/163833.stm](http://news.bbc.co.uk/hi/english/uk_politics/newsid_163000/163833.stm)>.

221. *See* Criminal Justice (Terrorism and Conspiracy) Act of 1998, 1998, ch. 40, §§ 2A-(2) to (3) (Eng.).

222. *See id.* at §§ 2A-(4) to (6).

223. *See id.* at § 4-(3).

224. *BBC News* (last visited Feb. 7, 1999) <[http://news.bbc.co.uk/hi/english/uk\\_politics/newsid\\_16400/164559.stm](http://news.bbc.co.uk/hi/english/uk_politics/newsid_16400/164559.stm)>.

225. *London Telegraph* (last visited Feb. 7, 1999) <<http://www.telegraph.p&atmo+yyyyyyyp&pg+/et/98/9/4/nbil04.html>>.

226. *See* HILLYARD & PERCY-SMITH, *supra* note 197, at 274.

227. In addition to the matters raised in this section, consider the incredible statement quoted at text accompanying *supra* note 219.

this capacity, the court has upheld a law ordering newspaper publishers to obtain a government license and to post bond with the government.<sup>228</sup> The court held that a Jamaican death sentence for a defendant who had not been represented by a lawyer was permissible—even though the Jamaican Constitution explicitly guarantees a right to counsel in all criminal trials.<sup>229</sup> The laxness of judicial review results in administrative agencies suffering almost no legal constraints.<sup>230</sup> The British courts, like other segments of British society, seem considerably more passive than their American counterparts.

The grand jury, which, like civilian gun ownership was an ancient common law institution, was abolished in 1933.<sup>231</sup> Civil jury trials have been abolished for all cases except libel, and criminal jury trials are rare. Today, over ninety percent of all jury trials in the world take place in the United States. Even when a British subject does receive a jury trial, *voir dire* is far more restricted than in the United States.<sup>232</sup>

While the United States has the *Miranda* rules, Britain allows police to interrogate suspects who have asked that interrogation stop, and allows the police to keep defense lawyers away from suspects under interrogation for limited periods.<sup>233</sup> The American doctrine of the “fruit of the poisonous tree” bars use of evidence derived from leads developed in a coerced confession.<sup>234</sup> Britain allows use of such evidence.<sup>235</sup> Even the traditional right to silence has been abolished, as 1994 legislation now allows a defendant’s silence to be used as evidence against him.<sup>236</sup> Further, defense trial lawyers (barristers) often serve as prosecutors on other cases. The clubby, collegial relationship between prosecution and defense counsel discourages defense counsel from aggressive defense of clients.<sup>237</sup> Four out of five defendants pleading innocent do not even meet their barrister until the first day of trial.<sup>238</sup>

It is not difficult for the police to obtain legal authorization to search wherever they want since, for example, wiretaps do not even need judicial approval.<sup>239</sup> In any case, formal legal constraints are irrelevant. A study of police searches by London’s Metropolitan Police showed that a large per-

228. See *Attorney-General v. Antigua Times Ltd.*, 1976 App. Cas. 16.

229. See *Robinson v. The Queen*, 1985 App. Cas. 956.

230. See DAVID HENDERSON, *INNOCENCE AND DESIGN—THE INFLUENCE OF ECONOMIC IDEAS ON POLICY* 36 (1985); Cento Veljanovski, *Privatization in Britain—The Institutional Constitutional Issues*, 71 MARQ. L. REV. 579 (1988).

231. See PHILIP JOHN STEAD, *THE POLICE OF BRITAIN* 147 (1985).

232. See *id.* at 150. Although the prosecution can dismiss as many potential jurors as it wishes, the defense’s peremptory challenges are limited to three. See HILLYARD & PERCY-SMITH, *supra* note 197, at 157.

233. See Police and Criminal Evidence Act 1984, § 58(1) (Eng.). See also EWING & GEARTY, *supra* note 194, at 38-39.

234. See *Wong Sun v. United States*, 371 U.S. 471 (1963).

235. See Police and Criminal Evidence Act, *supra* note 233. See also EWING & GEARTY, *supra* note 194, at 45.

236. See Criminal Justice and Public Order Act, 1994 (Eng.).

237. See Stephen Gillers, *The Prosecution and Defense Functions: Do They Promote Justice?* THE RECORD 626, 661-63 (1987). Such an arrangement is too much, even for the United States’ armed forces. In the mid-1970s, recognizing the corrosive effect of this “cozy” arrangement on the administration of justice, each military service created a *separate* defense branch within its Judge Advocate Corps. Zealous representation was deemed a crucial priority.

238. See Barry James, *Justice in England Undergoes Stress*, L.A. TIMES, Apr. 7, 1985, at 2.

239. See DUQUESNE & GOODMAN, *supra* note 195, at 26 (discussing the Interception of Communications Act, July 25, 1985). American wiretaps authorize only the recording of conversations regarding the subject of the tap. British wiretappers are required to record all conversations on the tapped line. See EWING & GEARTY, *supra* note 194, at 70.



centage of stops and searches were not supported by reasonable suspicion, and that the police did not care whether their searches comported with formal legal standards.<sup>240</sup> One reason the police do not need to care about legality is that Britain lacks an exclusionary rule to deter illegal police acquisition of evidence.<sup>241</sup> Indeed, it is unlawful in a British court to point out the fact that a police wiretap was illegal.<sup>242</sup>

Upon instructions of police administrators, officers in several jurisdictions have begun compiling Japanese-style dossiers on individuals in their locality. Reports contain unsubstantiated gossip and non-criminal information, such as the fact that a woman is three months pregnant and living with her parents.<sup>243</sup> The British police may arrest on "reasonable suspicion," rather than on "probable cause."<sup>244</sup> They may arrest anyone who does not have a permanent address. They may detain a suspect for twenty-four hours without charges, another twelve hours upon authorization by a police administrator, and up to ninety-six more hours upon authorization by a magistrate. The police may prevent a detainee from communicating with his family or lawyer for up to forty-eight hours.<sup>245</sup>

#### *D. The Role of Gun Controls*

If guns had never been invented, many of the British government's modern invasions of civil liberties would still have taken place. Still, the advance of gun controls has played an important role in creating laws that do infringe upon other civil liberties, as well as in providing precedents.

To enforce the gun control laws, the police have been given broad search and seizure powers. Sections 46 through 50 of the 1968 Firearms Act authorized the police to search individuals and vehicles without warrants, to require the handing-over of weapons for inspection, and to arrest without a warrant, even in a home.<sup>246</sup> The principle of warrantless searches for firearms was expanded to include searches for "offensive weapons" by the Police and Criminal Evidence Bill of 1984. Since "offensive weapons" are never defined, the police have nearly unlimited authority to search and seize. African combs, bunches of keys, and tools have been considered offensive weapons. In one case reported by the National Council of Civil Liberties, a workman carrying tools to his car was asked, "Would you use this tool to defend yourself if attacked?" Had the workman given an affirmative answer, he would have been subject to arrest for the felony of carrying an offensive weapon.<sup>247</sup>

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240. See DUQUESNE & GOODMAN, *supra* note 195, at 80-81 (citation omitted).

