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Antecedents of the Second Amendment

This is online Chapter 16 of the second edition of the law school textbook Firearms Law and the Second Amendment: Regulation, Rights, and Policy (2d ed. 2017). *The printed book, by Nicholas J. Johnson, David B. Kopel, George A. Mocsary, and Michael P. O'Shea, consists of Chapters 1 through 11. More information and additional materials are available at https://www.wklegaledu.com/johnson-firearms-law-2. The printed book may also be purchased from Amazon.com and Barnes & Noble (bn.com). The companion website for the book is firearmsregulation.org.*

The online chapters, by Nicholas J. Johnson, David B. Kopel, George A. Mocsary, and E. Gregory Wallace, are available at no charge from either https://www.wklegaledu.com/johnson-firearms-law-2 or from the book's separate website, firearmsreglation.org. They are:

12. *Firearms Policy and Status. Including race, gender, age, disability, and sexual orientation.*
13. *International Law. Global and regional treaties, self-defense in classical international law, modern human rights issues.*
14. *Comparative Law. National constitutions, comparative studies of arms issues, case studies of individual nations.*
15. *In-Depth Explanation of Firearms and Ammunition. The different types of firearms and ammunition. How they work. Intended to be helpful for readers who have little or no prior experience, and to provide a brief overview of more complicated topics.*
16. *Antecedents of the Second Amendment. Self-defense and arms in global historical context. Confucianism, Taoism, Greece, Rome, Judaism, Christianity, European political philosophy. (This chapter.)*

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Chapter 2 of the printed textbook examines the history of the United Kingdom's right to arms; the rest of the book studies the right in the United States. Occasionally the printed chapters discuss related laws from other nations, such as Hungary's Golden Bull (1222), which is similar to England's Magna Carta (1215). Yet debates about the legitimate use of arms and legitimate forms of arms control long precede the invention of firearms, the English settlement of America, or even the most rudimentary existence of "England" as a kingdom.

This Chapter provides a sample of the arguments that various philosophers have offered for or against arms possession, and about appropriate constraints on the use of arms. Many of the readings in this Chapter are part of the intellectual background of the Second Amendment. These include material from ancient Greece and Rome (Part B), the Judeo-Christian tradition (Part C), and European political philosophy (Part D). Other material, especially Part A on ancient China, was unknown to the Americans who adopted the Second Amendment. Yet the same questions that concerned Confucians and Taoists have been at issue throughout history.

One key issue is personal ethics. Is it moral to use force, or deadly force, in self-defense? Does the answer depend on whether the attacker is an individual criminal or a governmental tyrant?

The other major question is the distribution of force. Because arms greatly amplify the user's physical force, should government have a monopoly on arms possession and use? Or should arms be broadly distributed among the population? Each system has benefits and dangers. Chapter 2 describes how distributionism was a sine qua non for England's maintenance of its independence for many centuries. But in the twentieth century, English policy moved strongly toward centralization. (Online Chapter 14.C.1 details modern English policy.) Chapters 3 through 7 describe how American policy, from colonial days to the present, has generally been distributionist, based in part on the view that England was insufficiently so.

This Chapter steps away from the United States and the United Kingdom to consider how some great minds outside the Anglosphere have thought about the distribution of force.

One theme of this Chapter is the benefits and dangers of militias versus standing armies. Standing armies consist of full-time soldiers, usually but not always armed by the state. In contrast, a militia consists of soldiers who only serve for part of the year or in situations of necessity. The rest of the time, they maintain their civilian occupations as farmers, merchants, and so on. Usually they supply their own arms. A select militia is a hybrid in which militiamen are drawn from a small segment of the population, spend more (perhaps all) of their time soldiering, and may depend on their militia pay for their livelihoods.

A. The Early Far East

1. Confucianism

There is no evidence that Framers of the Second Amendment were familiar with the Confucians or Taoists. Yet the Chinese and Framers, like many other

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people, faced the same challenge: allocating power, while avoiding the dual perils of too little government or too much. So Confucians and Taoists wrote about issues such as resistance to tyranny, just warfare, militias, and arms ethics.

"Confucius" is an imperfect translation of "K'ung-tzu," or, in English, "Master K'ung." The most important collection of Confucian sayings is the *Analects*.

The Analects of Confucius
Simon Leys trans., 1997

"To govern a state of middle size," the ruler should "mobilize the people only at the right times." (Analects 1:5). The Master said: "The people need to be taught by good men for seven years before they can take arms." The Master said: "To send a people to war that has not been properly taught is wasting them." (13:29-30).

The Master said: "A gentleman avoids competition. Still, if he must compete let it be at archery. There, as he bows and exchanges civilities both before the contest and over drinks afterward, he remains a gentleman, even in competition." (3:7).

In archery, it does not matter whether one pierces the target, for archers may be of uneven strengths. Such was the view of the ancients. (3:16).

The Master fished with a line, not with a net. When hunting, he never shot a roosting bird. (7:27).

The Head of the Ji Family was richer than a king, and yet Ran Qiu kept pressuring the peasants to make him richer still. The Master said: "He is my disciple no more. Beat the drum, my little ones, and attack him: you have my permission." (11:17).

Mencius[1]

Mencius was the most influential developer of Master K'ung's thought. He lived from about 371 to 289 B.C., a period when rival Chinese states were adopting the principles of the Legalist philosophers. The Legalists favored extremely centralized governments with rigidly applied laws. The Legalist states were very militaristic, aiming to regiment the peasants into armies made for wars of conquest. Eventually, the state of Ch'in, which had gone further than any other in adopting Legalism, conquered all of China, ruling it from 221 to 207 B.C. The Legalists, like the Utilitarian philosophers of nineteenth-century Great Britain,

1. Most of what we know about the thought of Mencius is in a book that is simply called "The Mencius." For the benefit of readers who may use a different edition of this often-republished work, information about cited subdivisions is provided, in addition to the page number of the particular edition used. Similar information is provided for some other ancient sources cited in this Chapter. Parts of this Chapter are based on David B. Kopel, The Morality of Self-Defense and Military Action: The Judeo-Christian Tradition (2017).

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viewed humans as egocentrics, motivated only by reward or punishment. D.C. Lau, "Introduction," *in* Mencius 10-11 (D.C. Lau trans., 1970).

Mencius viewed rapacious governors as equivalent to ordinary robbers: "Now the way feudal lords take from the people is no different from robbery." Accordingly, accepting a gift from a feudal lord was like accepting stolen property from a robber. *Id.* at 154 (bk. 5, pt. B). Mencius told King Hsüan of Ch'i that royal ministers should remove a king who repeatedly ignored their warnings and made serious mistakes. *Id.* at 66-67 (bk. 1, pt. B, no. 6); 121-22 (bk. 4, pt. A, item 9). Further, said Mencius, a good subject could banish a bad ruler, if the subject had good motives. *Id.* at 188-89 (bk. 7, pt. A, no. 31).

In a discussion of two previous emperors who had been overthrown, Mencius was asked, "Is regicide permissible?" He replied:

> A man who mutilates benevolence is a mutilator, while one who cripples rightness is a crippler. He who is both a mutilator and a crippler is an "outcast." I have heard of the punishment of the "outcast Tchou," but I have not heard of any regicide.

Id. at 68 (bk. 1, pt. B, no. 8).

The common Chinese understanding was that the ruler had the "mandate of heaven." Mencius added an important qualification: "Heaven sees as the people see; Heaven hears as the people hear." Michael Nylan, The Five "Confucian" Classics 155 (2001). In other words, a ruler who lost the support of the people had necessarily lost the mandate of heaven, and hence was no longer a legitimate ruler.

Like Confucius (and the Taoists, see below), Mencius strictly insisted that hunting be according to the rules. One day, a charioteer drove all morning for an archer who failed to shoot any birds; the charioteer had obeyed all the rules, and the archer blamed the charioteer for the archer's lack of success. The charioteer asked for another chance; after the second hunt, the charioteer explained, "I used underhanded methods, and we caught ten birds in one morning." Mencius rebuked the charioteer for bending himself to please others. Mencius 106-07 (bk. 3, pt. B, no. 1). Conversely, Mencius praised a gamekeeper who refused to answer a summons from his master, because the master had given an improper signal, by raising a pennon (a thin triangular flag) rather than by raising a cap. *Id.* at 157-58 (bk. 5, pt. B, no. 7).

Personal protection was uncontroversial for Confucians. In a story illustrating that one should only accept gifts when there is justification, Mencius seemed to accept the legitimacy of arms for personal protection:

> In Hsüeh, I had to take precautions for my safety. The message accompanying the gift said, "I hear you are taking precautions for your safety. This is a contribution towards the expense of acquiring arms." Again, why should have I refused? But in the case of Ch'i, I had no justification for accepting a gift. To accept a gift without justification is tantamount to being bought.

Id. at 88 (bk. 2, pt. B, no. 3).

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NOTES & QUESTIONS

1. In Confucian theory, a state of "middle size" was ideal because it could manifest the characteristics of moderation that Confucianism extolled. How might a militia system, as opposed to a full-time professional standing army, foster moderation?

2. Why might Confucius have favored such extensive training before militiamen were sent into combat?

3. One of the modern martial arts is a form of archery called *kyudo* (pronounced "cue-dough"). In *kyudo,* marksmanship is much less important than good form and a proper mental state. What virtues might be cultivated by noncompetitive, highly ritualized sports, such as the archery favored by Confucius?

4. Thomas Jefferson advised his nephew: "Games played with a bat and ball are too violent, and stamp no character on the mind." Letter from Thomas Jefferson to Peter Carr (1785) *in* John Foley, The Jeffersonian Cyclopedia 318 (1900). "As to the species of exercise, I advise the gun." *Id.* Do you see any parallels between the Jeffersonian and Confucian attitudes? Does either make sense today?

5. What is the conservation basis for Confucius's fishing and hunting practices? Are there rationales in addition to species protection? Why should one not shoot a roosting bird? Why is such hunting dishonorable? If the etiquette rules for hunting are so rigid that raising a pennon as a signal is improper, does this suggest that one purpose of hunting is something other than catching game? If so, what might the purpose be? **CQ:** In what ways has the concept of honorable usage of arms been relevant at different periods in the United States's history?

6. Confucius authorized the beating of the war drum to summon people to overthrow a king who was extorting money from them. How could a philosopher who extolled moderation in all things support the violent overthrow of a ruler? How could Mencius claim that killing a wicked king was not "regicide"?

7. Mencius was not unique in believing that unjust and oppressive rulers were simply a type of criminal. The fifth-century Christian theologian Augustine of Hippo wrote:

> Indeed, that was an apt and true reply which was given to Alexander the Great by a pirate who had been seized. For when that king had asked the man what he meant by keeping hostile possession of the sea, he answered with bold pride, "What thou meanest by seizing the whole earth; but because I do it with a petty ship, I am called a robber, whilst thou who dost it with a great fleet art styled emperor."

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Augustine, Concerning the City of God Against the Pagans 139 (Henry Bettenson trans., Penguin Books, 1984) (translation of 1467 edition; original edition c. 410). Or as the fourth-century B.C. Taoist philosopher Chuang Tzu put it: "The petty thief is imprisoned but the big thief becomes a feudal lord. . . ." The Complete Works of Chuang Tzu § 29 (Burton Watson trans., 1968).

The seventeenth-century English political writer Algernon Sidney wrote that being subjected to a tyrant is little different from being under the power of a pirate. Algernon Sidney, Discourses Concerning Government 574 (Thomas G. West ed., Liberty Fund 1996) (ch. 3, § 46) (1698, published posthumously). Sidney was executed for treason in 1683, and later venerated by the English and Americans as one of the greatest martyrs of liberty. *See* Ch. 2.K.3. He was much admired by the American Founders. Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 Const. Comment. 87 (1992).

What is your assessment of the claim by Mencius and the rest that the difference between an ordinary mugger and a criminal government is one of scale? If forcible resistance to the former is legitimate, does it follow that forcible resistance to the latter is also legitimate? Compare the views of Thomas Hobbes (Ch. 2.K.4 Note 5) and John Locke (Ch. 2.K.2).

8. In 124 B.C., Han Dynasty chancellor Gongsun Hong proposed banning nongovernment possession of bows and crossbows. He argued that the possession of distance weapons allowed bandits to defeat a larger group of law enforcement officers who were trying to apprehend them. The proposal would have been a drastic change from the Han Dynasty's generally permissive arms policies, with subjects permitted to own and carry a wide variety of arms. Another court official, Yuqui Shouwang, wrote an essay against the proposed ban. As he pointed out, during the Qin Dynasty, a notoriously cruel emperor had confiscated all the subjects' arms, lawless violence greatly increased, and the unpopular emperor was overthrown. Yuqui Shouwang blamed the current crime problem on poverty, which was exacerbated by venal and incompetent local officials. Since the ancients had made and used arms, arms could not be intrinsically bad, Shouwang argued. Bandits would violate arms laws with impunity, since banditry itself was already a capital offense. Meanwhile, "[t]he good people who might have them for self-defense would run into legal prohibition." The emperor decided not to adopt the ban. *See* Charles Sanft, *Bow Control in Han China: Yuqiu Shouwang on Self-Defense*, 42 J. Asian Hist. 143 (2008).

9. Confucian law was embedded in the Rites of Zhou, written around the second century B.C. It affirmed the lawfulness of killing to defend one's home or community. 2 Le Tcheou-Li, or Rites des Tcheou 352 (Édouard Biot trans., 1851). The Rites of Zhou principles were included in the code of the T'ang Dynasty (618-907 A.D.), which is the oldest Chinese legal code whose text has survived in its entirety. Under the T'ang Code, there was no punishment for killing a night-time home invader, unless it was known that the invader intended no harm. If the intruder was captured, the homeowner could not then kill him. 2 The T'ang Code: Specific Articles 276-77 (Wallace Johnson trans., 1997) (art. 269). Use of force in defense of a third

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party, or to apprehend a criminal, was lawful and was sometimes a duty. *See id.* at 291 (art. 281), 515-19 (arts. 453-56) The T'Ang Code was very hostile to private possession of "military weapons," which meant armor, crossbows, long spears, lances, and horse armor. Nonmilitary weapons, which private persons could possess, were bows, arrows, knives, shields, and short spears. *See id.* at 227 (art. 238), 233-34 (art. 243), 284-85 (art. 275), 331-33 (art. 306), 504-06 (art. 444).