241. See *Kuruma Son of Kaniu v. Regina*, 1 All E.R. 236, 239 (1955) ("the test to be applied . . . is whether it is relevant to the matters at issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.").

242. The only judicial forum for discussion of wiretap legality is in a prosecution against the illegal wiretapper, an extremely rare event. See EWING & GEARTY, *supra* note 194, at 80-81.

243. See DUQUESNE & GOODMAN, *supra* note 195, at 96.

244. Nelson Pickett, *Barry's a bit British, but all bobby*, OR. J., Nov. 4, 1981, at 8.

245. See Police and Criminal Evidence Act, 1984, ch. 60 (Eng.).

246. See GREENWOOD, *supra* note 33, at 202. A warrant is still required for home searches in most cases. See *id.*

The principle of warrantless arrests is now a general practice in British law, even for minor offenses or for failure to provide satisfactory identification to the police.<sup>248</sup> When the Deer Act 1963 allowed warrantless arrests for poachers, few supporters foresaw that warrantless arrests for everyone, not just poachers, would become the norm in a few decades.

Today the practice that police may inspect private homes without a warrant is being established by the "safe storage" provisions of the gun laws. In many jurisdictions the police will not issue or renew a firearms or shotgun certificate without an in-home visit to ensure that the police standards for safe storage are being met. The police have no legal authority to require such home inspections, yet when a homeowner refuses the police entry, the certificate application or renewal will be denied.<sup>249</sup> The 1989 extension of the safe storage law to shotguns—a reasonable concept in itself—has added several hundred thousand more British homes to those to which the police consider they have the authority to demand entry without a warrant. Finally, the gun control laws have helped teach that laws in practice are made by police administrators or London bureaucrats, rather than being the exclusive creation of Parliament.

## **X. The Causes of British Decline—and Some Danger Signs for Slippery Slopes**

What makes a civil liberty particularly vulnerable to a slippery slope? This section discusses some particular factors that have made gun rights, like most of the rest of the freedoms guaranteed in the American Bill of Rights, particularly vulnerable in Great Britain: its structure of government, and its civil liberties organizations. Before addressing those topics, this Essay will consolidate the factors that have been touched upon in earlier sections.

### ***A. Seven Key Factors***

The first factor that undermined the British right to arms was a technological change when revolvers came to be seen by some persons as much more dangerous than previous weapons.<sup>250</sup> This same phenomenon can be seen in the treatment of other technological advances, such as the automobile, which from the 1920s onward, has often been treated by the United States Supreme Court as a "Constitution-free zone", where searches and seizures in contravention of normal Fourth Amendment standards may take place.<sup>251</sup>

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247. See DUQUESNE & GOODMAN, *supra* note 195, at 111 (citing §71 Debate on Police and Criminal Evidence Bill, House of Lords, June 21, 1984). The bill is codified as Police and Criminal Evidence Act, 1984, ch. 60. (Eng.). The original prohibition against carrying "offensive weapons" was the Prevention of Crimes Act, 1953, 1 & 2 Eliz. 2, ch. 14, § (1) (Eng.).

248. See EWING & GEARTY, *supra* note 194, at 23.

249. See Lorton, *supra* note 43, at 73-74.

250. See *supra* notes 33-36, 47-51.

The second factor that undermined the British right to arms was the role of the media, with its lurid and exaggerated accounts of gun crime in the 1880s, or its vicious denunciations of recreational shooters in the 1990s. This suggests that slippery slopes may be less dangerous when the right in question is supported by the press, as free speech and abortion rights are in the modern United States. Conversely, slippery slopes may be more dangerous when the press is indifferent, as in the case of federalism and states' rights, or actively hostile, as in the case of gun rights.

The third undermining factor was the development of government mistrust of the people, as in the 1920 fears of Bolshevism. We may hear echoes of this today in the United States government's fears the militia movement and its allies. Certainly, however, the dangers posed by the modern militia movement are much smaller than the dangers posed by Soviet communism and its United States agents in the 1950s or by violent anarcho-syndicalism in the early twentieth century. Consequently, the related suppressions of civil liberties have been smaller.<sup>252</sup>

The major "subversive" group in the United States today is not anarcho-syndicalists, militia members, or Fenians, but drug users. They are "traitors in the War on Drugs" according to much public rhetoric, and according to the United States' moralist-in-chief William Bennett, public beheadings of drug users would be a good idea. Over the last two decades, no force has been more important in eroding the civil liberties of all Americans, drug users and abstainers alike, than the War on Drugs.<sup>253</sup>

The shifting of the burden of proof, both at law and in popular discussion, was the fourth factor degrading the British right to arms. Rather than the government having to prove that a particular gun-owner or a particular type of gun was dangerous, the gun-owner began to have to prove his "good reason," and the government began deciding to outlaw weapons that the government did not think anyone outside the government had a good reason to own.

The "added authority" problem described by Schauer was of great significance. Once the people agreed that Parliament had the authority to decide whether to ban any type of gun, or to decide how people could acquire guns, a wide range of restrictions became intellectually conceivable. Even more significantly, once the police were given authority over licensing, they were able to use that authority to impose many additional controls, and to reduce the number of licensed shooters. In addition, Parliament's allowing the Home Office to ban weapons by administrative edict has resulted in certain weapons such as swordsticks being banned for no good reason.

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251. See, e.g., *New York v. Belton*, 453 U.S. 454 (1981) (allowing the search of an automobile in order to protect the officer's safety, even though the occupants of the automobile were under arrest, under restraint, and in the police car); *Carroll v. United States*, 267 U.S. 132 (1925) (allowing warrantless searches of automobiles).

252. See David B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247 (1996).

253. See, e.g., DAVID B. KOPEL & PAUL H. BLACKMAN, NO MORE WACOS: WHAT'S WRONG WITH FEDERAL LAW ENFORCEMENT AND HOW TO FIX IT (1997).

This suggests that often the most important aspect of a particular restriction on civil liberty, as least in terms of slippery slope dangers, is not the content of the restriction, but who will decide its contours. For example, the 1994 Congressional ban on "assault weapons" contained a complete definition of what an "assault weapon" is, and gave the Bureau of Alcohol, Tobacco, and Firearms no discretionary authority to add guns to the banned list. Thus, the potential future expansion of the law was constrained. Conversely, the most important aspect of Canada's latest gun control law, Bill C-68, is not that it banned some handguns, but that it gave the Prime Minister and his appointees the authority to ban any other weapon they want, without asking Parliamentary approval. Thus, how much "added authority" one control creates for future controls is a fifth important factor in estimating slippery slope dangers.

Additionally, how many people are there who care to resist infringement of a right? Few politicians seriously propose a total gun ban in the United States because there are seventy million gun-owning households—about half the population. But only about four percent of the British population legally owns guns—a much smaller interest group. If, over the course of generations, the percentage of a population that is interested in a right can be gradually reduced, stricter controls become more politically feasible, and the stricter controls can further reduce the long-term number of people who exercise their rights.

This suggests the long-term importance of young people exercising their rights. If high school newspapers have large staffs that fearlessly report the truth, the future of the First Amendment is better protected. If, conversely, laws prevent teenagers from target shooting or hunting, the future of the Second Amendment is endangered.

A final potential reason that a polity might move further down a slippery slope is that the polity sees the previous step as being useful. For instance, if a city council imposed a 10 p.m. curfew for sixteen-year-olds, and night-time crime perpetrated by sixteen-year-olds fell significantly and immediately, the city council would likely consider extending the curfew to seventeen-year-olds. In the United States, there is no shortage of studies claiming that laws tightening gun controls (like the Brady Act) or laws relaxing gun controls, like laws allowing trained citizens to carry a concealed handgun for protection, reduce crime. Scholars such as John Lott, Gary Kleck, Arthur Kellerman, Garen Wintemute, and others, carry on a steady debate about the empirical benefits of various firearms policies. Anyone who follows the firearms debate seriously will soon encounter one of these social scientists on a television interview. The gun control debate in Canada likewise includes scholars such as Gary Mauser and Thomas Gabor, who make various empirical research claims for or against particular gun policies.

From an American point of view, one of the truly odd characteristics of

the British gun debate is the apparent irrelevance of social science. To the extent that any research is cited, the research is from North America, or involves transnational comparisons. Nobody cites British quantitative research because none exists other than raw crime statistics collected by the Home Office.

The raw statistics do make some facts clear: when Britain had no gun control (early in the twentieth century) or moderately-administered gun control (in the middle of the century), Britain had virtually no gun crime. Today, Britain literally has substantially more gun crime, as well as more violent crime in general. From 1776 until very recently, the United States has suffered a much higher violent crime rate than Britain, regardless of whether British gun laws were liberal or strict. In recent years, however, the once-wide gap in violent crime has disappeared. This gap was closed by a moderate drop in American crime rates, coupled with a sharp rise in the British rates. One does not hear British gun control advocates touting statistics about how crime rates fell after previous gun laws were enacted.<sup>254</sup> Rather, the advocacy is based on the "inherent danger of guns," and on the "horror" of Dunblane and Hungerford.

Even though Britain shows that demonstrated empirical success is not essential for movement down a slippery slope, success does help. The drop in New York City's crime rate following Mayor Rudolph Guliani's aggressive policing policies, which were roundly condemned by the New York Civil Liberties Union, has encouraged other cities to adopt similar policies. This, in turn, made Guliani's brand of authoritarian conservatism an important element in the national Republican party's thinking about crime policy.

There are certainly other factors that may affect the potential danger of a given slippery slope. The seven factors that this Essay has discussed, however, could be usefully analyzed in many different situations to examine the relative risks of a slippery slope argument. In addition to these seven factors there are several other factors that made the right to arms so vulnerable in Britain—and which also have implications for civil liberties in the United States. It is to these additional factors that this Essay now turns.

## *B. Balancing instead of Checks and Balances*

### *1. A Balancing Test?*

When the government cuts back on civil liberties, it couches its actions in the reasonable-sounding language of "balancing." For example, under the Public Order Act of 1986, organizers of marches must give seven days notice to the police, and it is illegal for a person to participate in a march that

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254. The reason is obvious, during the period from 1988 to 1993, as legal gun ownership fell by 22%, the violent crime rate increased by 33%, the robbery rate increased by 80%, and the firearm assisted robbery rate increased by 117%. Home Office (1995). See also, Toni Marshall, *In Britain, call it Fleece Street: Rates for robbery, assault top those in U.S., study finds*, WASH. TIMES, Oct. 13, 1998, at A13.

has not complied with the Public Order Act. The Act was initiated by Home Secretary Douglas Hurd, author of the 1988 gun controls. The Home Office claimed that it was balancing "the rights of those who wish to demonstrate and the interests of the wider community."<sup>255</sup> The Police Act, authorizing incommunicado detention, was promoted as a "balance" between police powers and individual rights.<sup>256</sup> Likewise, Hurd justified the 1988 gun controls as "a better balance between the interests of the genuine sportsman and the safety of the public as a whole."<sup>257</sup> The gun lobby's concession that guns are only for sports, and not for defense, ensures that the balance is always tipped against the gun owner. If guns make no positive contribution to personal or public safety, the public's concerns about safety must always override the gun owners' interest in sports.

The rhetoric of balancing is dangerous because it tends to give too much weight to the short-term concerns of public safety. Thus, the American right that has been most subject to balancing, the Fourth Amendment, has suffered badly in the United States Supreme Court.<sup>258</sup> More fundamentally, the "balancing" that legislatures or courts sometimes do is not their job, because the balancing has already been done. Whether in the 1689 Bill of Rights, which was to apply "for all time," or in the 1789-91 United States Constitution, a balance was struck. Because of this balance, governments were prohibited from doing certain things since, in the long run, public safety and liberty were both enhanced by preventing short-term considerations from controlling. Thus, when the *Blaisdell* Court "balanced" its way around the Constitution's absolute ban on the impairment of contracts, and upheld Minnesota's debtor relief law,<sup>259</sup> the Court did not merely err – the Court usurped power and attempted to re-open the question that the Contracts Clause had decided with finality.

When rights are protected with bright lines, as the First Amendment usually is, then rights are particularly secure against slippery slopes. When rights are subjected to "balancing" (a/k/a "reasonableness") tests by courts, as the Fifth Amendment Takings Clause often is, then rights are particularly vulnerable. And when a society has lost the theory of constitutional absolutes as Britain has, and replaced this with "balancing," then every right is in danger.

## 2. Checks and Balances

Although the British government praises "balancing," the lack of checks and balances within the government itself endangers liberties. Any

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255. HILLYARD & PERCY-SMITH, *supra* note 197, at 259. Road blocks are now routinely used to prevent people from attending unauthorized demonstrations, including anti-nuclear activities and coal mining strikes.

256. See DUQUESNE & GOODMAN, *supra* note 195, at 27.

257. Douglas Hurd, Home Secretary, Speech to Police Superintendent's Association Conference, Torquay, Sept. 22, 1987, reprinted in Fiddick, *supra* note 67, at 19.

258. See Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

259. See *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

United States law, including a restriction on liberty, must be approved by the legislative and the executive, enforced by the executive, and upheld by the courts. The independence of the legislature, executive, and judicial branches in the United States is a deliberate formula for government gridlock, for it ensures that government cannot speak with a single voice.

In contrast, the British Parliament is supreme. An act of Parliament that is clearly expressed cannot be questioned on constitutional grounds by any British court.<sup>260</sup> A majority in Parliament means control of the entire government. The party leader—the Prime Minister—and the leader's close advisors have a much easier time turning their unchecked will into law than do their counterparts in the United States or Canada.<sup>261</sup> The British system does not mean legislative supremacy, but rather executive supremacy, since the leader of the dominant party in Parliament faces no effective opposition or check.<sup>262</sup> There is, 300 years after the Glorious Revolution, an unexpected new "monarch"—the Prime Minister. As a practical matter, the Parliament today acts as less of a check on the supreme executive's power than Parliament did in 1613, when King James I asserted the divine right of kings. The modern "servile but supreme parliament" is no longer a restraint on executive power, but instead an instrument of that power.<sup>263</sup>

In the seventeenth century prelude to the English Civil War, as Parliament took control of the militia away from the King, Parliament exalted itself as the "epitome" of the nation, insisting "there can be nothing against the arbitrary Supremacy of Parliaments." Indeed, it was commonly said that "Parliament can do no wrong."<sup>264</sup> The fiction of a King, who embodied all national sovereignty and could do no wrong, was replaced with the fiction of an equally absolute Parliament.