2. Taoism

The second great world religion to emerge from China was Taoism. As with Confucianism, Taoism's historical roots are obscure; the foundation is usually attributed to a sage named Lao Tzu, although some people argue that the Lao Tzu material is a collection of earlier sources. In legend, Lao Tzu is said to have been renowned as a swordsman. Deng Ming-Dao, Scholar Warrior: An Introduction to the Tao in Everyday Life 11 (1990).

"The Tao" literally means "the way." Over the centuries, various versions of Taoism have developed; in some of these versions, Taoism is a philosophy, or a way of life, but it is not what Westerners would usually call a religion. In other versions, Taoism does have the characteristics of a religion. Over Chinese history, many people have followed various blends of Confucianism and Taoism. Taoism has also mixed with Buddhism, especially Zen Buddhism.

a. Tao Te Ching

The foundation of Taoism is the *Tao Te Ching*, ascribed to Lao Tzu, and probably written around the sixth century B.C. The *Tao Te Ching* (Book of the Way and Its Power) is a collection of poems, prose, and proverbs. It is second only to the Bible in the number of worldwide translations. Regarding arms it states:

> Now arms, however beautiful, are instruments of evil omen, hateful, it may be said, to all creatures. Therefore they who have the Tao do not like to employ them.
>
> The superior man . . . uses them only on the compulsion of necessity. Calm and repose are what he prizes; victory (by force of arms) is to him undesirable.

Lao-tzu, Tao Te Ching, no. 31 (J. Legge trans., 1891).

> In a little state with a small population, I would so order it, that, though there were individuals with the abilities of ten or a hundred men, there should be no employment of them; . . .
>
> Though they had boats and carriages, they should have no occasion to ride in them; though they had buff coats and sharp weapons, they should have no occasion to don or use them.

Id. no. 80.

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NOTES & QUESTIONS

1. Do you agree or disagree with the views expressed in the first poem? Why?

2. In the second poem, why does the state have people keep arms but not use them?

3. **CQ:** Compare the description of the state described in the second poem to the description of Switzerland in online Chapter 14.C.2. Switzerland continues to have a robust militia system, in which men train regularly, are encouraged to additional practice, and keep arms at home. The nation has fought no war since 1847.

b. Wen-Tzu

The *Wen-Tzu,* also known as "Understanding the Mysteries," is attributed to disciples of Lao Tzu who wrote down his discourses. A major theme of the *Wen-Tzu* is the virtue of moderation, both in the individual and the state. It warned: "If you allow small groups to infringe upon the right of large masses and allow the weak to be oppressed by the strong, then weapons will kill you." Thomas Cleary, The Taoist Classics: The Collected Translations of Thomas Cleary 192 (1999) (no. 49). The *Wen-Tzu* further states:

> What makes a country strong is willingness to die. What makes people willing to die is justice. What makes justice possible to carry out is power. So give people direction by means of culture, make them equal by arming them, and they may be said to be sure of victory. When power and justice are exercised together, this may be said to be certain strength. . . .
>
> . . . When there is a day set for battle, if they [the people] look upon death as like going home, it is because of the benevolence [that] has been bestowed upon them.

Id. at 289-90 (no. 171).

The *Wen-Tzu* also praised certain regulations on hunting:

> There were laws of ancient kings not to surround the herds to take the full-grown animals, not to drain the ponds to catch fish, and not to burn the woods to hunt for game. Before the proper seasons, traps were not to be set in the wild and nets were not to be set in the water. . . . Pregnant animals were not to be killed, birds' eggs were not to be sought out, fish less than a foot long were not to be taken. . . .

Id. at 270-71 (no. 151).

c. The Master of the Hidden Storehouse

Lao Tzu's disciple Keng Sang-tzu has been credited with writing *The Master of the Hidden Storehouse,* a collection of advice for rulers. However, the history of the work is obscure until the T'ang Dynasty in the eighth century A.D., where it

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was honored as part of a revival of Taoist studies. The Emperor Hsuan-tsung, who reigned from 713 to 755, liked it so much that he called it the "Scripture of Open Awareness." Regarding militias, it says:

> When warfare is truly just, it is used to eliminate brutal rulers and rescue those in misery. . . .
>
> . . . [W]hen a just militia enters enemy territory, the people know they are being protected. When the militia comes to the outskirts of cities, it does not trample the crops, does not loot the tombs, does not plunder the treasures, and does not burn the houses. . . .
>
> . . . [A] just militia safeguards the lives of individual human beings many times over, why would people not like it?
>
> Therefore, when a just militia arrives, people of the neighboring countries join it like flowing water; the people of an oppressed country look to it in hope as if it were their parents. The further it travels, the more people it wins.

Id. at 126-27, 141-42 (2000).

d. Huainanzi

Sometime before the first millennium A.D., the *Huainanzi* (The Masters of Huainan) was composed. The *Huainanzi* extolled a free, diverse society, in which individuals lived in a balanced way, including in balance with nature. It observes:

- "The reason why leaders are set up is to eliminate violence and quell disorder. Now they take advantage of the power of the people to become plunderers themselves. They're like winged tigers—why shouldn't they be eliminated? If you want to raise fish in the pond, you have to get rid of otters; if you want to raise domestic animals, you have to get rid of wolves—how much the more so when governing people!"
- "When water is polluted, fish choke; when government is harsh, people rebel."
- "So you cannot fight against an army of parents, children, and siblings, because of how much they have already done for one another." "When people serve as militia in the same spirit as children doing something for their parents or older siblings, then the force of their power is like an avalanche—who can withstand it?"
- "What makes warriors strong is readiness to fight to the death. What makes people ready to fight to death is justice. . . . Therefore, when people are united by culture and equalized by martial training, they are called sure winners."
- The people expect "three things from the rulers: that the hungry can be fed, the weary can be given rest, and the worthy can be rewarded." If the government neglects them, "then even if the country is large and its people many, the militia will still be weak."
- "The basis of military victory or defeat is in government." If the people "cleave to those above, then the militia is strong." But when "those below turn against those above, then the militia is weak."

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- "When you use arms well, you employ people to work for their own benefit. When you use arms badly, you employ people to work for your own benefit. When you employ people to work for their own benefit, anyone in the world can be employed. When you employ people to work for your own benefit, then you will find few."
- "A degenerate society is characterized by expansionism and imperialism, starting unjust military operations against innocent countries, killing innocent people, cutting off the heritage of ancient sages. . . . This is not what armies are really for. A militia is supposed to put down violence, not cause violence."
- "Sages' use of arms is like combing hair or thinning sprouts: a few are removed for the benefit of many. There is no greater harm than killing innocent people in supporting unjust rulers." Likewise, "[i]n ancient wars, they did not kill young or capture the old. . . ."

Id. at 313, 316-18, 330, 357, 360-61, 367.

The *Huainanzi* contained language on hunting similar to the *Wen-Tzu*, and added more rules for hunting in harmony with the Way: "In early spring . . . pregnant animals are not to be killed. . . . In late autumn, hunters practice with their weapons, and ceremonies propitiating animals are carried out." In contrast to the harmonious hunting of the idealized past, "[i]n latter-day government, there are heavy taxes on hunting, fishing, and commerce. Hatcheries are closed off; there is nowhere to string nets, nowhere to plow." *Id.* at 325, 329, 352-53.

A well-ordered mind is more important than material possessions. "So to obtain sharp swords is not as good as mastering the art of the swordsmith." *Id.* at 314. Likewise:

> In human nature, nothing is more valuable than benevolence; nothing is more urgent than wisdom. Therefore, if one has courage and daring without benevolence, one is like a madman wielding a sharp sword. . . . So the ambitious should not be lent convenient power; the foolish should not be given sharp instruments.

Id. at 326.

For society to function well, people should recognize that different people contribute in different ways:

> In the space of one generation, the cultural and the martial may shift in relative significance, insofar as there are times when each is useful. Nowadays, however, martialists repudiate culture and the cultured repudiate the martial. Adherents of cultural and martial arts reject each other, not knowing their functions according to the time.

Id. at 369.

NOTES & QUESTIONS

1. What role does arms possession play in political order and civil equality, according to the *Wen-Tzu*?

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2. Why might a militia be better or worse at liberating foreign countries than a standing army?

3. The *Huainanzi* (like many other Taoists, and many Confucians) analogized the government and the people to a benevolent family, with government playing the role of parents. How did the militia fit into this vision?

4. According to the *Huainanzi*, under what circumstances is it legitimate to use violence to overthrow the government?

5. The Taoists and the American Founders both thought that large armies and warfare states were an abomination that would destroy a good society. Conversely, a harmonious and ideal state simply defended itself with a well-trained and well-armed citizen militia. As far as we know, the American Founders had no knowledge of Taoism, but instead drew their vision of a militia from knowledge of the history of Greece, Rome, Switzerland, England, and other parts of Europe. Yet the Taoists and the Americans arrived at similar conclusions. What might account for this?

6. The Taoists seem to have envisioned a more active welfare state than did the American Founders. In what ways might a more activist government contribute to the effective functioning of a militia in a balanced, harmonious society? In making a society more balanced and harmonious?

7. Could a larger state have *less* need for a militia to deter or resist tyranny? Does a large state have *greater* needs for checks against tyranny?

8. Taoist hunting and fishing rules promote conservation, such as by the prohibition on shooting pregnant animals. Ecological balance aside, in what other ways do the Taoist game rules help a society live in harmony with nature?

9. For what practical or other reasons could being a swordsmith be considered better than owning many swords?

10. How might one prevent the foolish from obtaining sharp instruments, and the ambitious from obtaining inordinate power? **CQ:** This is a central question of the textbook, and there are no perfect answers.

11. Can you think of times in American history, or today, in which martialists and the cultured have failed to respect the contributions of each other?

12. *Further reading* on other Asian religions: Joan V. Bondurant, Conquest of Violence: The Gandhian Philosophy of Conflict (rev. ed. 1988); Tessa J. Bartholomeusz, In Defense of Dharma: Just-War Ideology in Buddhist Sri Lanka (2002); Trevor Ling, Buddhism, Imperialism and War (1979); Thomas Cleary, Code of the Samurai: A Modern Translation of the Bushido Shoshinshu of Taira Siigesuike (Thomas Cleary trans., 1999); Taisen Deshimaru, The Zen Way to the Martial Arts (1982); David B. Kopel, *Self-Defense in Asian Religions*, 2 Liberty L. Rev. 79 (2007) (particular attention given

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to the Theravada, Mahayana, Tibetan, and Zen forms of Buddhism, and their diverse understandings of *ahimsa*, the compassionate principle of not harming others).

B. Ancient Greece and Rome

1. Greece

While the Framers of the Second Amendment knew almost nothing about Chinese political philosophy, they were eminently familiar with the history of ancient Greece and Rome. The Framers carefully studied classical history in order to understand how liberty had been defended, advanced, and lost. The Constitution sought to prevent takeover by a military strongman or demagogue, such as Julius Caesar or Alexander the Great. *See* Carl J. Richard, The Founders and the Classics: Greece, Rome, and the American Enlightenment (1994).

a. Greek Law

From the ancient world until the present, people who aspire to eloquence have studied the speeches of Demosthenes (384-322 B.C.). He was the greatest orator of ancient Greece, a lawyer, and a speechwriter for parties in legal disputes. In 352 B.C., the Athenian Senate passed a decree written by Aristocrates, which greatly revised the homicide law. Among its features were eliminating all due process, granting absolute immunity to Charidemus (a mercenary who had previously assisted Athens), and abolishing the right of self-defense. When Euthycles brought a case in the law-courts against Aristocrates, Demosthenes delivered his famous oration "Against Aristocrates." The oration included an explication of the self-defense provision in traditional Athenian law. Because of the lawsuit, the new homicide law never went into effect.

Demosthenes, Against Aristocrates
The Orations of Demosthenes 168, 186-87 (Charles Rann Kennedy trans., 1856)

Read the next law:

THE LAW.

"And if one resisting any unlawful seizure or violence shall immediately kill the aggressor, his death shall not be punishable."

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Here are other causes for which it is lawful to take life. If a man resisting any unlawful seizure or violence shall immediately kill the aggressor, he orders that the death shall not be punishable. Pray observe, how wisely. By his having first mentioned the causes for which life may be taken, and then adding the word "immediately," he left no time for contriving any foul play: by the word "resisting," it is clear that that he gives the power to the aggrieved party, not to anyone else. The law has therefore given permission to kill immediately in self-defence; Aristocrates has it simply, "if any one shall kill," even though with justice or as the laws allow. Oh, but we are caviling; for whom will Charidemus attack or seize unjustly? Everybody. For you are of course aware, that all military commanders lay violent hands upon those whom they think they can overpower, to make requisitions for money. Is it not shameful then—(O earth and heaven!)—is it not manifestly illegal, contrary to not only the written law, but to the common law of all mankind, that I am not at liberty to resist a person who seizes or forcibly carries off my property, treating me as an enemy?—for even in this way it will not be lawful to kill Charidemus; but, should he iniquitously seize and make booty of any man's property, the party killing him will be liable to arrest, although the law gives him impunity under such circumstances.

NOTES & QUESTIONS

1. Suppose that Demosthenes had not prevailed, and that Aristocrates's new law had gone into effect. The written statute that forbade self-defense would have been in conflict with what Demosthenes called "the common law of all mankind." In situations of perceived conflict between a written statute and inherent human rights, what should responsible citizens do?

2. According to the historian Xenophon, Athenian law presumed that the citizen militia would possess their own arms, which they would use when called to military service. Otherwise, arms-carrying was allowed in the countryside, but not in the city unless there was a particular need. Xenophon, Hellenica, bk 1. What are the advantages and disadvantages of laws that allow arms-carrying in rural areas but not in urban ones?

b. Plato

Many of the major debates in 2,500 years of Western philosophy can be found in the contrasting views of Plato and his student Aristotle. Plato and Aristotle both agreed that arms possession and political power were inseparable. Or as Mao Zedong, founder of the People's Republic of China, would later put it, "political power grows out of the barrel of a gun." Mao Zedong, *Problems of War and Strategy*, Speech to the Central Committee of the Chinese Communist Party (Nov. 6, 1938).

Plato and Aristotle drew very different lessons from their shared insight. Mao's policy was Platonic, not Aristotelian.