Unfortunately, modern Britain's politics derives more from early seventeenth century absolutism than from the eighteenth century common law

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260. See *Webb v. Outrim*, 1907 App. Cas. 81 (P.C. 1907).

261. See EWING & GEARTY, *supra* note 194, at 15.

262.

The real power struggle is behind the scenes, in the informal advisory bodies with access to Secretaries of State, in the Cabinet committees, in the meetings of Ministers with their powerful back-benchers, and in the informal cabals that focus energies on future policy. A bill before the House signals the end of the real battle and the start of a squabble over detail.

*Id.* at 6.

263. See I.J. Craik-Henderson, *The Dangers of a Supreme Parliament*, in Lord Campion et al., *PARLIAMENT: A SURVEY* 94 (1952). British MP and constitutional scholar L.S. Amery points out that while in the United States the individual is the starting point of sovereignty, and government receives what is given up by the individual, in Great Britain the people and the government possess what Amery calls "independent and original authority." L.S. AMERY, *THOUGHTS ON THE CONSTITUTION* 12-13 (1964). Legislation is initiated by the government, and the purpose of Parliament is to provide a forum for the people to reject a governmental action. *Id.* at 21. Amery describes the British system "of democracy by consent and not by delegation, of government of the people, for the people, with, but not by, the people." *Id.* at 33.

264. LOIS G. SCHWOERER, "NO STANDING ARMIES!" *THE ANTIARMY IDEOLOGY IN SEVENTEENTH CENTURY ENGLAND* 46-49 (London, The Johns Hopkins University Press 1974) (1697). As one British scholar wrote, in rejecting the American assertion that there should be no taxation without representation, "a supreme and uncontrollable power must exist somewhere in every state." JAMES MACPHERSON, *THE RIGHTS OF GREAT BRITAIN ASSERTED AGAINST THE CLAIMS OF AMERICA* (1776), quoted in JACK P. GREENE, *PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITICS OF THE BRITISH EMPIRE AND THE UNITED STATES 1607-1788*, at 130 (1990).

United States Supreme Court Justice William Paterson, a signer of the United States Constitution, contrasted the English system of government, where "the authority of Parliament runs without limits," to the United States government, where "the Constitution is the sun of the political system, around which all Legislative, Executive, and Judicial bodies must revolve." *Vanhome's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (1795).

described by Blackstone, in which the "right of the individual" to arms was meant for "the natural rights of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." In Blackstone's time, and for many decades thereafter, Britons believed that they had the same right that citizens of the United States claimed in the Declaration of Independence—to "alter or abolish" their government by force, if the government became too oppressive.

What a slippery slope Britain has descended in just a century! When the century dawned, Blackstone's right to resist oppression was the law. Today in Britain, only the Libertarian Alliance dares to argue about a right of resistance. Regarding the issue of the government's absolute sovereignty, the British government holds a tighter ideological grip over its subjects today than most British governments since 1689 ever dreamed of achieving.<sup>265</sup>

Virtually no one in the debates surrounding the creation of the United States constitutional government, or in the two centuries of that government's existence, has asserted that any branch of government deserved absolute power. A person insisting that "Congress can do no wrong," would be making a joke. The "checks and balances" of the United States Constitution reflect the explicit choice of the its framers that government was itself something that needed to be controlled—by the internal checks of three equal branches of government.<sup>266</sup> The United States' system of checks and balances constrains the central government by dividing its power. Thus, slippery slope problems in the United States take longer to develop than those in Great Britain. Thus, almost any slippery slope argument made in Great Britain is inherently more plausible than the same argument made in the United States, although the ultimate harm may be the same.<sup>267</sup>

Because the United States Constitution's separation of powers is a very powerful protection against slippery slope degradation of its citizens' individual rights, United States citizens must be particularly vigilant that the separation of powers itself does not fall victim to a slippery slope. The British, after all, once separated their powers—between a House of Commons, a

265. Canadian law professor Edward Morgan explains that "[i]n the British constitutional tradition, sovereignty resides in the Crown rather than the people, and thus flows from top down rather than bottom up." Edward Morgan, *Act of Blindness, State of Insight* 13 B.U. INT'L L.J. 1 n.133 (1995). What the United States calls "domestic tranquility," Britain calls "the Queen's Peace." The different phrasing reflects the British assumption that the government is not simply an arbiter between individuals, but an independent power, sufficient unto itself with the authority to take whatever steps it needs to protect its own interest in peace. Likewise, criminal cases in the United States are prosecuted in the name of the people, while British cases are prosecuted in the name of the monarch. One nation is the "United States," the other the "United Kingdom." The head of state in one country is "Mr. President," and in the other "Your Highness." Likewise, the British anthem "God Save the Queen" became in the United States, "My country 'tis of thee, sweet land liberty, of thee I sing." The monarch no longer exercises political power in the United Kingdom. Nevertheless, the monarchy symbolizes the distinction between the sovereign and the subject.

266. See *Myers v. United States*, 272 U.S. 52 (1926) (Brandeis, J., dissenting).

The doctrine of the separation of powers was adopted by the Convention in 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of government powers among three departments, to save the people from autocracy.

*Id.* Just as the First Amendment protects an independent press so that it may perform a "checking function" against the government, the right of the people to bear arms serves as the ultimate check. See, e.g., JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1890 (Fred B. Rothman & Co. 1991) (1833). "The right of the citizens to keep and bear arms . . . offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if those are successful in the first instance, enable the people to resist and triumph over them." *Id.*

267. For more on British notions of the absolute supremacy of Parliament, see Dicey, *supra* note 170.



House of Lords, and a Monarch. But over time, the first has arrogated to itself all but the tiniest remnant of the national government's political power.<sup>268</sup> Indeed, there is now discussion of the House of Commons, by its own fiat, abolishing the House of Lords or the Monarchy.

Current conditions in the United States are, however, no cause for complacency. As Bruce Ackerman details in *We the People: Transformations*, the central government now exercises vast powers which were never granted by the text of the 1789 Constitution, and the separation of powers between the central government and the states has been severely damaged, far beyond the change in federal/state relations that the Fourteenth Amendment wrought.<sup>269</sup> Also severely damaged is the separation of powers between the three branches of the central government. David Schoenbrod's superb *Power without Responsibility: How Congress Abuses the People Through Delegation* details how Congress, the Executive, and the Judiciary have collaborated in a vast transfer of Congress's Article I lawmaking authority to the Executive branch.<sup>270</sup> Additionally, the slippery slope of executive branch lawmaking continues to worsen. In earlier decades the Executive Branch made law almost exclusively through formal regulations or through quasi-judicial adjudications—a usurpation of the legislature's law making power and the judiciary's Article III powers. Currently, however, executive law-making often tends to slip even the restraints of the Administrative Procedure Act, as the Executive branch invents "law" through the creation of "guidelines" implementing federal statutes.<sup>271</sup> The "guidelines" are de facto law for the vast number of citizens and businesses attempting to comply with what the legions of federal enforcement officers demand. Although the guidelines are not formally enforceable in court, only a small minority of the victims of illegal executive law-making are able to spend the money necessary to go to federal court and win a ruling three years later that guidelines are not law.