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The Republic is Plato's most important work of political philosophy. He describes how the possession of arms plays an essential role in what he considers the inevitable development of society from oligarchy to democracy to despotism:

> [The oligarchs] next proceed to make a law which fixes a sum of money as the qualification of citizenship; the sum is higher in one place and lower in another, as the oligarchy is more or less exclusive; and they allow no one whose property falls below the amount fixed to have any share in the government. These changes in the constitution they effect by force of arms, if intimidation has not already done their work. . . .
>
> Another discreditable feature [of oligarchy] is, that, for a like reason, they are incapable of carrying on any war. Either they arm the multitude, and then they are more afraid of them than of the enemy; or, if they do not call them out in the hour of battle, they are oligarchs indeed, few to fight as they are few to rule. . . .
>
> [The people eventually displace the oligarchs,] whether the revolution has been effected by arms, or whether fear [of an imminent armed revolution] has caused the opposite party to withdraw.
>
> [Later, the democratic people fall under the sway of a demagogic tyrant. The tyrant does not fully reveal himself until he has disarmed the people:]
>
> *Teacher:* "Then the parent [the people] will discover what a monster he has been fostering in his bosom; and, when he wants to drive him out, he will find that he is weak and his son [the tyrant] strong."
>
> *Student:* "Why, you do not mean to say that the tyrant will use violence? What! Beat his father if he opposes him?"
>
> *Teacher:* "Yes, he will, having first disarmed him."

Plato, The Republic 353 (Book VIII) (Benjamin Jowett trans., 1928) (360 B.C.).[2]

In *The Laws,* Plato set out his vision of an ideal state, which was ruled by a philosopher-king. The king would use a standing professional army, "the Guardians," to police society and keep everyone else under control. Arms would be stored at central armories and could only be used by the people once a month, during state-supervised training. The military would have full control of all arms imports, and independent retail sale of arms would be forbidden. Plato, Laws, Books VII-VIII (A.E. Taylor ed., 1966).

The following is Plato's ideal law of self-defense, although we do not know if any Greek government followed this particular law.

> But if a brother kills brother in a civil broil or under other like circumstances, if the other has begun, and he only defends himself, let him be free from guilt as he would be if he had slain an enemy; and the same rule will apply if a citizen kills a citizen, or a stranger a stranger. Or if a stranger kill a citizen or a citizen a stranger in self-defence, let him be free from guilt in like manner; and so in the case of a slave who has killed a slave; but if a slave have killed a freeman in self-defence, let him be subject to the same law as he who has killed a father. . . . If a man catch a thief coming, into his house by night to steal, and he take and kill him, of if he slay

2. In the Ancient and Classical periods, bound books did not exist. A writing that could be bound in a single volume today would have to be written on multiple scrolls. "Book IX" was the ninth scroll of *The Republic.*

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a footpad in self-defence, he shall be guiltless. And any one who does violence to a free woman or a youth, shall be slain with impunity by the injured person, or by his or her father or brother or sons. If a man find his wife suffering violence, he may kill the violator, and be guiltless in the eye of the law; or if a person kill another in warding off death from his father or mother or children or brethren or wife who are doing no wrong, he shall assuredly be guiltless.

Plato, Laws, Book IX, at 209, 213 (Benjamin Jowett trans., 1871).

NOTES & QUESTIONS

1. What is the difference between a philosopher-king and a tyrant? Is there a danger that a philosopher-king could become a tyrant? Is there a way to enjoy the benefits of a philosopher-king without risking tyranny?

2. Karl Marx and Plato agreed that societies must move through stages of development in a particular order, and that material conditions greatly influence this evolution. How might the presence or absence of arms affect these developments?

3. Are *The Republic* and *The Laws* inconsistent with each other? How might they be synthesized?

4. **CQ:** In England, starting in the latter sixteenth century, many militia arms were centrally stored—as Plato had prescribed. Early American law, in contrast, required militiamen to keep their arms at home. Some colonies required that people *not* in the militia be armed—for example, female householders, men too old for the militia, or men with occupational exemptions from the militia. They too had to keep their arms at home. *See* Ch. 2 (England) and Chs. 3-4 (early America); David B. Kopel & Joseph Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. Ill. U. L.J. 495 (2019). What are the advantages and disadvantages of central storage versus distributed storage?

5. *Karl Popper.* After Athens was defeated by Sparta in the Peloponnesian War, Sparta appointed the Thirty Tyrants to rule Athens in 404 B.C. Consolidating power, the tyrants disarmed the Athenians, except for 3,000 supporters of the tyrants. The tyrants murdered approximately 8 percent of the Athenians. In *The Open Society and Its Enemies,* the influential twentieth-century philosopher Karl Popper devoted considerable energy to arguing that Plato was an ally of the Thirty Tyrants. There is no historical consensus on this charge.

Popper extolled the resistance to the tyrants: "[T]he democrats fought on. At first only seventy strong, they prepared under the leadership of Thrasybulus[3] and Antyus[4] the liberation of Athens, where Critias [leader of the

3. [An Athenian general.—Eds.]
4. [An Athenian politician.—Eds.]

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Thirty Tyrants] was meanwhile killing scores of citizens. . . .” 1 Karl Popper, The Open Society and Its Enemies 192 (Princeton Univ. Press 1971) (1945). After months of warfare, the democrats destabilized the tyrants, who lost their support from Sparta. Democracy was restored to Athens. According to Popper, there are two circumstances when violence against the government is permissible:

> [First,] under a tyranny which makes reforms without violence impossible, and it should have only one aim, that is, to bring about a state of affairs which makes reforms without violence possible.
>
> [Second,] resistance, once democracy has been attained, to any attack (whether from within or without the state) against the democratic constitution and the use of democratic methods. Any such attack, especially if it comes from the government in power, or if it is tolerated by it, should be resisted by all loyal citizens, even to the use of violence. In fact, the working of democracy rests largely on the understanding that a government which attempts to misuse its powers and to establish itself as a tyranny (or which tolerates the establishment of a tyranny by anybody else) outlaws itself, and that citizens have not only a right but also a duty to consider the action of such a government as a crime, and its members as a dangerous gang of criminals.

Id. at 151-52.

Do you agree with Popper’s rules for resistance? **CQ:** Chapter 3, on the American Revolution, shows how Americans wrestled with the question of when violence against government is justified. Consider the Declaration of Independence’s claim that the American use of arms was a last resort, all other means of redress having failed.

6. *Self-defense against social superiors.* Plato placed an important limitation on self-defense: It was forbidden against social superiors. Are there non-invidious reasons for a prohibition on “upward” self-defense? How might the allowance or prohibition of upward self-defense affect social relations?

Unlike Plato, the political philosophers who conceived international law (such as Francisco Suárez and Hugo Grotius, online Ch. 13.C.2) explicitly approved of personal self-defense against one’s superior, in case of necessity. Even in the American South on the eve of the Civil War, a court ruled that the natural right of self-defense guaranteed the right to a free black to use violence against a white law enforcement officer:

> The conviction of the defendant may involve the proposition that a free negro is not justified, under any circumstances, in striking a white man. To this, we cannot yield our assent. . . . An officer of the town having a *notice to serve on the defendant,* without any authority whatever, *arrests him and attempts to tie him!!* Is not this gross oppression? For what purpose was he to be tied? What degree of cruelty might not the defendant reasonably apprehend after he should be entirely in the power of one who had set upon him in so highhanded and lawless a manner? Was he to submit tamely?—Or, was he not excusable for resorting to the natural right of self-defense? Upon the facts stated, we think

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> his Honor ought to have instructed the jury to find the defendant not guilty. There is error. *Venire de novo* [order for retrial].

State v. Davis, 52 N.C. (7 Jones) 52, 53, 55 (1859).

On the other hand, under Sharia law certain people under Islamic rule (typically Jews and Christians, and sometimes Buddhists or Hindus) are classified as *dhimmi:* To be allowed to continue to practice their religion, they must accept a second class status that includes a prohibition on the possession of arms, and a prohibition on any use of force against a Muslim, including in self-defense. This prohibition can be traced to the Covenant of 'Umar, which traditionally was said to have been a seventh-century treaty between the Caliph Umar I and Syrian Christians. Although the true historical origins of the Covenant are unclear, the Covenant was universally accepted by Muslim legal scholars as setting forth the basic standards for Muslim rule over conquered monotheists. The Covenant requires that the conquered people agree "not to ride on saddles; not to keep arms nor put them in our houses nor to wear swords. . . . [H]e who strikes a Muslim has forfeited his rights." A.S. Tritton, The Caliphs and Their Non-Muslim Subjects: A Critical Study of the Covenant of 'Umar 5-9 (1970); *see also* David B. Kopel, *Dhimmis, in* Encyclopedia of Political Thought (Michael T. Gibbons et al. eds., 2014).

Similar standards have sometimes been applied by Christian nations. For example, the Visigothic Code, which was used in Spain after the fall of the Western Roman Empire, provided: "All Christians are Forbidden to Defend or Protect a Jew, by Either Force or Favor. . . . No one shall attempt, under any pretext, to defend such persons in the continuance of their depravity, even should they be under his patronage. No one, for any reason, or in any manner, shall attempt by word or deed, to aid or protect such persons, either openly or secretly, in their opposition to the Holy Faith and the Christian religion." The Visigothic Code (Forum judicum) bk. 12, tit. 2, law 15 (S.P. Scott ed., 1910).

Likewise, in Japan during the Tokugawa Shogunate (1603-1868) self-defense against a social superior was forbidden, whereas the Samurai could kill disrespectful commoners at will, under *kiri-sute gomen* (permission to kill and depart). David B. Kopel, *Japanese Gun Control,* 1993 Asia-Pac. L. Rev. 26, 33.

c. Aristotle

In *Politics,* Aristotle maintained that each citizen should work to earn his own living, should participate in political or legislative affairs, and should bear arms. Aristotle criticized the theory of the philosopher Hippodamus, who wanted a strict division of roles between skilled labor, agriculture, and defense. Aristotle found Hippodamus's division defective, because such a division would lead to the armed ruling the unarmed: "But the husbandmen have no arms, and the artisans neither arms nor land, and therefore they become all but slaves of the warrior class." 1 The Politics of Aristotle 48 (B. Jowett trans. & ed., 1885).

Aristotle explained the connection between arms and self-government:

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- "[W]hen the citizens at large administer the state for the common interest, the government is called by the generic name,—a constitution. . . . And there is a reason for this use of language. One man or a few may excel in virtue; but of virtue there are many kinds: and as the number increases it becomes more difficult for them to attain perfection in every kind, though they may in military virtue, for this is found in the masses. Hence, in a constitutional government the fighting-men have the supreme power, and those who possess arms are the citizens." *Id.* at 80.
- "The devices by which oligarchies deceive the people are five in number: . . . (4) concerning the possession of arms, and (5) gymnastic exercises, they legislate in a similar spirit. For the poor are not obliged to have arms, but the rich are fined for not having them; and in like manner no penalty is inflicted on the poor for non-attendance at the gymnasium, and consequently, having nothing to fear, they do not attend, whereas the rich are liable to a fine, and therefore they take care to attend. . . ." *Id.* at 131.
- "[W]ithout discipline, infantry are useless, and in ancient times there was no military knowledge or tactics, and therefore the strength of armies lay in their cavalry. But when cities increased and the heavy armed grew in strength, more had a share in the government; and this is the reason why the states, which we call constitutional governments, have been hitherto called democracies." *Id.* at 73.
- "As of oligarchy so of tyranny . . . both mistrust the people, and therefore deprive them of their arms." *Id.* at 171.
- "Let us then enumerate the functions of a state . . . there must be arms, for the members of a community have need of them in order to maintain authority both against disobedient subjects and against external assailants." *Id.* at 220.
- "Again, there is in a state a class of warriors, and another of councillors, who advise about the expedient and determine matters of law, and these seem in an especial manner parts of a state. Now, should these two classes be distinguished, or are both functions to be assigned to the same persons? Here again there is no difficulty in seeing that both functions will in one way belong to the same, in another, to different persons. To different persons in so far as their employments are suited to different ages of life, for the one requires wisdom, and the other strength. But on the other hand, since it is an impossible thing that those who are able to use or to resist force should be willing to remain always in subjection, from this point of view the persons are the same; for those who carry arms can always determine the fate of the constitution. It remains therefore that both functions of government should be entrusted to the same persons, not, however, at the same time, but in the order prescribed by nature, who has given to young men strength and to older men wisdom." *Id.* at 221-22.

In *The Athenian Constitution,* Aristotle wrote a political history of the city-state of Athens. Rediscovered in the late nineteenth century, *The Athenian Constitution* provided an example of how tyrants disarm the people. In the sixth

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century B.C., the tyrant Peisistratus took over Athens. Aristotle described how the tyrant obtained absolute power by disarmament:

> Now, he stripped the people of their arms after the following fashion: Ordering a review under arms in the Anakeum, he pretended to make an attempt to harangue them, but spoke in a low voice; and when they said they could not hear, he bade them go up to the propylæa of the Acropolis,[5] that he might be heard the better. Whilst he continued addressing them, those who had been appointed for the purpose took away the arms of the people, and shut them up in the neighbouring buildings of the Thesæum.[6] They then came and informed Peisistratus. After finishing his speech, he told the people what had been done about their arms, saying that they had no need to be surprised or out of heart, but bade them go home and attend to their own affairs, adding that all public matters would now be his concern.

Aristotle, Constitution of Athens, ch. XV (Thomas J. Dymes trans., 1891).

NOTES & QUESTIONS

1. Imagine you are founding a new nation, and you have carefully studied Plato and Aristotle. What lessons about arms-control policy would you draw from your studies?

2. **CQ:** Thomas Jefferson described Aristotle, Cicero (*infra* Section B.2.c.), John Locke (Ch. 2.K.2), and Algernon Sidney (Ch. 2.K.3) as the four major sources of the American consensus on rights and liberty, which Jefferson distilled into the Declaration of Independence. Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *in* 16 The Writings of Thomas Jefferson 117-19 (Andrew A. Lipscomb ed., 1903). What elements of Aristotle's political philosophy can you find in the Declaration of Independence, and in the political structure of the American Early Republic?

3. By about 1830, the United States reflected Aristotle's view about the scope of the voting franchise. Property requirements for voting had been abolished in almost every state, so that the class of eligible voters was similar to the class of persons liable to perform militia duty—namely, free white adult males. (However, the states did allow voting by males over the age of 45, which was the typical upper limit for militia service, and did not allow voting by males under 21, who had to serve in the militia.) What are the arguments for and against Aristotle's view that the people with the responsibility for defending the state should be the ones who control the state?

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5. [The Acropolis was the citadel of Athens. The propylaea were the monumental gateway.—Eds.]

6. [The Thesæum was an important temple. It was dedicated to the iron-forging god Hephestus, and also known as the *Hephaisteion*.—Eds.]

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4. *Further reading*: Michael Gagarin, *Self-Defence in Athenian Homicide Law*, 19 Greek, Roman, and Byzantine Stud. 111 (1978).

2. Rome

The law of the Roman Republic and Empire was the leading legal system in the Western world for many centuries. Even after the Western Roman Empire fell in the fifth century A.D., Roman law remained a foundation of European law. Thus, Roman law later became part of the laws of much of Latin America, Africa, and Asia, through the process of colonization. Roman law continued to be the core of European law until the Napoleonic era. Although post-colonial nations have developed their legal systems in diverse ways, Roman law still comes closer than anything else to being the common global legal heritage.

a. The Twelve Tables

The foundation of Roman law was the Twelve Tables (*Lex Duodecim Tabularum,* or *Duodecim Tabulae*). The Twelve Tables were, literally, twelve bronze tablets containing basic legal rules, published in final form in 449 B.C. So that every citizen could easily read them, they were placed in the Forum, which was the marketplace and the government center. The Twelve Tables were written by a committee of ten (*decemvirs*), after extensive public debate and discussion. They relied in part on Greek law and made revisions based on public comment by citizens. 1 Titus Livius, The Early History of Rome 255, 260, 292 (bk. 3, §§ XXXIV, XXXVIII, LVII) (George Baker trans., 1823) (first published sometime during the reign of Augustus Caesar).

The creation of the Twelve Tables was a monumental development in due process. The laws were published, readily accessible, and written to be readily understood by an ordinary citizen. Previously, the laws had been closely guarded by an élite that secretly manipulated the laws to its own benefit. Unfortunately, the Twelve Tables themselves were later destroyed, so what we know of them comes from secondary sources. Self-defense rules were in Table VIII:

> 12. If a theft be committed at night, and the thief be killed, let his death be deemed lawful.
> 13. If in the daytime (only if he defend himself with weapons).

Id. at Table VIII, items 12-13 (parenthetical addition by translator).[7] An alternate version reads:

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7. *See also* Allan Chester Johnson et al., Ancient Roman Statutes 11 (2003) (alternate translation, to the same effect). Another translator locates this law in Table VIII, law 3: "If one is slain while committing theft by night, he is rightly slain." Fordham University, Ancient History Sourcebook: The Twelve Tables, Table VIII. Still another scholar puts the law in Table II, law 4. "Where anyone commits a theft by night, and having been caught in the act is killed,

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12. If a thief commits a theft by night, if the owner kills the thief, the thief shall be killed lawfully.
13. By daylight . . . if a thief defends himself with a weapon . . . and the owner shall shout.
14. In the case of all other . . . thieves caught in the act[,] freemen shall be scourged and shall be adjudged as bondsmen to the person against whom the theft has been committed provided that they have done this by daylight and have not defended themselves with a weapon. . . .

The Twelve Tables, Table VIII: Torts or Delicts, items 12-14. For a thousand years, the Twelve Tables were venerated as the embodiment of Roman law.

NOTES & QUESTIONS

1. Why do the Twelve Tables distinguish between night-time and day-time burglars? Jewish law (*infra* Section C.1) makes a similar distinction.

2. The present-day laws of France and Belgium establish a presumption of the lawfulness of use of deadly force against night-time home invaders. Code Pénal [France], § 122-6; Code Pénal [Belgium], art. 417. In contrast, Costa Rica and Honduras presume the lawfulness of deadly force against home invaders regardless of the time of the invasion. Código Penal [Costa Rica], Ley no. 4573, art. 28; Código Penal [Honduras], Decreto No. 144-83, art. 24(1). Which approach is better?

b. Militias and Standing Armies

After the people of Rome overthrew the Tarquin kings in 509 B.C., Rome's growing military might was based on a militia. When needed, some or many free men were required to serve in the militia for several months a year and to supply all their own equipment. In 107 B.C., Gaius Marius, who seized and held near-absolute power for several years, began to supplant the militia with a professional standing army, using a mixture of volunteers and conscripts. There were short-term benefits, in that soldiers were now supplied with equipment at government expense; previously, some militiamen lacked the resources even to buy shoes for themselves. The increased training and drilling made possible by a standing army made the Roman army more effective in combat.

However, the shift of the military balance in Rome from militia to army ultimately shifted the political balance. Ambitious politicians, including Julius Caesar, began to threaten to use the troops under their command to achieve near-absolute rule. After a series of civil wars, Julius's great-nephew Octavian

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he is legally killed." S.P. Scott, 1 The Civil Law Including The Twelve Tables, The Institutes of Gaius, The Rules of Ulpian, The Opinions of Paulus, The Enactments of Justinian, and The Constitutions of Leo 59 (1932).

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completed the destruction of the Republic by using the army to install himself as absolute ruler. He renamed himself "Augustus Caesar." For the next five centuries, control of Rome would hinge on who commanded the support of the most powerful faction of the army.

The lesson drawn by the Enlightenment in Europe was summarized by Edward Gibbon: "A martial nobility and stubborn commons, possessed of arms, tenacious of property, and collected into constitutional assemblies, form the only balance capable of preserving a free constitution against enterprises of an aspiring prince." 1 Edward Gibbon, Decline and Fall of the Roman Empire 78 [ch. 3] (1787).

Among the most influential political philosophers of the Renaissance was Niccolo Machiavelli (*infra* Section D.1.a). He detailed how the first two emperors of Rome (Octavian/Augustus and his successor Tiberius) used weapons control and a standing army to hold absolute power. According to Machiavelli, the Roman policy had led to ruin. Machiavelli argued that a king would be more secure in the long term if he were defended by a militia rather than by a standing army:

> . . . Ottavianus[8] first, and then Tiberius, thinking more of their own power than the public usefulness, in order to rule over the Roman people more easily, begun to disarm them and to keep the same armies continually at the frontiers of the Empire. And because they did not think it sufficient to hold the Roman People and the Senate in check, they instituted an army called the Praetorian (Guard), which was kept near the walls of Rome in a fort adjacent to that City.[9] And as they now begun freely to permit men assigned to the army to practice military matters as their profession, there soon resulted that these men became insolent, and they became formidable to the Senate and damaging to the Emperor. Whence there resulted that many men were killed because of their insolence, for they gave the Empire and took it away from anyone they wished, and it often occurred that at one time there were many Emperors created by the several armies. From which state of affairs proceeded first the division of the Empire and finally its ruin. Kings ought, therefore, if they want to live securely, have their infantry composed of men, who, when it is necessary for him to wage war, will willingly go forth to it for love of him, and afterwards when peace comes, more willingly return to their homes; which will always happen if he selects men who know how to live by a profession other than this. And thus he ought to desire, with the coming of peace, that his Princes return to governing their people, gentlemen to the cultivation of their possessions, and the infantry to their particular arts (trades or professions); and everyone of these will willingly make war in order to have peace, and will not seek to disturb the peace to have war.

Niccolo Machiavelli, The Art of War 16-17 (Christopher Lynch trans., Wilder Publications 2008) (1521).

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8. [Machiavelli's rendition of "Octavian" in Italian.—Eds.]

9. [The Praetorian Guard was the portion of the army around the emperor, under his immediate control. They were a formidable bodyguard and were also in the best position to stage a coup. Accordingly, emperors tended to pay them well.—Eds.]

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c. Cicero

Cicero was the greatest Roman lawyer and orator of the first century B.C. Historically, he has been viewed as one of the noblest of all Romans, a hero who did his best to prevent the degenerate Republic from transforming into Empire.

During the Dark Ages, knowledge of many of the Greek and Roman writers (including Aristotle) was lost in the West, but Cicero never disappeared from view. Recovery of knowledge of Antiquity and the Classical Age began in the Little Renaissance of the twelfth century; it continued with enthusiasm in the Renaissance in the fourteenth through seventeenth centuries, and then the Enlightenment in the eighteenth century. Cicero's prestige continued to grow. As of the 1600s, he was the most influential and admired political theorist in the West.

Until the nineteenth century, Latin was a standard part of secondary education. Countless pupils studied the following speech by Cicero, in defense of Titus Annius Milo:

> What is the meaning of our retinues, what of our swords? Surely it would never be permitted to us to have them if we might never use them. This, therefore, is a law, O judges, not written, but born with us—which we have not learned, or received by tradition, or read, but which we have taken and sucked in and imbibed from nature herself; a law which we were not taught, but to which we were made—which we were not trained in, but which is ingrained in us—namely, that if our life be in danger from plots, or from open violence, or from the weapons of robbers or enemies, every means of securing our safety is honorable. For laws are silent when arms are raised, and do not expect themselves to be waited for, when he who waits will have to suffer an undeserved penalty before he can exact a merited punishment.
>
> The law very wisely, and in a manner silently, gives a man a right to defend himself. . . . [T]he man who had used a weapon with the object of defending himself would be decided not to have had his weapon about him with the object of killing a man.

Cicero, Speech in Defence of Titus Annius Milo, *in* Orations of Marcus Tullius Cicero 204-05 (Charles Duke Yonge trans., rev. ed. 1899) (written 52 B.C.). Although the above oration has been delivered by students in many classrooms, Cicero himself was prevented from delivering it; Milo's enemy, Pompey, surrounded the court with troops.

Cicero was an explicit advocate of tyrannicide:

> What can be greater wickedness than to slay not only a man, but even an intimate friend? Has he then involved himself in guilt, who slays a tyrant, however, intimate? He does not appear so to the Roman people at least, who of all great exploits deems that the most honorable. Has expediency, then, overcome virtue? Nay, rather, expediency has followed virtue.

Cicero, On Duties [*De Officiis*], *in* Cicero's Three Books of Offices and Other Moral Works 120-21 (bk. III, ch. 4) (Cyrus R. Edmonds trans., 1865).

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> Now as to what relates to Phalaris,[10] the decision is very easy; for we have no society with tyrants, but rather the broadest separation from them; nor is it contrary to nature to despoil, if you can, him whom it is a virtue to slay—and this pestilential and impious class of men ought to be entirely exterminated from the community of mankind. For as certain limbs are amputated, both if they themselves have begun to be destitute of blood, and, as it were, of life, and if they injure the other parts of the body, so the brutality and ferocity of a beast in the figure of a man, ought to be cut off from the common body, as it were, of humanity.
>
> Of this sort are all those questions in which our duty is sought out of the circumstances of the case.

Id. at 126-27 (Book III, ch. 6). Cicero's principles were put into action in 44 B.C. when Marcus Junius Brutus the Younger and other Senators assassinated Julius Caesar. The assassination failed to restore the Republic, however, and over the next five centuries, assassinations or military coups were the only means of removing an especially bad emperor.

In the same vein, the Roman philosopher Seneca (4 B.C.-65 A.D.) wrote, "No offering is more acceptable to God than the blood of a tyrant." Seneca, On Benefits [*De Beneficiis*] 8, 20 (A. Golding trans., 1974).

d. Arms Law

Under Roman law, citizens could carry personal arms for lawful defense. Conquered peoples had no legal right to arms until 212 A.D. Then, Roman citizenship was extended to all free subjects of the Empire. Emperor Caracalla, *Constitutio Antoniniana De Civitate, in* Paul Robinson Coleman-Norton, Frank Card Bourne, Allan Chester Johnson & Clyde Pharr, Ancient Roman Statutes: A Translation with Introduction, Commentary, Glossary, and Index 212, 225-26 (2003) (Latin text here). The right to arms was abolished in 364, at least for persons who did not have advance approval from the government: "No person whatever, without Our knowledge and advice, shall be granted the right to employ any weapons whatsoever." Clyde Pharr, The Theodosian Code and Novels § XV.15.1, at 439 (2001) (Emperors Valentian (Valentinianus I) and Valens Augustuses, to Bulphorus, Governor of Campia, Decree of Oct. 5, 364).[11]

The inability of the emperors to protect their subjects led to a restoration of the right in 440 in both the Western and the Eastern Roman Empires. The restoration was reconfirmed several years later by the Western Emperor Majorian Augustus:

> [B]ecause it is not sufficiently certain, under summertime opportunities for navigation, to what shore the ships of the enemy can come, We admonish each and all by this edict that, with confidence in the Roman strength and the courage with

10. [Tyrant of Acragas, Sicily, alleged to have engaged in torture and cannibalism, and who ruled from approximately 570 to 554 B.C. —Eds.]

11. "Novels" was a legal term of art for new laws. In 286 A.D., governance of the Roman Empire was divided, with a separate emperor for East and West. Laws applicable to both halves bore the names of both emperors, here, Valentian and Valens Augustuses.

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> which they ought to defend their own, with their own men against the enemy. . . . [T]hey shall use those arms which they can, but they shall preserve the public discipline and the moderation of free birth unimpaired.

Restoration of the Right to Use Weapons (De Reddito Jure Amrorum) (June 24, 440), *in id.,* at tit. 9, p. 524.

NOTES & QUESTIONS

1. Cicero's line "laws are silent when arms are raised" (*inter arma enim silent leges,* also translated as "For laws are silent amid arms") became a legal principle. It is sometimes invoked as a justification that "anything goes" during wartime; governments may even ignore their own constitutions. Cicero, though, was arguing about personal self-defense. Under what circumstances can the government legitimately forbid self-defense by a person who at a moment of peril is left unprotected by the government? Can the government forbid self-defense under positive law? Does natural law, as Cicero suggests, limit positive law? *See* Ch. 6.G.5 Note 4, Ch. 10.A Note 31 (discussing nineteenth- and twentieth-century arguments and case law).

2. If assassination is the only way to depose a ruler like Julius Caesar, Caligula, Commodus,[12] or Hitler, is it legitimate? How can any theory that authorizes tyrannicide prevent self-appointed rescuers (or the self-deluded) from threatening any ruler with assassination?

3. Does the fact that tyranny and despotism thrived after Julius Caesar's assassination show that tyrannicide is not a justifiable reason for arming a population? Recall that Roman citizens had the right to possess personal arms at the time of the assassination.

4. *Trajan.* The Roman emperor Trajan reigned from 98 to 117 A.D. He was the second of the "Five Good Emperors" (Nerva, Trajan, Hadrian, Antonius Pius, and Marcus Aurelius). They guided the area governed by the Roman Empire to a broad prosperity that was never equaled until 1,500 years later. According to the historian Cassius Dio: "Indeed, when he [Trajan] first handed to the man [Sura] who was to be prefect of the Praetorians the sword which this official was required to wear at his side, he bared the blade and holding it up said: 'Take this sword, in order that, if I rule well, you may use it for me, but if ill, against me.'" Cassius Dio, Roman History, Book 68, 393 (Earnest Cary trans., 1925).