### C. Written Constitutions

Civil liberties in Britain lack the shield of a written constitution enforced by judicial review. Civil liberties endure only so long as Parliamentary majorities respect unwritten traditions or the statutes of previous Parliaments, such as the Bill of Rights. A civil liberties leader in the House of

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268. As the great Whig pamphleteer John Trenchard warned: "All title arises from an equal distribution of Power, and he that gets an overbalance of Power . . . takes away the title from the rest, and leaves them a possession without a Right, which is a Tenure at the Will of the Lord." JOHN TRENCHARD, A LETTER FROM THE AUTHOR OF THE ARGUMENT AGAINST A STANDING ARMY TO THE AUTHOR OF THE BALANCING LETTER 14-15 (London 1697), quoted in J.R. WESTON, THE ENGLISH MILITIA IN THE EIGHTEENTH CENTURY: THE STORY OF A POLITICAL ISSUE 1660-1802, at 91 (1965).

269. See generally BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998). Ackerman celebrates all these changes, and argues that the Constitution can be changed in ways outside the constitutional amendment process. Whether or not one agrees with Ackerman, he is undeniably correct that modern practice is very different from the text of Constitution that was adopted in 1789-91 and in the Reconstruction Amendments.

270. See generally DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993).

271. See generally ROBERT A. ANTHONY, *UNLEGISLATED COMPULSION: HOW FEDERAL AGENCY GUIDELINES THREATEN YOUR LIBERTY* (1998).

Lords has argued for the importance of a written constitution:

Human rights are built into American life by the Constitution, and protected by a court, the Supreme Court of the USA. Not so in my country. "Human rights" is not a term of art in English law. Civil liberties—yes, our courts understand them and protect them. We rely on the common law: but the common law has no constitutional protection against the inroads of the legislature. Judges are, in terms of power, subordinate to parliament. Mr. Justice Brennan's approach to human rights is the pearl of great price that we have lost in the rough seas that prevail outside the world of a written constitution.<sup>272</sup>

Ironically, while the British government believes that it functions just fine without a written constitution, the British government only grants approval to shooting clubs if they are "a genuine target shooting club with a written constitution."<sup>273</sup> What topsy-turvy priorities for a body politic: Safety dictates that the law must demand "a written constitution" from each approved shooting club; but there is no "written constitution" demanded for the British government—which is vastly more important, and more dangerous than all the gun clubs put together.

The differing constitutional policies of the United States and Britain, and the differing fate of the right to bear arms in the two nations, can be traced in part to the revolutionary times that gave birth to the formal recognition of the right to bear arms in each nation. The Second Amendment was written just a few years after an armed United States fought a long and violent revolution that overthrew what many United States citizens considered an imperial dictatorship. The closest the British people ever came to successfully overthrowing a government was watching passively when William of Orange frightened James II into fleeing the country, in the Glorious Revolution of 1688-1689. And the resultant statutory "Bill of Rights" was as close as Britain ever got to a strong written Constitution protecting a right to bear arms.<sup>274</sup> The resultant Bill of Rights enacted by Parliament in 1689 has turned out to be of little value in protecting even a small core of a "right" to own guns in Britain. In contrast, the appeal that a United States citizen

272. The Right Honorable The Lord Scarman OBE, House of Lords, *Foreword*, in *CIVIL LIBERTIES IN CONFLICT* xiii (Larry Gostin ed., 1988). Professor John Dunn of Cambridge finds that the language of British civil liberties "has more the flavor of moral criticism . . . than confident appeal to existing or positive constitutional law." In addition, writes Dunn, "the far greater salience of conflicts of class interest in British politics greatly accentuates the externality and conceptual instability of political defenses of civil liberties." John Dunn, *Rights and Political Conflict*, in *CIVIL LIBERTIES IN CONFLICT*, *supra*, at 21, 23.

When the Law Lords upheld a temporary injunction against the publication of *Spycatcher*, one of the dissenting Lords complained: "Having no written constitution, we have no equivalent in our law to the First Amendment to the Constitution of the United States of America." *Attorney-General v. Guardian Newspaper Ltd.*, 3 All E.R. 316 (1987) (Lord Bridge of Harwich, dissenting).

273. Home Office, *Firearms: Approval of Rifle and Muzzle-loading Pistol Clubs* (1998) (visited Feb. 7, 1999) <<http://www.homeoffice.gov.uk/ppd.oppu/club98.htm>>.

274. See Lorton, *supra* note 43, at 104.

makes to the Bill of Rights is an appeal to the highest law, and a claim of entitlement. Gun owners in the United States, and a very large majority of the United States public, believe that they have a right to bear arms. In fact, legal scholarship now overwhelmingly endorses the "Standard Model" of Second Amendment interpretation, holding that the Bill of Rights provides a meaningful, individual right to keep and bear arms, which does restrict government.<sup>275</sup> Akhil Amar observes how the United States' Bill of Rights grew in importance over time. It was like the Decalogue, with ten essential fundamental rules.<sup>276</sup> The United States' Bill of Rights had an important advantage over its British ancestor: the United States Bill was part of a larger document, and that larger document—the Constitution—was universally acknowledged to be superior to the federal government. The United States' federal government was under the Constitution, everyone agreed. And therefore the United States' federal government must be under the Bill of Rights, since the Bill of Rights is part of the Constitution. But the British Bill of Rights hangs by itself. It is not attached to the written constitution for the British government.

The lesson of slippery slopes is that the strength with which a right is expressed in fundamental law can make a great difference. The Second Amendment has undeniably made a huge difference in the progress of the gun debate in the United States. Imagine the debate if there were not millions of political activists, and a huge majority of the public, who believed that ownership of a guns was a constitutional right.<sup>277</sup>

Contrast the fate of the right to arms in the United States with the fate of the right to medical choice. Suppose that Madison had included a right to medical liberty in the Bill of Rights, and the nation had ratified it. With an explicit constitutional right to medical choice, would United States citizens have ever allowed their government to get to the point that it denies the best painkillers (such as heroin) to terminally ill people in incurable pain? To deny various treatments to people who conventional treatments are failing to save from cancer? To use the interstate commerce power to make felons out of people undergoing chemotherapy who control their nausea by smoking a homegrown hemp plant—a plant which George Washington grew on his farm?

Thus, aspects of freedom that are traditional, but which are not enumerated in the Constitution, may be especially vulnerable to slippery slopes. For example, the right to privacy, the right to self-defense, the right to move around (by foot or by auto); and the right to medical freedom all deserve protection against further encroachment because small encroachments may snowball. Some readers will object that something on this paragraph's list of

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275. See Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995).