In the Roman Empire, the only way to get rid of a good emperor who had gone bad was to kill him, as Trajan recognized. Should well-intentioned rulers in nations that do not have elections give a trusted aide the power to assassinate them if necessary?

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12. Caligula reigned 37-41 A.D., Nero 54-68 A.D., and Commodus A.D. 180-92. All were notoriously tyrannical, and often deranged.

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For further reading on Trajan's exemplary governance, see Robert G. Natelson, *The Government as Fiduciary: A Practical Demonstration from the Reign of Trajan*, 35 U. Rich. L. Rev. 191 (2001).

5. *Civic virtue.* To the American Founders, Rome's degeneration from Republic to Empire epitomized what America must avoid. Roman history is part of the explanation for the separation of powers, federalism, insulation of government from transient passions (e.g., staggered terms for the Senate), and many other constitutional provisions. *See, e.g.*, U.S. Const. art. I, § 8 (Congress, not a single man, has the power to declare war; army appropriations limited to two years); art. II, § 2 (a civil officer, the President—and not a general—is commander-in-chief); art. III, § 3 (treason is levying war against the United States or adhering to its enemies—and thus does not include criticizing the ruler).

The Founders believed the constitutional safeguards would fail if the American people, like the degenerate Romans of the late Republic, lost their civic virtue. When Benjamin Franklin was leaving Independence Hall, after the concluding day of the Constitutional Convention, a woman asked him "Well, Doctor, what have we got—a Republic or a Monarchy?" He replied, "A Republic, if you can keep it." 3 The Records of the Federal Convention of 1787, app'x A, at 85 (Max Farrand ed., 1934 reprint ed.) (1911) (citing notes of Maryland delegate James McHenry). Does modern America more resemble a virtuous republic or a decadent empire? Under current conditions, how can an American republic be sustained?

e. Corpus Juris

The Western Roman Empire fell in 476, when the last emperor, Romulus Augustulus, was deposed. The Eastern Roman Empire, also known as the Byzantine Empire, lasted until 1453, when Constantinople was captured by the Ottomans.[13] The Byzantines were especially powerful under Emperor Justinian I (reigned 527-565), who ordered the creation of a compilation of all Roman law, which became known as the *Corpus Juris Civilis*. The *Corpus Juris,* by preserving for posterity the work of Rome's legal scholars, transmitted to the world the memory of Rome's historic culture of ordered liberty and the rule of law. Emperor Justinian's *Corpus Juris* formally replaced the Twelve Tables as the embodiment of Roman law. The self-defense principles of the Twelve Tables were incorporated into the *Corpus Juris*.

The *Corpus Juris* was not meant to create new law, but to provide a comprehensive collection of existing law. Accordingly, it contains rules from many different Roman legal commentators from previous centuries. These rules are not necessarily mutually consistent. However, the general principle was that the use of deadly force was permissible when no lesser force would suffice.

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13. The Byzantines never called themselves "Byzantines." Instead, they considered themselves "Romans"—a continuation of the state that had, according to tradition, been founded in 753 B.C.

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The famous formulation of the self-defense rule was "Cassius writes that it is permissible to repel force by force, and this right is conferred by nature. From this it appears, he says, that arms may be repelled by arms."[14] Dig. 43.16.1.27 (Ulpian, Edict 69). In Latin, this is succinctly expressed as *vim vi licit repellere*, also translated as "force may be repelled by force." The rule is pervasively quoted throughout the Western legal tradition, sometimes with attribution and sometimes not. *See, e.g.*, Edward Coke (Ch. 2.E Note 3), William Blackstone (Ch. 2.K.1), the Massachusetts royal government describing the behavior of the colonists (Ch. 3.E.3), South Carolina's first constitution (Ch. 3.H.1), Francisco de Vitoria (online Ch. 13.C.1), Francisco Suárez (online Ch. 13.C.2), and Hugo Grotius (online Ch. 13.C.3). Typically, the phrase was interpreted to encompass forceful resistance to criminal government, as well as resistance to ordinary criminals.

The *Digest* (in Latin, *Digesta*) was by far the lengthiest part of the *Corpus Juris*; it consisted of 50 books that compiled the surviving fragments from cases decided by Roman judges, and opinions written by legal scholars. The Bluebook citations for the *Digest* provide the volume, title, law, and part numbers. The parenthetical after the numbers indicates the author and the document quoted and cited by the *Digest*—in the quote above, the eminent Roman lawyer Gnaeus Domitius Annius Ulpianus, who wrote in the early third century A.D.; fragments from his 83-book legal commentary *Ad edictum* comprise about a fifth of the *Digest*.

A near-identical formulation is embodied in the self-defense provision of the modern Italian criminal code (*è lecito respingere la violenza con la violenza*), which recognizes self-defense as a justification. Codice Penale art. 52 (It.); *see also id.* art. 53 (legitimate use of arms as a justification).

In addition to the *Digest*, the *Corpus Juris* also contained the Code (*Codex Justinianus,* laws and decisions made by Roman Emperors before Justinian), and the Institutes (a summary of key laws).[15] The Digest, the Code, and the Institutes collectively comprised the original *Corpus Juris*. The *Novels* (statutes promulgated by Justinian after the 534 A.D. publication of the second edition of the *Corpus Juris*) were considered by later generations to be part of the *Corpus Juris*.[16] *Corpus Juris* provisions on self-defense are as follows:

- "The right to repel violent injuries. You see, it emerges from this law that whatever a person does for his bodily security he can be held to have done rightfully; and since nature has established among us a relationship of sorts, it follows that it is a grave wrong for one human being to encompass the life of another." Dig. 1.1.3 (Florentinus, Institutes 1).
- "If someone kills anyone else who is trying to go for him with a sword, he will not be deemed to have killed unlawfully; and if for fear of death

14. "Cassius" here is the first-century A.D. Roman jurist Gaius Cassius Longinus, author of *Libri juris civilis*. He is not the Senator of the exact same name who participated in the assassination of Julius Caesar.

15. For detailed analysis of Code provisions on self-defense and arms, see Will Tysse, *The Roman Legal Treatment of Self Defense and the Private Possession of Weapons in the* Codex Justinianus, 16 J. Firearms & Pub. Pol'y 163 (2004).

16. The *Corpus Juris* translations are from 1 Alan Watson, The Digest of Justinian (Univ. of Pa. Press 1998). The bracketed inserts were added by the translator, Prof. Watson.

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someone kills a thief, there is no doubt he should not be liable under the *lex Aquila*.[17] But if, although he could have arrested him, he preferred to kill him, the better opinion is that he should be deemed to have acted unlawfully." Dig. 9.2.5 (Ulpian, Edict 18).

- "A person lawfully in possession has the right to use a moderate degree of force to repel any violence exerted for the purpose of depriving him of possession, if he holds it under a title which is not defective." Code Just. 8.4.1 (Emperors Diocletian and Maximian).
- "But anyone who uses force to retain his possession is not, Labeo says, possessing it by [illegitimate] force." Dig. 43.16.1.28 (Ulpian, Edict 69).[18]
- "Someone who recovers by force in the same conflict a possession of which he has been forcibly deprived is to be understood as reverting to his original condition rather than possessing it by force. So if I eject you and you immediately eject me, and I then eject you, the interdict 'where by force' will lie effectively in your favor."[19] Dig. 43.16.17 (Julian, Digest 48).
- "[I]t is not always lawful to kill an adulterer or thief, unless he defends himself with a weapon. . . ." Dig. 4.2.7 (Ulpian, Edict 11).
- "If anyone kills a thief by night, he shall do so unpunished if and only if he could not have spared the man[']s life] without risk to his own." Dig. 48.8.9 (Ulpian, Edict 37).
- "The Law of the *Twelve Tables* permits one to kill a thief caught in the night, provided one gives evidence of the fact by shouting aloud, but someone may only kill a person caught in such circumstances at any other time if he defends himself with a weapon, though only if he provides evidence by shouting." Dig. 9.1.4 (Gaius, Provincial Edict 7).[20]
- "[I]f I kill your slave who is lying in ambush to rob me, I shall go free; for natural reason permits a person to defend himself against danger." Dig. 9.2.4 (Gaius, Provincial Edict 7).
- "Where parties commit damage because they could not otherwise protect themselves, they are guiltless; for all laws and all legal principles permit persons to repel force by force. But if I throw a stone at an adversary for the purpose of defending myself, and I do not hit him but do hit a passer-by, I will be liable under the *Lex Aquilia*; for you are only permitted to strike a person who is attacking you, and this solely where you do so in defending yourself, and not where it is done for the purpose of revenge." Dig. 9.2.45 (Paul, Sabinus 10).[21]

The *Corpus Juris* authorized the possession of arms for lawful defense or hunting, while forbidding the accumulation of arms for seditious purposes:

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17. A statute from about 287 B.C. imposing liability for various torts.

18. Marcus Antistius Labeo (c. 54 B.C.-c. 10/11 A.D.) was a prolific and eminent Roman jurist.

19. In other words, a rightful owner who forcefully reclaimed his own property would not lose a lawsuit claiming that his possession of the land was based merely on force.

20. Gaius was a Roman jurist active around 130 to 180 A.D.

21. Masurius Sabinus was a Roman jurist during the reign of Tiberius (14-37 A.D.).

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- "Persons who bear weapons for the purpose of protecting their own safety are not regarded as carrying them for the purpose of homicide." Dig. 48.6.11 (Paul, Views 5).
- "A man is liable under the *lex Julia*[22] on *vis publica*[23] on the grounds that he collects arms or weapons at his home or on his farm or at his country house beyond those customary for hunting or a journey by land or sea. But those arms are excepted which someone has by way of trade or which come to him by inheritance. Under the same heading come those who have entered into a conspiracy to raise a mob or a sedition or who keep either slaves or freemen under arms. 1. A man is also liable under the same statute if, being of full age, he appears in public with a missile weapon." Dig. 48.6.1-3 (Marcian, Institutes 14 & Scaevola).[24]

The *Corpus Juris* served as a source—often the primary source—for local laws and was regarded as the authoritative source of international law. Indeed, the *jus gentium* (the *Corpus Juris* term for laws that apply everywhere) became synonymous with what we today call international law.

Notwithstanding the *Corpus Juris*'s apparent legal protection of self-defense and the possession of arms, the Emperor Justinian himself made arms manufacture a government monopoly and forbade all arms sales to civilians. The law was perhaps inspired by the Niko riots of 532 A.D., which were provoked by Justinian's oppressive taxation, fierce religious persecutions over differences in Christian doctrine, ravages inflicted on the people by Justinian's mercenary Huns, and popular armed resistance to Hunnish depredations.[25]

> Therefore, desiring to prevent men from killing each other, We have thought it proper to decree that no private person shall engage in the manufacture of weapons, and that only those shall be authorized to do so who are employed in the public arsenals, or are called armorers; and also that manufacturers of arms should not sell them to any private individual. . . . We prohibit private individuals from either making or buying bows, arrows, double-edged swords, ordinary swords, weapons usually called hunting knives, those styled *zavae,*[26] breast-plates, javelins, lances and spears of every shape whatever, arms called by the Isaurians[27] *monocopia,* others called *siginnos* or missiles,[28] shields, and helmets; for We do not permit anything of this kind to be manufactured, except by those who are

22. [Roman statutes from the reigns of Julius Caesar (47-44 B.C.) or Augustus Caesar (27 B.C.-14 A.D.).—EDS.]

23. [Use of force in public in a manner that disturbs the operation of the laws. For example, a mob that prevents a court from operating.—EDS.]

24. Marcian was Eastern Roman Emperor from 450 to 457 A.D.; Quintus Mucius Scaevola (d. 82 B.C.) was a Roman jurist.

25. The religious persecutions involved controversies about the relationship between Jesus's human and divine natures. Many Christian sects oppressed by the Byzantines welcomed Muslim conquest, since the Muslims had no interest in policing the details of local Christian doctrine. *See* Philip Jenkins, Jesus Wars: How Four Patriarchs, Three Queens, and Two Emperors Decided What Christians Would Believe for the Next 1,500 Years (2010).

26. [Probably a form of chain mail.—EDS.]

27. [Inhabitants of a mountainous region in south-central Turkey.—EDS.]

28. [*Monocopia* and *siginnos* appear to be types of missiles.—EDS.]

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> appointed for that purpose in Our arsenals, and only small knives which no one uses in fighting shall be allowed to be made and sold by private persons.

Novel 85, ch. 4. Nevertheless, Justinian affirmed the lawfulness of self-defense: "Someone who kills a robber is not liable, at least if he could not otherwise escape danger." J. Inst. 4.3 (enactment of Justinian).

NOTES & QUESTIONS

1. What sorts of modern gun controls are prefigured by the weapons restrictions in the *Corpus Juris*?

2. How similar are modern statutory and common-law self-defense rules to those of the *Corpus Juris*?

3. Missile arms allow a smaller person to project force at a distance against a larger group. The capability can be used for good or ill. Note the restrictions in Roman law on missile arms. Why might such weapons be given special negative treatment? Are modern guns the equivalent of the missile weapons referred to by the *Corpus Juris*? **CQ:** Consider the arguments for and against the proposed ban on bows and crossbows during the Han Dynasty in China, discussed *supra* Section A.1 Note 8.

4. *Further reading*: The Roman Law Library (full texts in Latin).

C. Judeo-Christian Thought

1. Jewish Thought

In addition to studying Greece and Rome, the American Framers looked closely to the history of ancient Israel and the Jewish people, which they knew from the Old Testament (the Hebrew Bible).

a. Arms for Ex-Slaves

According to the Book of Exodus, after the Egyptians suffered ten plagues because Pharaoh refused Moses's repeated commands to "let my people go," the Hebrew slaves were permitted to leave. Before departing Egypt, the Hebrews were allowed to take whatever they wanted from the Egyptians, because God made the Egyptians favorably disposed to the Hebrews. *Exodus* 12:35-36. The Hebrew slaves thus received partial reparations for hundreds of years of slavery. "And God took the people toward the way of the Wilderness to the Sea of Reeds. And the Children of Israel were armed when they went

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up from Egypt." *Exodus* 13:18.[29] Presumably, the weapons were obtained from the Egyptians.[30]

b. Legal Duties of Self-Defense and Defense of Others

Later, according to the Old Testament, God gave the Jewish people a detailed legal code, which today is called the Mosaic law. Under that law, the nearest relative of a person who was murdered was obliged to kill the murderer, providing blood restitution for the death of the innocent. However, restitution was not necessary if the decedent was killed while attempting to perpetrate a robbery. Edward J. White, The Law in Scriptures 77 (2000).

The key law for self-defense was: "If a thief be found breaking up, and be smitten that he die, there shall no blood be shed for him. If the sun be risen upon him, there shall be blood shed for him." *Exodus* 22:2. In other words, killing a night-time burglar was lawful, and killing a day-time burglar was not. However, the day/night distinction was not applied literally.[31]

The *Talmud* is a multi-layered commentary on Jewish law and is itself a source of Jewish law. Regarding the passages in *Exodus,* the *Talmud* explains:

> The reason why the Scripture freed the detector if he killed the burglar, is because it is certain that a man cannot control himself when he sees his property taken. And as the burglar must have had the intention to kill anyone, in such a case, who should oppose him, the Scripture dictates that if one comes to kill you, hasten to kill him first.

The Babylonian Talmud: Tract Sanhedrin 214 (Michael L. Rodkinson trans., 1918). The final phrases are not optional; they are a positive command: There is a duty to use deadly force to defend oneself against murderous attack.

The *Talmud* also imposes an affirmative duty for bystanders to kill if necessary to prevent murder, rape of a betrothed woman, or pederasty. 2 Talmud Bavli; The Gemara: The Classic Vilna Edition with an Annotated, Interpretive Elucidation, as an Aid to Talmud Study, Tractate Sanhedrin folio 73a[1] (Michael

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29. This is a standard Jewish Bible translation. 2 Rashi, The Torah: With Rashi's Commentary Translated, Annotated, and Elucidated: Shemos/Exodus 145 (Yisrael Isser Zvi Herczeg et al. trans. & eds., 4th ed. 1997). Rashi is the foremost of all Jewish Bible commentators.

Instead of "armed," the King James Version uses the word "harnessed," an archaic word for wearing military equipment. More recent translations also express that the Hebrews marched out in battle array: "And the people of Israel went up . . . equipped for battle" (Revised Standard Version); "and the children of Israel went up armed" (American Standard Version); "And the sons of Israel went up in military order" (American Baptist Publication Society). The Hebrew word is *chamushim,* probably related to the Egyptian *chams,* meaning "lance." The Pentateuch and Haftorahs 265 n.18 (Joseph H. Hertz ed., 1967).

30. This is the view set forth in Rashi, *supra,* at 145 (explaining that *Exodus* 13:18 was written so that readers would not wonder where the Israelites got the arms with which they fought the Amalekites a short while later).

31. If the deceased were not a real burglar, but someone who was mistaken for a burglar, there was no criminal offense. Samuel Mendelsohn, The Criminal Jurisprudence of the Ancient Hebrews 33 n.55 (The Lawbook Exchange 2001) (1891).

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Wiener & Asher Dicker elucidators, Mesorah Pubs., 2d ed. 2002).[32] The commentators agree that a person is required to hire a rescuer if necessary to save the victim from the "pursuer" (the *rodef*). *Id.* at folio 73a[3]. Likewise, "if one sees a wild beast ravaging [a fellow] or bandits coming to attack him . . . he is obligated to save [the fellow]." *Id.* at folio 73a[1] (brackets in original).

The duty to use force to defend an innocent is based on two Bible passages. The first is *Leviticus* 19:16, "you shall not stand up against the life of your neighbor." Or in the modern New American Bible translation, "nor shall you stand idly by when your neighbor's life is at stake."

The second passage comes from *Deuteronomy* 22:23-27. If a man and a betrothed (engaged) woman have illicit sex in the city, it would be initially (not conclusively) presumed that she consented because she could have cried out for help. But if the sexual act occurred in the country, she would be presumed to have been the victim of a forcible rape: "For he found her in the field, and the betrothed damsel cried, and there was none to save her." The passage implies that bystanders must heed a woman's cries and come to her rescue. 2(a) The Mishneh, Sefer Nezekin 150-51 (Matis Roberts trans. & commentary, 1987). *See generally* Michael N. Rader, *The "Good Samaritan" in Jewish Law: Lessons for Physicians, Attorneys, and Laypeople*, 22 J. Legal Med. 375 (2001).

c. Overthrowing Governments

The Biblical history of the Jewish people included many stories that, to some readers, justified forcible resistance to tyranny. For example, the seventeenth-century English patriot and political philosopher Algernon Sidney advocated revolution against the oppressive Stuart kings of England. In support of his advocacy, he reeled off a list of well-known Jewish heroes who used violence against tyrants: "Moses, Othniel, Ehud, Barak, Gideon, Samson, Jephthah, Samuel, David, Jehu, the Maccabees, and others." Algernon Sidney, Discourses Concerning Government 228 (Thomas G. West ed., Liberty Fund 1996) (1698). For more on Sidney, see Chapter 2.K.3.

Here is how Sidney (and other advocates of forcible resistance to tyranny) would have understood the above stories: Moses, while a prince of Egypt, killed a slave driver who was beating a Hebrew slave. Othniel led the Hebrews in a war of national liberation against a Mesopotamian king. Ehud assassinated a foreign king who had conquered the Hebrews. Barak, along with General Deborah, liberated the Hebrews from Canaanite rule. Gideon liberated the Hebrews from the Midianites. Samson fought the Philistines. Jephthah led the war of liberation against the Ammonites. Samuel was the spiritual leader in a war of national liberation against the Philistines. David overthrew King Saul at Samuel's orders. Jehu overthrew the Israelite King Jehoram, who was leading Israel to participate in a nature religion involving human sacrifice. The Maccabees led a successful war of national liberation against the Seleucid Empire, which wanted to eliminate the Jewish religion.

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32. The superscripted numbers in the citations are to particular pages within a folio.

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d. Arms Bans

The Hebrew Bible also told the story of what might be the first arms ban in recorded history. The Hebrews had invaded the "promised land" of Canaan by crossing the Jordan River from the east. At about the same time, Canaan came under assault from the west as well. The sea-faring Philistines, who may have come from Crete, had failed in an attempt to conquer Egypt, so they set their sights on Canaan. Technologically superior to the Israelites, the Philistines were outstanding ironsmiths who equipped their soldiers with high-quality iron weapons. Chaim Herzog & Mordechai Gichon, Battles of the Bible 81-82 (Greenhill Books 2002) (1978); William G. Dever, Who Were the Early Israelites and Where Did They Come From? 69 (2003). The Philistine invasion of Canaan was partially successful, for they established secure control over the territory of Gaza.

Much later, as described in the final chapters of the *Book of Judges,* some of the Israelites came under a degree of Philistine control. Samson fought them single-handedly, over the objections of other Israelites. By the beginning of the *First Book of Samuel,* the Philistines had captured extensive territories from the disunited Israelite tribes. After conquering the tribe of Judah, which controlled the southern part of modern-day Israel, the Philistines imposed a weapons-control law: "Now there was no smith found throughout the land of Israel: for the Philistines said, Lest the Hebrews make them swords or spears." 1 *Samuel* 13:19. In order to sharpen agricultural tools such as plows, the Israelites had to pay for services from a Philistine ironsmith. *Id.* 13:20-21.

Because of the weapons control law, the Israelites had few good weapons to use against the Philistines, although the future Israeli king Saul and his son Jonathan apparently had some of their own: "So it came to pass on the day of battle, that there was neither sword nor spear found in the hand of any of the people that were with Saul and Jonathan: but with Saul and with Jonathan his son was there found." *Id.* 13:22.

e. Standing Armies versus Militias

The Hebrew Bible also addressed another issue of prime concern to the American Founders: the relationship between militias, standing armies, national security, and liberty. Initially, as a tribal confederation, the Hebrews relied on a militia system. *See* David B. Kopel, *Ancient Hebrew Militia Law*, 90 Denv. U. L. Rev. Online 175 (2013). But there were frequent problems of getting all the tribes to participate in wars of national defense. Too often, the tribes fought each other.

Around 1020 B.C., the Hebrews asked the prophet Samuel to ask God to appoint a king to rule over them. Samuel replied with God's warning about the dangers of abusive government, including a prophecy that a king would conscript the Israelites into a standing army:

> He will take your sons and appoint them for himself, for his chariots, and to be his horsemen; some shall run before his chariots. And he will appoint him captains over thousands, and captains over fifties; and will set them to ear [plough] his ground, and to reap his harvest, and to make his instruments of war, and instruments of his chariots.

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1 *Samuel* 8:111-12.

In other words, military conscription for a standing army would lead to labor conscription, with Israelites forced to toil for the king. Samuel continued with more warnings about how the Hebrews would have to labor for greedy kings. Nevertheless, the Hebrews persisted in wanting a monarch, and God gave them what they wanted. Saul was the first king. He was later overthrown by David, who was succeeded by his son Solomon.

To many latter political commentators, *Samuel*'s story of the creation of the Hebrew monarchy was evidence that kings receive their power from the people, and therefore may rule only by consent. The American patriot writer Thomas Paine went further. To him, "That the Almighty hath here entered his protest against monarchical government is true, or the scripture is false." Thomas Paine, Common Sense 39 (1776) (Ch. 3.F.6).

Every warning that Samuel issued about monarchy came to pass. Kings David and Solomon built large standing armies and turned many nations in the region into tributaries. But the Hebrews suffered from centralization of political power, labor conscription, and oppressive taxation. After Solomon died and was succeeded by Rehoboam (928-911 B.C.), the people petitioned for easing of their burdens. The new king's older advisors suggested that he lie to the public, but the younger ones urged him to be frank. "And the king answered the people roughly . . . saying, My father made your yoke heavy, and I will add to your yoke: my father also chastised you with whips, but I will chastise you with scorpions." 1 *Kings* 12:13-14.

As a result, Judah, the southern part of the kingdom, successfully revolted. Thereafter, the Hebrew kingdom was split between a southern kingdom of Judah and a northern kingdom of Israel. The consequences of disunity eventually led to Israel being conquered by the Assyrians, with the ten tribes of the northern kingdom deported and mostly disappearing from history. The small southern kingdom of Judah hung on longer, until it was conquered by Babylon around 587 B.C. The Jewish upper class was carried away to Babylon.

Later, after Babylon was conquered by the Persians, Persian King Cyrus allowed some of the exiled Jews to return in 538 B.C. Cyrus knew that the Jews's martial vigor would help them maintain their hold on Judah. He also knew that a small Jewish settlement would not be strong enough to seek independence; surrounded by hostile neighbors, it would be dependent on Persia. As the Jews rebuilt their Temple and the wall around Jerusalem, half of them did the construction work while the other half stood armed guard. *Nehemiah* 4:16-18.

Two centuries later, the Persian Empire was swept away by Alexander the Great. After he died, his empire split into four parts. The Jews were initially part of the Ptolemaic Empire (based in Egypt), and then the Seleucid Empire (based in Syria and Iraq). For a long time, the empires extracted tribute and otherwise left the Jews to govern themselves. But when the Seleucids outlawed the Jewish religion and attempted to force all Jews to adopt Greek culture, rural Jews began a successful revolt that won national independence, in the second century B.C. The story is told in the First and Second *Books of Maccabees*.

Although Rome had been an early ally of the Jewish rebels, the Romans eventually took over the Jewish kingdom, turning it into a client state in 63 B.C. and assuming direct rule in 6 A.D. The Jewish homeland proved to be an especially troublesome addition to the Roman Empire, with major revolts in

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57-50 B.C., 66-73 A.D. (culminating in the siege of the Masada fortress), 115 A.D., and 132-35 A.D. The last one needed 12 legions (about 60,000 soldiers, plus support personnel) to suppress. Determining that Judea, the central part of modern Israel, could never be in secure imperial control as long as so many Jews were there, the Romans exiled most of them, creating the diaspora. In the area near Jerusalem, only a small Jewish population remained.

In sum, Jewish political history embodied many of the eternally difficult questions on the organization of military force. Disunity—whether in the ancient Hebrew confederation, or during the various anti-Roman revolts—is often fatal. Yet centralized unity can sometimes lead to government as oppressive as that of a harsh foreign conqueror. Standing armies may be superior to militias for national defense and are almost always superior for foreign conquest. A government with a powerful standing army can also endanger the lives, liberty, and property of the people whom it is supposed to protect.

NOTES & QUESTIONS

1. Like the ancient Hebrews, many other societies have believed that a distinctive feature of a free man is possession of arms, and a distinctive feature of a slave is to be disarmed. What accounts for this view? Does this distinction make sense today?

2. *Thou shalt not kill.* In a common English translation, the Sixth Commandment states: "Thou shalt not kill." Many scholars, however, argue that "Thou shalt not murder" more closely matches the original Hebrew. The Hebrew Bible has numerous mandates for killing: in defense of self or others, in warfare, and in the dozens of capital offenses in the Mosaic law. *See* David B. Kopel, The Morality of Self-Defense and Military Action 13-15, 23-25 (2017). In the views of Algernon Sidney and many other readers, the Bible also sanctions tyrannicide. How can all this be squared with the Sixth Commandment?

3. *Parallels with Roman law.* One of the greatest Jewish legal scholars of antiquity was Philo of Alexandria (approx. 20 B.C.-50 A.D.), who wrote about the Jewish law in Alexandria, Egypt, during the period when Egypt and Israel were both under Roman rule. Much of Philo's treatise aimed to show that Jewish law from the Bible was consistent with Roman law. Philo argued that the Mosaic provision about killing robbers conformed to the Roman law of the Twelve Tables (*supra* Section B.2.a), because every night robber was a potential murderer. The burglar would be armed, at the least, with iron house-breaking tools, which could be used as weapons. Because assistance from the police or neighbors would be unlikely during the night, the victim was allowed immediate resort to deadly force. Philo of Alexandria, *The Special Laws, IV*, *in* The Works of Philo 616-17 (C.D. Yonge trans., 1993) ("Concerning Housebreakers"). Modern scholarship about the practices at Philo's time suggests that use of deadly force during a day-time burglary would be legal if a victim in mortal peril called for help and none arrived. Edwin

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R. Goodenough, The Jurisprudence of the Jewish Courts of Egypt: Legal Administration by the Jews Under the Early Roman Empire as Described by Philo Judaeaus 154-55, 231-32 (The Lawbook Exchange 2002) (1929). (Philo Judaeaus is better known as Philo of Alexandria.)