276. See generally AKHIL AMAR, *THE BILL OF RIGHTS* (1998).

277. Some writers, such as Garry Wills or Dennis Henigan argue that common American beliefs about the Second Amendment as an individual right are misguided, but these writers also acknowledge that popular beliefs about the Second Amendment indeed do play a major role in the current gun control battle.

unenumerated rights are not really rights at all, and deserve no protection. This objection confirms that the rights in question are at risk, and therefore need special guardianship from persons who believe in the right.

#### D. Civil Liberties Groups

The National Rifle Association in the United States is *sui generis*; it is the only gun rights lobby in the world to be one of the very most influential lobbies affecting its government. The American Civil Liberties Union is not as legislatively powerful as the NRA, but it too is vastly more influential on government than are the ACLU's foreign cousins.

The British lobbies accuse the United States of going too far. Commented the general secretary of the National Council for Civil Liberties of England and Wales, "[u]nlike the American Civil Liberties Union, we feel that freedom of speech is not an absolute." Thus, Britain's NCCL decided not to oppose legislation prohibiting the public expression of racist views.<sup>278</sup> The National Council on Civil Liberties favors suppression of racist speech, and has even refused to represent racist clients on other issues.<sup>279</sup> Similarly, British gun organizations criticize the laxity of United States gun laws.<sup>280</sup> When the Home Office imposed major new restrictions on gun clubs, the Chief Executive of Britain's National Rifle Association affirmed his assent by simply noting that "the Government saw a need."<sup>281</sup> In the United States, the notion that a civil liberties group or a national shooting organization would support a reduction in freedom simply because "the government saw a need," is almost too absurd to contemplate.

#### 1. The Right to Life

The British gun-owners must accept much of the blame for their current predicament because of their concession that guns were only appropriate for sports. When the Home Office in the 1980s began complaining that some people were obtaining guns for protection, British Shooting Sports Council joined the complaint: "This, if it is a fact, is an alarming trend and reflects

278. See *Britain Plans to Give Police Power to Curb Violent Acts or Threats*, N.Y. TIMES, Dec. 11, 1985. See also Public Order Act, 1986 ch. 64, § 18 (Eng.).

When American Nazis were denied a permit to march in the Jewish suburb of Skokie, Illinois, the American Civil Liberties Union went to court and won a permit. See *Collins v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

ACLU President Norman Dorsen criticizes the NCCL for not opposing curbs on racist speech. Dorsen observes that these curbs, originally intended to protect blacks, "are now used against blacks in their communities, trade unions on the picket lines, and the Campaign for Nuclear Disarmament." Norman Dorsen, *Is There a Right to Stop Offensive Speech? The Case of The Nazis at Skokie*, in *CIVIL LIBERTIES IN CONFLICT* 129 (Larry Gostin ed., 1988). Police in Skegness and Mablethorpe used the Act to control what they considered a "craze for obscene T-shirts and hats." EWING & GEARTY, *supra* note 194, at 122.

Despite its relative docility, the National Council for Civil Liberties has been branded a subversive organization by MI5, the national security agency. See Campbell, *supra* note 185, at 34.

279. The NCCL turned away a racist transsexual who was pursuing a legal claim to state medical care. The NCCL also rejected a rank-and-file member of the racist National Front who was roughed up while the police conducted a warrantless search of her home and destroyed her property. See Larry Gostin, *Editor's Notes*, in *CIVIL LIBERTIES IN CONFLICT* 118-19 (Larry Gostin ed., 1988).

280. Ken West of the National Pistol Association stated: "We certainly do not believe that one should be able to obtain firearms by buying them from a supermarket." Transcript, "Gun Control Special," *European Journal* #20/89 (Oregon Public Television).

281. Jan A. Stevenson, *Sit Perpetuum? 100 Years at Bisley*, HANDGUNNER, Nov. 1990, at 21. The Clay Pigeon Association endorsed the new controls as well.

sadly on our society.”<sup>282</sup> One hunting lobby official condemned “the growing number of weapons being held in urban areas” for reasons having nothing to do with sport. The major hunting lobby, the British Association for Shooting and Conservation, defended the right to arms, but only, in its words, “the freedom to possess and use sporting arms.”<sup>283</sup>

The BASC’s stance may appear to be a “reasonable” position, which demonstrates that gun-owners are not bloodthirsty nuts wanting to shoot people. Rather, shooters are harmless sportsmen, and licensed guns belong in the same category as cricket bats or golf clubs. In practice, however, the concession that guns are only for sports undermines defense of the right to bear arms. If guns are not to be owned for defense, then guns make no positive contribution to public safety. If the sovereignty of the central government is absolute, then the people’s ownership of arms makes no positive contribution to a sound body politic.

British libertarian Sean Gabb points out that the British gun lobbies’ support of gun licensing undermines the lobbies arguments that licensed gun owners are not part of the gun crime problem. As Gabb writes: “[b]ut if control is needed, and if it can be made to work, the fact that it did not prevent Thomas Hamilton from shooting those poor children is surely an argument at least for tightening it in future.”<sup>284</sup> Gabb further argues that British gun owners have been losing battle after battle and have therefore shriveled in numbers because “you all failed to put the real case for guns—that their possession for defence is a moral right and duty, as well as a positive social good.”<sup>285</sup> Instead, the many eloquent MPs who spoke against handgun confiscation pointed to all the admirable sporting uses of sporting guns: by handicapped people in the paralympics; by British athletes in the Olympics and in the Commonwealth Games; and by ordinary Britons on a Saturday afternoon of innocent sport.

The anti-ban MPs spoke well, but the prohibitionists’ argument, while simple, was intellectually stronger. There are substitutes for sports; displaced handgun shooters can still use rifles or shotguns or airguns. But there is no substitute for a child’s life. Even if virtually all handguns are never misused, at the very least, once in a while a handgun will be. If complete prohibition saves one life, it’s worth it.<sup>286</sup> The score in this debate, for potential lives saved was Gun Ownership: zero; Gun Prohibition: perhaps one or

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282. JACKSON, *supra* note 165, at 74.

283. Advertisement, SPORTING GUN, Nov. 1989, at 35.

284. Sean Gabb, *Open Letters to the Gunowners of the United Kingdom*, Aug. 21, 1996 (last visited Feb. 7, 1999) <<http://freespace.virgin.net/old.whip/guns4.htm>>.

285. Sean Gabb, *A Fourth Open Letter to the Gunowners of the United Kingdom*, Oct. 16, 1996. A real case for gun ownership can, however, be made both on moral grounds and on the basis of pragmatic considerations. See, e.g., JOHN R. LOTT, JR., MORE GUNS LESS CRIME (1998); Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150 (1995); Jeffrey R. Snyder, *A Nation of Cowards*, THE PUB. INTEREST, Fall, 1993, at 40.

286. As Labour Home Secretary Jack Straw explained to Parliament on the night when all handguns were banned, “I recognize, as I have always recognized, that many law-abiding shooters will be inconvenienced or worse, and I regret that. But I am in no doubt about where the balance should be struck between the right to practise a sport and the right to life—especially the right to life of a child.” Jack Straw, HANSARD, June 11, 1997, at pt. 27, col. 1170.

more. If this is the only calculus, then prohibition is a clear winner.

To Labour's winning argument, Prince Philip made another of his "insensitive" comments: that other sports were dangerous too. A person with a cricket bat would be able to commit a murder, he noted. True enough, and the media response to his comment was not very powerful on the logical front; the Prince's comment supposedly showed that he was insensitive to the Dunblane victims' families.<sup>287</sup> In contrast, Labour arguments offered in Parliament on the day the total handgun ban passed were more logical. Namely: a gun is deadlier than other sporting tools, which is not surprising, since guns were designed for killing.<sup>288</sup> If guns are to survive in a rational political debate, then they must be defended on the basis that guns are legitimate for shooting violent criminals when lesser force will not suffice. In the United States, even the gun prohibition groups concede that guns are used 60,000 to 80,000 times a year for self-defense. Most studies suggest that the number is in the hundreds of thousands, or millions.<sup>289</sup> The number is undeniably large. This agreed-upon large number of legitimate self-defense cases weighs heavily in the debate on gun control. A logical public official must consider that, while a particular gun control proposal may promise a reduction in gun misuse that hurts people, the particular gun control might also impair some of the many instances of guns being used to save people. On the United States balance, there are potential lives saved on each side of the scale. In the British balance, lives are saved only on the prohibition side.

A particular right's vulnerability to a slippery slope may depend on whether its advocates can answer the following question: "If your right kills just one more child, is your right really worthwhile?" What if, after the infamous Nazi march in Skokie, Illinois, a person who watched the parade had been inspired to emulate Hitler, and, three months later, he strangled two Jewish children? What could the ACLU say to their parents? The ACLU could argue that by making sure that the government can never control speech because of its political content, we help ensure that the government cannot suppress dissent. If government could suppress dissent, then hundreds or millions of children might be killed. We should remember, as the ACLU would add, that the Nazis felt it necessary to use their control of the press to prevent the German public from learning that the Holocaust was taking place. Thus, the ACLU could argue that its policy of defending Nazi speech is, ironically, important to the long-run prevention of Nazi practice. This absolutist ACLU position of free speech has become the law of the land.<sup>290</sup>

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287. The Queen's office promptly announced that the entire Royal Family felt very sensitive about everything having to do with Dunblane.

288. Here the British sporting shooters interject that many of the guns with which they shoot are far removed in design from guns that were designed to kill. The Britons are right that a gun such as a custom-designed Holland & Holland sporting clays shotgun is designed solely for sports, from start to finish. But it is still a shotgun, and shotguns were originally made for firing lead or steel shot downrange to kill a person or an animal. Besides, Tony Blair's New Labour would likely be willing to ban another sport if lives could be saved and the political calculus for prohibition were positive.

289. See Kleck & Gertz, *supra* note 285, at 164 (estimating that there are 2.5 million successful defensive gun uses per year in the United States, mostly involving brandishing the gun rather than firing it, and summarizing previous studies).

Our Nazi child-killing case was a hypothetical, but the National Association of Criminal Defense Lawyers really does face cases where enforcement of a criminal procedure element of the Bill of Rights lead to the release of criminals who murder children. Yet the NACDL can respond that its position saves lives; without a strong Bill of Rights, innocent people might be given capital punishment, or imprisoned for the rest of their lives.

## 2. *United We Stand?*

Unwilling to support the right to keep and bear arms for defense, as opposed to the privilege to use sporting weapons, British gun owners have also been unwilling to band together for defensive purposes. While Britain has a large number of groups that promote particular shooting disciplines, such as the Clay Pigeon Shooting Association, the National Small-Bore Rifle Association, and the United Kingdom Practical Shooting Association, most of these organizations content themselves simply with running their own competitions. Getting involved in legislative affairs would hardly occur to them and they would never dream of getting involved in legislative affairs on an issue that did not affect their own discipline. The clay pigeon folks paid no attention to how the government was restricting handguns, nor did the handgunners care much about what the government did to the rifle shooters. Indeed, during the debate on the post-Dunblane handgun ban, one might hear a shotgunner claiming that people who enjoy practical pistol shooting are "killers," while a handgunner on a television program retorted that rifles and shotguns are more dangerous than handguns.<sup>291</sup> This rhetoric is the political equivalent of gun-owners forming a firing squad by standing in a circle.

Contrast the my-shooting-sport-only stance of so many British gun-owners with the policy of the American Civil Liberties Union, which not only defends speech it favors, but also speech that it loathes, as was the case at *Skokie*. The ACLU understands that the principle used to suppress anyone's speech can be used to suppress everyone's.

The firing-squad-in-a-circle attitude of some British gun owners is apparent among some shooters in the United States. Some hunters complain when the NRA defends semi-automatic rifles used by target shooters. Some target shooters complain that the NRA is too involved in fighting for people who want to carry handguns for protection, and almost everybody is willing to let the already heavily-regulated machine gun shooters get regulated out of existence. Nevertheless, the historical accident that the shooting sports in the United States are unified under a single National Rifle Association helps mitigate the tendency to circular firing squads. Although there have been internal struggles, the NRA has always maintained a leadership and a politi-

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290. See *Collins*, 578 F.2d at 1197.

291. John Walter, *Editor's Column*, 37 GUNS REV. 5, 7 (1997).

cal stance that regards an attack on one type of gun as an attack on all types of guns.<sup>292</sup> It is for this reason that the NRA defends the right to own small, inexpensive handguns, also referred to as “junk guns” or “Saturday Night Specials,” even though the NRA’s membership does not have much of a direct stake in the guns.<sup>293</sup> The NRA recognizes that bans on any given type of gun just sets the stage for banning another gun and every time a gun is banned and its owners disarmed, there are fewer people left to stand up for the Second Amendment. It is true that many of today’s legislators promoting a ban on small handguns for poor people bear no animus towards expensive skeet shotguns, but the British experience confirms that taking a mediocre handgun away from a poor person does, in the long run, endanger the ownership of \$1,300 sporting shotguns.

Benjamin Franklin’s advice to his fellow revolutionary Patriots that “[w]e must all hang together, or we shall all hang separately” is well understood by mainstream exercisers of First Amendment rights. Eminently respectable entities like the American Library Association or the *Washington Post* do not hesitate to file amicus briefs in cases involving non-mainstream defendants like *Soldier of Fortune* or Larry Flynt. This same “all hang together” advice transcends civil liberties boundaries. First Amendment advocates such as the ACLU, Second Amendment advocates such as the NRA, and Fourth Amendment advocates such as the NACDL, are needed to defend the full scope of their particular rights. Those who defend rights become stronger still when they defend the rights of each other. Twenty years ago, the lobbyist from the American Civil Liberties Union and the lobbyist from Gun Owners of America were never seen making joint visits to members of Congress. Perhaps the most important positive development for civil liberties in the 1990s was the forceful emergence of the “Leave Us Alone Coalition”—in which Christian home-schoolers and hemp activist hippies began to find common ground in their common desire to limit federal control of families and schools. In the same vein, groups like the Eagle Forum and Quaker social action groups worked together against wiretapping and the militarization of federal law enforcement.