4. *Day-time burglaries. Exodus* says that the burglar may not be killed "[i]f the sun be risen upon him." Jewish commentators have unanimously interpreted the "sun" language metaphorically: If the circumstances indicated that the burglar posed a violent threat to the victims in the home, the burglar could be slain regardless of the time of day. Conversely, if it were clear that the burglar was only taking property, and would not attack the people in the home, even if they interfered with the burglary, the burglar could not be slain. In modern legal theory, this form of interpretation is called "purposivism." That is, the interpreter seeks to fulfill the purpose behind the particular statute or constitutional provision. Purposivism has sometimes been used by the U.S. Supreme Court, and is especially favored by Justice Breyer. Purposivism is quite different from reading the statute literally, which would make the legality of killing a burglar depend on the hour of the day, not on the homeowner's perception of the burglar's intentions. Is purposivism is a legitimate interpretive method for the burglary laws in *Exodus*? For modern American statutes and constitutions? Can different rules of interpretation be appropriate for different sources?

5. *Spatial restrictions on self-defense against burglars.* The great Jewish legal scholar Maimonides (Rabbi Moshe Ben Maimon, a/k/a "Rambam") (1153-1204) elaborated on when it was permissible to kill a burglar:

> 8. [The license mentioned above] applies to a thief caught breaking in or one caught on a person's roof, courtyard or enclosed area, whether during the day or during the night. . . .
> 12. Similarly, a person who breaks into a garden, a field, a pen or a corral may not be killed, for the prevailing assumption is that he came merely [to steal] money, for generally the owners are not found in such places."

James Townley, The Reasons of the Laws of Moses from the "More Nevochim" of Maimonides 226-28 (The Lawbook Exchange 2001) (1827). Are Maimonides's spatial distinctions sensible? Many American states recognize greater self-defense rights (such as a stronger presumption in favor of the use of deadly force in self-defense) in the home than in other places. Some statutes distinguish the home from one's yard, porch, or outbuildings. Are the distinctions compelling?

6. A 1998 law in Israel, derived from the Mosaic law, mandates that a person aid another who is in immediate danger if aid can be rendered without danger to the rescuer. A few American states have similar laws, often called Good Samaritan laws. *See, e.g.*, Victor D. López & Eugene T. Maccarrone, *Should Emergency Good Deeds Go Unpunished? An Analysis of the Good Samaritan Statutes of the United States*, 45 Rutgers L. Rec. 105 (2018) (also discussing statutes

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providing civil immunity to various types of rescuers); Thomas Lateano, Silvina Ituarte & Garth Davies, *Does the Law Encourage or Hinder Bystander Intervention? An Analysis of Good Samaritan Laws*, 44 Crim. L. Bull. art. 4 (Fall 2008); *cf.* David C. Biggs, *"The Good Samaritan Is Packing": An Overview of the Broadened Duty to Aid Your Fellowman, with the Modern Desire to Possess Concealed Weapons*, 22 U. Dayton. L. Rev. 225 (1997) (arguing that armed assistance to strangers is too dangerous). Is it appropriate to mandate that a person come to the aid of others? That she defend herself against certain types of attacks? Does it depend on the particular type of society?

7. *Arms-making controls.* As the Philistine conquerors of the Hebrews understood, governments intending to prevent subjects from possessing arms must do more than outlaw arms themselves; they must also find a way to prevent people from making their own arms. Similarly, during the Tokugawa period in Japan, starting in the seventeenth century, the government was able to impose very restrictive controls on the small number of gunsmiths in the nation, thereby ensuring that the almost total prohibition on firearms would be effective. David B. Kopel, The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies? 29-33 (1992).

Today, the manufacture of a working firearm is not particularly difficult. People with access to the machine tools found in many homes make firearms, as do West African villagers with considerably inferior tools. *See, e.g.*, Mark A. Tallman, Ghost Guns: Hobbyists, Hackers, and the Homemade Weapons Revolution (forthcoming 2020); Charles Chandler, *Gun-Making as a Cottage Industry*, 3 J. Firearms & Pub. Pol'y 155 (1990); Emanuel Addo Sowatey, *Small Arms Proliferation and Regional Security in West Africa: The Ghanian Case*, *in* 1 News from the Nordic Afr. Inst. 6 (2005) (despite colonial and post-colonial arms bans, a gunsmith in Ghana can make several guns per day; some make working copies of the AK-47); online Ch. 14.A.3.c (more on Ghana manufacture). Developments in 3D printing add a new angle to an old issue. Under what circumstances could a government attempting to impose arms prohibition succeed?

8. *Further reading*: Flavius Josephus, War of the Jews (78 A.D.); Moses Maimonides, Mishneh Torah: Hilchot Melachim U'Milchamoteihem (The Laws of Kings and Their Wars) (Eliyahu Touger trans., 1987); Geoffrey Miller, The Ways of a King: Legal and Political Ideas in the Bible (2011) (the Bible suggests that although monarchy is flawed, it is preferable to anarchy or loose confederation—provided that the monarch obeys the law and is constrained by checks and balances); Joshua Berman, Created Equal: How the Bible Broke with Ancient Political Thought (2008) (the first five books of the Bible created a society and government much more egalitarian than were the surrounding nations of the ancient Near East); Robert Eisen, The Peace and Violence of Judaism: From the Bible to Modern Zionism (2011); Derek J. Penslar, Jews and the Military (2013); David B. Kopel, The Morality of Self-Defense and Military Action: The Judeo-Christian Tradition (2017); David B. Kopel, *The Torah and Self-Defense*, 109 Penn St. L. Rev. 17 (2004). The Holocaust is covered in online Chapters 14.C.2 and 14.D.2.

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2. Early Christian Thought

The New Testament, which is the story of early Christianity, covers a much shorter period of time than does the Old Testament, and pays much less attention to political history. However, two passages are often cited in discussions about the legitimacy of weapons. Another passage has been important to Western political thinking about the legitimacy of resistance to government.

a. The Sermon on the Mount

These are excerpts from the most famous sermon by Jesus.

> You have heard that it was said of them of old time, You shall not kill; and whosoever shall kill shall be in danger of the judgment: But I say unto you, That whosoever is angry with his brother without a cause shall be in danger of the judgment: and whosoever shall say to his brother, Raca,[33] shall be in danger of the council: but whosoever shall say, You fool, shall be in danger of hell fire. . . .
>
> You have heard that it was said by them of old time, You shall not commit adultery: But I say unto you, That whosoever looks on a woman to lust after her has committed adultery with her already in his heart. And if your right eye offend you, pluck it out, and cast it from you: for it is profitable for you that one of your members should perish, and not that your whole body should be cast into hell. And if your right hand offend you, cut it off, and cast it from you: for it is profitable for you that one of your members should perish, and not that your whole body should be cast into hell. . . .
>
> You have heard that it has been said, An eye for an eye, and a tooth for a tooth: But I say unto you, That you resist not evil: but whosoever shall smite you on your right cheek, turn to him the other also. And if any man will sue you at the law, and take away your coat, let him have your cloak also. And whosoever shall compel you to go a mile, go with him two. Give to him that asks you, and from him that would borrow of you turn you not away. You have heard that it has been said, You shall love your neighbor, and hate your enemy. But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you, and pray for those who despitefully use you, and persecute you. . . . Be you therefore perfect, just as your Father which is in heaven is perfect. . . .

Matthew 5:21, 27-30, 38-43, 48 (King James Version).

NOTES & QUESTIONS

1. Which of the sayings in the Sermon on the Mount appear to be meant to be taken literally?

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33. [A contemptuous word meaning "worthless." Derived from the root of "to spit."—EDS.]

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2. In the context of the times, a slap on the cheek was a serious personal insult. Can the example be extrapolated to a general admonition against self-defense?

3. Does "resist not evil" mean that a person should not resist evil? In what ways, if any, might resistance to evil be legitimate?

4. The great Russian novelist Leo Tolstoy was a pacifist who believed that all government is evil, because all government depends on force. His favorite quote was "Resist not evil." *See* Leo Tolstoy, The Kingdom of God Is Within You (Constance Garnett trans., 1894); Leo Tolstoy, My Religion: What I Believe (Huntington Smith trans., White Crow Books, 2009) (1884). He opposed revolution against bad government, because "[a]ll the revolutions in history are only examples of the more wicked seizing power and oppressing the good." Tolstoy, Kingdom of God, *supra* at 182. Writing in 1894, Tolstoy predicted that in the near future there would be mass global conversion to his form of pacifist Christianity that would bring global peace and happiness. Before that tipping point of global conversion, Tolstoy anticipated what would happen to pacifists, and he put the prediction in capital letters: "THE WICKED WILL ALWAYS DOMINATE THE GOOD, AND WILL ALWAYS OPPRESS THEM. . . . To terrify men with the prospect of the wicked dominating the good is impossible, for that is just what has always been, and is now, and cannot but be." *Id.* In other words, do not use force to resist evil, because evil will always win, until the world converts. Was Tolstoy right?

b. The Final Instructions to the Apostles

According to the New Testament, at the Last Supper, Jesus gave his final instructions to the apostles, and revoked a previous order about not carrying useful items. He asked, "When I sent you out with no moneybag or knapsack or sandals, did you lack anything?" "Nothing," the apostles replied. Jesus continued:

> But now, let the one who has a moneybag take it, and likewise a knapsack. And let the one who has no sword sell his cloak and buy one. For I tell you that this scripture must be fulfilled in me: And he was numbered with the transgressors. For what is written about me has its fulfillment.

The apostles responded, "Look, Lord, here are two swords." Jesus said to them, "It is enough." *Luke* 22:35-38 (English Standard Version).

Although the New Testament does not explicitly say so, the sword-carrying by 2 of the 12 apostles was apparently illegal under Roman law, since few Jews at the time were Roman citizens.[34]

34. Edwin R. Goodenough, The Jurisprudence of the Jewish Courts of Egypt: Legal Administration by the Jews Under the Early Roman Empire as Described by Philo Judaeaus

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NOTES & QUESTIONS

1. What should be drawn from Jesus's instruction that the apostles should carry swords?

2. In medieval Christian thought, the self-defense implication of carrying swords was considered obvious. But there was a great debate about the metaphorical implication of the "two swords." One sword was considered to be the power of the civil government, and the other sword to be the power of the church. Philosophers argued at length about which sword was the greater one—that is, whether the civil government should rule over the church, or the church should rule over the civil government. Within the context of the Two Swords debate, the idea of each side leaving the other alone was not much considered.

c. The Arrest of Jesus

Just a few hours after Jesus had given the above instructions, Roman soldiers came to arrest him in the Garden of Gethsemane. Peter, whom Jesus had appointed as the leader of the disciples, rushed to defend Jesus, drew his sword, and cut off the ear of a Roman soldier. Jesus healed the soldier's ear by touching it. He said to Peter: "Put up again thy sword into its place: for all they that take the sword shall perish with the sword," or "Put up thy sword into the sheath: the cup which my Father has given me, shall I not drink it?" *Matthew* 26:52; *John* 18:11 (King James Version).

NOTES & QUESTIONS

1. The instruction to Peter to put his sword away is one of the most common proof-texts for Christian pacifists. Nonpacifists argue that when Peter put his sword back in its sheath, he was no more disarmed than a man who puts his handgun back into its holster. Which interpretation do you think is more persuasive?

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151 (The Lawbook Exchange 2002) (1929). The weapons prohibition was enacted sometime between 35 B.C. and 5 A.D. *Id.*

The apostle Matthew was a tax collector (*Matthew* 10:3). He might therefore have been allowed legally to carry a sword. One of the swords presumably belonged to Peter (whom Jesus has appointed as leader of the apostles, making him the first Pope in some interpretations). Peter unsheathed his sword to use it against a Roman soldier a few hours after the Last Supper. In the first century A.D., the typical Roman sword was the Pompeii type, whose blade was only 16 inches. *See* M.C. Bishop & J.C.N. Coulston, Roman Military Equipment: From the Punic Wars to the Fall of Rome 78-82 (2d ed. 2006). The form of the disciples' presentation of the swords ("Look") indicates that the swords had been concealed—mostly likely, they were short swords hidden underneath loose clothing.

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d. Paul's Letter to the Romans

Next to the Gospels (four biographies of Jesus), the most influential book of the New Testament is Paul's letter to the Christians in Rome. Regarding submission to government, Paul wrote in *Romans* 13:1-7 (King James Version):

> Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation. For rulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? do that which is good, and thou shalt have praise of the same: For he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil. Wherefore ye must needs be subject, not only for wrath, but also for conscience sake. For this cause pay ye tribute also: for they are God's ministers, attending continually upon this very thing. Render therefore to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honour to whom honour.

To the same effect is 1 *Peter* 2:11-25.

Ever since *Romans* 13 was written, Christians have debated its meaning about their duties of submission to government. According to many, no matter how bad the government, Christians must submit. In contrast, the second-century theologian Irenaeus interpreted Paul to mean that good government comes from God, whereas tyrannical or unjust government comes from the devil. Irenaeus, *Against Heresies* (also known as "A Refutation and Subversion of Knowledge falsely so called"), in 1 The Ante-Nicene Fathers: Translations of the Writings of the Fathers Down to A.D. 325, bk. 5, ch. 24, ¶¶ 1-3 (Alexander Roberts & James Donaldson eds., 1885). During the last millennium, this view became widely accepted, starting with religious dissidents who refused to conform to governments' religious edicts.

The Massachusetts Reverend Jonathan Mayhew's famous 1750 sermon *A Discourse Concerning Unlimited Submission and Non-Resistance to the Higher Powers* (Ch. 3.C.3) developed the latter view in depth. According to Mayhew—and to the Americans whom he convinced that challenging King George III was morally legitimate—the praise that St. Paul offers to rulers for their good works necessarily means that Christians owe obedience only to "*good rulers*, such as are, in the exercise of their office and power, benefactors to society." By the time of the American Revolution, the mainstream of American Christian opinion had swung so decisively in favor of the analysis favored by Mayhew and others that the American Revolution was incited and fought as a holy war to protect God-given liberty. *See* Ch.3.C.3. "The basic fact is that the Revolution had been preached to the masses as a religious revival, and had the astonishing fortune to succeed." Perry Miller, Nature's Nation 110 (1967); *cf.* Harry S. Stout, The New England Soul: Preaching and Religious Culture in Colonial New England 311 (1988) ("New England's revolution would be nothing less than America's sermon to the world.").

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e. Other Early Christian Writings

It is sometimes asserted that early Christians were uniformly pacifist. But there is extensive evidence of Christians serving in the Roman army, especially after Roman citizenship was extended empire-wide in 212 A.D. Moreover, the Biblical history of the earliest church, the *Book of Acts,* contains stories of Roman soldiers who converted to Christianity, and who continued to serve as soldiers.