### 3. *Continued Appeasement?*

Almost every time the British government has demanded more power, the great mass of British gun owners have placidly accepted the government’s action without protest. The 1996-97 push for handgun confiscation

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292. In this regard, the NRA, which represents consumers, not manufacturers, is simply following the wishes of its gun rights activist constituency. At the annual Gun Rights Policy Conference, a meeting of Second Amendment activists organized by the Citizens Committee for the Right to Keep and Bear Arms, the nation’s second-largest gun rights group, the participants each year adopt a “NATO doctrine” resolution for gun rights—whereby an attack on one form of gun ownership is to be treated as an attack on all. (The original NATO doctrine held that a Soviet attack on a vulnerable or isolated NATO member, such as Turkey, should be regarded as an attack on all NATO members. Even if the Soviets had solemnly promised that they only wanted to capture Berlin or Ankara, and had no interest in London, diplomatic realists understood that to allow the piecemeal conquest of small democratic nations would eventually put even the most powerful democratic nations in mortal danger.).

293. People who can afford to pay thirty-five dollars in annual dues to a political organization can generally afford to buy guns that cost more than \$75.



saw the first significant display of mass gun-owner activism in many years, with tens of thousands of law-abiding gun owners and supporters rallying at demonstrations, and letter after letter to M.P.s. It was the biggest and most powerful display of political activism by British gun rights advocates in the twentieth century. If the gun owners had rallied so effectively in 1967, or in 1920, they would not be on the verge of extinction today. If they can sustain the present level of political activism into the next century, they will at least have a chance of survival.

But the politics of British gun owners in most of the twentieth century are a failure. The consequence of the "reasonable" approach of the gun owners has not been a reasonable treatment by the British government. Instead, the government has pressed down restriction after restriction upon the British people, and as every restriction fails to halt the rising tide of crime, the British government invents still more "reasonable" gun controls to distract the public from the government's inept efforts at crime control.

As armed crime grows worse and worse, despite nearly a century of severe firearms controls, the British government expends more and more energy "cracking down" on the rights of the law-abiding British people. The undermining of the right to arms has paralleled the destruction of many other common law rights, including the grand jury right, freedom of the press from prior restraints, the civil jury, freedom from warrantless searches, the right to confront one's accusers, and the right against self-incrimination. People who want to argue that gun rights can be destroyed while other rights prosper must find some other country to use as an example.

The United States' gun control lobbies and their intellectual supporters brim with praise for Britain's "sensible" gun laws. In response, are citizens of the United States who cherish Second Amendment rights necessarily wrong for being reluctant to take any more steps down the slippery slope? Should those United States citizens who cherish other parts of the Bill of Rights look forward to their civil liberty standards becoming more like Britain's?

## **XI. Conclusion: Towards Closer Analysis of Slippery Slopes**

While slippery slopes are frequently invoked in political and legal debate, little attention has been paid to factors that contribute to the real, as opposed to the merely theoretical, danger that a first step down a slippery slope may lead to severe damage or even elimination of a civil liberty. This Essay has identified the following factors that helped lead to the destruction of the right to arms in Great Britain:

- media sensationalism about abuses of the right and media hostility toward the exercise of the right;
- technological changes that introduce new and socially controversial

- ways of exercising the right;
- the hesitation of extending civil liberties principles developed under old technologies to new technologies;
- the creation of government jurisdiction, in the form of a licensing system, that created a platform for administrative constriction of the right;
- political leaders gaining political benefits (such as diverting the public from the death penalty, or demonstrating the leader's compassion) from attacks on the right;
- restrictions aimed at teenagers, which over the long term reduced the number of adults interested in the exercising of the right, and, consequently reduced the number of adults interested in defending the right politically;
- shifting the burden of proof away from the government, which no longer had to prove the need for new restrictions or for the denial of a permit to exercise the right, and placing the burden on the individual, who had to prove his or her need to own a particular item;
- restrictions created by administrative fiat that further reduced adult entry into or continuance in the activity, thus driving the exercise of the right to levels so low that rights advocates became an insignificant political group;
- the production of deliberately misleading data by the government in support of restrictive legislation;
- registration of the property of persons who exercised the right, which was later used to facilitate confiscation of property.
- the government's loss of trust in ordinary citizens.

In addition, we identified one other potential factor that might encourage movement down a slippery slope, that being the prominent success of an earlier step down the slope; this factor did not appear to be present in England. None of the British gun controls resulted in any statistically noticeable reduction in crime in the years after their enactment.

These factors are not the only factors that could make a slippery slope situation dangerous; but when slippery slope arguments are raised, the presence (or absence) of these factors may indicate how real the slippery slope danger is. The more factors that are present, the greater the potential slippery slope risk.

This Essay has also identified several structural elements in the British system of government that contributed to the gradual elimination of the right to arms in Great Britain:

- rights are subject to balancing against perceived government or social needs;
- the government is not constrained by internal checks and balances;
- there is a consensus that Parliament, which is, in practice, a few leaders of the majority party, rather than the people or the law, is sovereign;
- there is no written constitution;

- the absence of a right in a written constitution impedes the growth of rights consciousness among the people.

Regarding most of these elements, the United States is radically different from Great Britain. Consequently, civil liberties of all types are stronger in the United States than in Great Britain. However, the erosion of federalism and of the separation of powers over the last half century in the United States should caution Americans against complacency regarding the security of their constitutional structure.

We also identified several factors about the political defense of gun rights in Great Britain that made the arms right vulnerable to the slippery slope. Most of these factors have parallels regarding the defense of other civil liberties in Britain:

- the right was defended only on sporting grounds, and not on the basis that it protects people from dangerous criminals or from dangerously criminal governments;
- the right's defenders accepted and even applauded a great deal of regulation of the right;
- the right's defenders accepted the principle that the right could be further regulated whenever the government saw a need, rather than only when there was a genuine necessity for more regulation;
- the right's defenders usually appeased the government, rather than resisting unjustifiable government demands for more controls.
- people who exercised the right in one way were often unwilling to defend people who exercised the right in a different way.

As with constitutional structure, the American system is considerably more sound than the British one. Civil liberties organizations such as the National Rifle Association and the American Civil Liberties Union are bolder than their British counterparts, and better able to articulate strong theories of right that can withstand heavy political assault and pressure to balance the right against other interests.

In the United States' political and legal debate, arguments for or against slippery slopes have heretofore often been made in a simplistic manner, with little more than assertions that slippery slope dangers do or do not exist. We hope that this Essay can provide a step toward a more complex analysis of slippery slopes by highlighting some of the elements that can increase or decrease slippery slope risks.

Slippery slopes are not inevitable, but neither are they imaginary. The British experience demonstrates that many civil liberties, including the right to arms, really can slowly slide all the way to the bottom of the slippery slope. While we have not aimed to convince readers to value any particular civil liberty, such as arms, speech, or protection from warrantless searches, we have attempted to show that it is reasonable for groups that do honor such rights, like the NRA, ACLU, or NACDL, to refuse to acquiesce in "reasonable" infringements of those rights. Even though, as John Maynard

Keens observed, we are all dead in the long run, persons who cherish a particular civil liberty want that liberty to endure not just in their own lifetimes, but in the lives of subsequent generations. In the long run, the best way to protect a given civil liberty from destruction may be to resist even the smallest infringements in short run.