Many early Christians were indeed complete pacifists. *The Didache,* also known as *Teaching of the Twelve Apostles,* is an early set of instructions for gentile converts, perhaps dating from the latter part of the first century or the first half of early second century. Near the beginning of a restatement of the Sermon on the Mount, *The Didache* instructs: "[W]hen anyone robs you of your property, demand no return. You really cannot do it. Give to anyone that asks you, and demand no return." *The Didache, in* 6 Ancient Christian Writers: The Didache 15 (James A. Kleist trans. & annot., 1948).

Writing in the latter part of the second century, Athenagoras was one of the first Christian writers to blend Christian doctrine with the ideas of the Greek philosopher Plato. He wrote: "[W]e have learned, not only not to return blow for blow, nor to go to law with those who plunder and rob us, but to those who smite us on one side of the face to offer the other side also, and to those who take away our coat to give likewise our cloak." Athenagoras, A Plea for the Christians, *in* The Writings of Justin Martyr and Athenagoras (Marcus Dods et al. trans., 1868), *in* 2 Ante-Nicene Christian Library: Translations of the Writings of the Fathers Down to A.D. 325, at 376 (Alexander Roberts & James Donaldson eds., 1868).

Among the influential intellectuals of the first centuries of Christianity, nonpacifists included Irenaeus and Clement of Alexandria. Pacifists included Minucius Felix, Origen, St. Cyprian, and St. Martin of Tours. *See* Kopel, The Morality of Self-Defense, *supra*, at 173-88. Other than the authors of the New Testament, the most influential Christian writer was St. Augustine of Hippo. Although he took varying positions, he ultimately came to the view that Christian participation in Just War was legitimate. While laws allowing self-defense were just, Christians should adhere to a higher morality, and refrain from killing in self-defense. *Id.* at 199-201; Augustine, Free Choice of the Will (*De Libero Arbitrio*) bk. 1, §§ 5, 8-9 (Thomas Williams trans., 1993). As discussed *supra*, Augustine thought that rapacious governments were morally no different from common robbers or pirates. Section A.1 Note 7.

NOTES & QUESTIONS

1. Athenagoras extended the New Testament injunction that Christians should not use secular lawsuits to settle their disputes with each other. 1 *Corinthians* 6:1-8. To what extent, if any, is asking a court to criminally prosecute someone, or asking a court to settle a civil dispute, akin to participation in violence?

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2. *Further reading* on early Christian views on the use of force: C. John Cadoux, The Early Christian Attitude to War (Seabury Press 1982) (1919) (taking Origen's view that Christians should be pacifists personally, but they can hope and pray for the success of soldiers in just wars); Louis J. Swift, The Early Christians on War and Military Service (1983) (the best short source for original materials); David B. Kopel, The Morality of Self-Defense and Military Action (2017). Full annotated translations of early Christian writers are available at the Christian Classics Ethereal Library, www.ccel.org.

3. Medieval Christian Thought

The Dark Ages in the West are commonly dated from the fall of the Western Roman Empire in the fifth century A.D. until the early second millennium. The general Christian view of the time was that, pursuant to *Romans* 13, everyone must submit to government, no matter how oppressive.

A leading contrary voice was Manegold of Lautenbach, a scholar at a monastery destroyed by the German Emperor Henry IV. Writing in 1085, Manegold analogized a cruel tyrant to a disobedient swineherd who stole his master's pigs, and who could be removed from his job by the master. A.J. Carlyle & R.W. Carlyle, Medieval Political Theory in the West 164 (1950) (translating and paraphrasing Manegold's Latin text in *Liber ad Gebehardum*). According to Manegold:

> [I]f the king ceases to govern the kingdom, and begins to act as a tyrant, to destroy justice, to overthrow peace, and to break his faith, the man who has taken the oath is free from it, and the people are entitled to depose the king and to set up another, inasmuch as he has broken the principle upon which their mutual obligation depended.

In the "Little Renaissance" that began in the twelfth century, one of the most important events was the Western rediscovery of Aristotle and of the *Corpus Juris* (*supra* Sections B.1.c, B.2.e). The University of Bologna, Italy, was the first Western academic institution to study the *Corpus*. Almost as soon as the *Corpus Juris* was rediscovered, and for centuries afterward, the greatest activity of legal scholars was studying and writing commentaries on it. The commentaries were usually written *Talmud*-style, in the form of marginal annotations. The *Corpus Juris* led to the University of Bologna creating the first law school that the Western world had known since the fall of Rome.

Because the authors of the *Corpus Juris* had written down all the legal rules and decisions they could find, and simply organized the rules and decisions by subject matter, there appeared to be many legal standards that were contradicted by other legal standards. Using techniques that are the intellectual tools of every good lawyer, scholars at the University of Bologna and elsewhere looked for ways to reconcile the seemingly inconsistent statements in Justinian's text. "Glossolators" provided a gloss—an explanatory commentary in the wide margins of the printed edition of Justinian's *Corpus Juris*—that explicated and reconciled the various rules. The method of scholarship was known as Scholasticism.

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a. Gratian and Natural Law

Around 1140 A.D., Gratian of Bologna was the first scholar to bring the Scholastic approach to canon law (church law). The formal title was *Concordia discordantium canonum* (Harmonization of discordant canons), but it was also known as the *Decretum Gratiani* or just *Decretum*. The *Decretum* (including later commentaries on the *Dectrum* by other authors) was the definitive consolidation, harmonization, and analysis of all church laws since the time of the apostles. The *Decretum* was taught in law schools, and until 1917 served as the first volume of the *Corpus Juris Canonici,* the law of the Roman Catholic Church.

Gratian began with a concise expression of natural law:

> Natural law is common to all nations because it exists everywhere through natural instinct, not because of any enactment.
>
> For example: the union of men and women, the succession and rearing of children, the common possession of all things, the identical liberty of all, or the acquisition of things which are taken from the heavens, earth, or sea, as well as the return of a thing deposited or of money entrusted to one, and the repelling of violence by force. This, and everything similar, is never regarded as unjust but is held to be natural and equitable.

Gratian, The Treatise on Law (Decretum Dd. 1-20) with the Ordinary Gloss Pt. 1 D.1 p.2 c.7 (Augustine Thompson & James Gordley trans., 1993).

NOTES & QUESTIONS

1. Do you think there is a "natural law," in the sense that Gratian used the term? If so, is self-defense part of it?

2. **CQ:** Compare Manegold's views with the American Declaration of Independence: "That to secure these rights, Governments are instituted among Men. . . . That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government. . . ." Do you agree with Manegold and Jefferson that any legitimate ruler is necessarily contractually bound to protect the public good? That the people necessarily have a right to remove their rulers, by force if necessary?

b. John of Salisbury's Policraticus

A cosmopolitan and well-educated English bishop, John of Salisbury, wrote the first serious new book of political science published in the West since the fourth century. It was perhaps the most influential book written since the Byzantine Emperor Justinian's legal treatise *Corpus Juris* had been compiled six centuries before, and it remained influential throughout the Middle Ages. *Policraticus* (Statesman's Book), published around 1159, was for the next hundred years considered the most important book on government.

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Thomas Aquinas, whose work later displaced Salisbury's, consciously built on Salisbury's foundation.

Policraticus argued that intermediate magistrates, such as local governors, had a duty to lead forcible resistance, if necessary, against serious abuses by the highest magistrate, such as the king. Not since the Cicero had any Western writer provided a detailed theory of tyrannicide. Salisbury wrote:

> [I]t is not only permitted, but it is also equitable and just to slay tyrants. For he who receives the sword deserves to perish by the sword.
>
> But "receives" is to be understood to pertain to he who has rashly usurped that which is not his, not to he who receives what he uses from the power of God. He who receives power from God serves the laws and is the slave of justice and right. He who usurps power suppresses justice and places the laws beneath his will. Therefore, justice is deservedly armed against those who disarm the law, and the public power treats harshly those who endeavour to put aside the public hand. And, although there are many forms of high treason, none of them is so serious as that which is executed against the body of justice itself. Tyranny is, therefore, not only a public crime, but if this can happen, it is more than public. For if all prosecutors may be allowed in the case of high treason, how much more are they allowed when there is oppression of laws which should themselves command emperors? Surely no one will avenge a public enemy, and whoever does not prosecute him transgresses against himself and against the whole body of the earthly republic. . . .

John of Salisbury, Policraticus 25 (Cary J. Nederman ed. & trans., Cambridge Univ. Press 1990) (circa 1159).

> As the image of the deity, the prince is to be loved, venerated and respected; the tyrant, as the image of depravity, is for the most part even to be killed. . . . [I]t is just for public tyrants to be killed and the people to be liberated for obedience to God.

Id. at 191, 207.

NOTES & QUESTIONS

1. **CQ:** Compare John of Salisbury's views with the motto that Thomas Jefferson and Benjamin Franklin proposed placing on the Great Seal of the United States: "Rebellion to tyrants is obedience to God." The words were the motto of John Bradshaw (1602-1659), the lawyer who served as President of the Parliamentary Commission that sentenced British King Charles I to death. (Chs. 2.H.2.a, 3.C.5 Note 5).

2. The theory in *Policraticus* of "intermediate magistrates" is a check on the use of forcible resistance. It means that self-appointed individuals (in the worst case, people like Timothy McVeigh or Charles Manson) have no authority to try to start a revolution. Rather, a revolution may only be initiated by "intermediate magistrates," such as local governments. **CQ:** Was the American Revolution consistent with this theory? In *Federalist* 46, James Madison described resistance to a hypothetically tyrannical federal government as being led by the states (Ch. 4.C.1). Is Salisbury's view merely an invitation for *coup d'états*?

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c. *Thomas Aquinas*

The apex of medieval thought was Saint Thomas Aquinas's *Summa Theologica,* a massive treatise on numerous matters of ethics and theology.

Thomas Aquinas, Summa Theologica

The "Summa Theologica" of St. Thomas Aquinas: Part II. (Second Part): Second Number 195, 208, 209-10 (Fathers of the English Dominican Province trans., Benziger Bros. 1918)

QUESTION LXIV.

OF THE VICES OPPOSED TO COMMUTATIVE JUSTICE, AND, IN THE FIRST PLACE, OF MURDER . . .

SEVENTH ARTICLE.

WHETHER IT IS LAWFUL TO KILL A MAN IN SELF-DEFENCE? . . .

. . . It is written (Exod. xxii. 2): "*If (a thief) be found breaking into a house or undermining it, and be wounded so as to die; he that slew him shall not be guilty of blood.*" Now it is much more lawful to defend one's life than one's house. Therefore neither is a man guilty of murder if he kill another in defence of his own life.

I answer that, Nothing hinders one act from having two effects, only one of which is intended, while the other is beside the intention. Now moral acts take their species according to what is intended, and not according to what is beside the intention, since this is accidental as explained above. . . . Accordingly the act of self-defence may have two effects, one is the saving of one's life, the other is the slaying of the aggressor. Therefore this act, since one's intention is to save one's own life, is not unlawful, Seeing that it is natural to everything to keep itself in *being,* as far as possible. And yet, though proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end. Wherefore if a man, in self-defence, uses more than necessary violence, it will be unlawful: whereas if he repel force with moderation his defence will be lawful, because according to the jurists, *it is lawful to repel force by force, provided one does not exceed the limits of a blameless defence.* Nor is it necessary for salvation that a man omit the act of moderate self-defence in order to avoid killing the other man, since one is bound to take more care of one's own life than of another's. But as it is unlawful to take a man's life, except for the public authority acting for the common good, . . . it is not lawful for a man to intend killing a man in self-defence, except for such as have public authority, who while intending to kill a man in self-defence, refer this to the public good, as in the case of a soldier fighting against the foe, and in the minister of the judge struggling with robbers, although even these sin if they be moved by private animosity.

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Another topic covered by the *Summa Theologica* was resistance to government.

Thomas Aquinas, Summa Theologica

The "Summa Theologica" of St. Thomas Aquinas: Part II. (Second Part): First Number 515, 517-18 (Fathers of the English Dominican Province trans., Benziger Bros. 1917)

QUESTION XLII.

OF SEDITION . . .

Second Article.

WHETHER SEDITION IS ALWAYS A MORTAL SIN? . . .

. . . [S]edition is contrary to the unity of the multitude, viz. the people of a city or kingdom. . . . [S]edition is opposed to the unity of law and common good: whence it follows manifestly that sedition is opposed to justice and the common good. Therefore by reason of its genus it is a mortal sin,[35] and its gravity will be all the greater according as the common good which it assails surpasses the private good which is assailed by strife.

Accordingly the sin of sedition is first and chiefly in its authors, who sin most grievously; and secondly it is in those who are led by them to disturb the common good. Those, however, who defend the common good, and withstand the seditious party, are not themselves seditious, even as neither is a man to be called quarrelsome because he defends himself. . . .

. . . A tyrannical government is not just, because it is directed, not to the common good, but to the private good of the ruler, as the Philosopher [Aristotle] states (Polit. iii, 5; Ethic. viii). Consequently there is no sedition in disturbing a government of this kind, unless indeed the tyrant's rule be disturbed so inordinately, that his subjects suffer greater harm from the consequent disturbance than from the tyrant's government. Indeed it is the tyrant rather that is guilty of sedition, since he encourages discord and sedition among his subjects, that he may lord over them more securely; for this is tyranny, being conducive to the private good of the ruler, and to the injury of the multitude.

NOTES & QUESTIONS

1. Note how Aquinas's theory of double effect resembles Cicero's speech in defense of Milo (*supra* Section B.2.c): "[T]he man who had used a weapon with the object of defending himself would be decided not to have had his

35. [A mortal sin is an especially serious sin, with grave danger to the soul. *Contrast* "venial sin."—Eds.]

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weapon about him with the object of killing a man." The Aquinas theory of double effect has been used to analyze many ethical issues. Is it persuasive?

2. **CQ:** Like Thomas Aquinas and John of Salisbury, U.S. Supreme Court Justice Joseph Story suggested that the forceful removal of a tyrant would be a legitimate way to restore constitutional law and order: "The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. . . . The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and it will generally, even if these are successful in the first instance, enable the people to resist and triumph over them. . . ." Joseph Story, A Familiar Exposition of the Constitution of the United States 264-65 (1842) (Ch. 5.F.2.b). What is your assessment of the claims by Salisbury, Aquinas, and Story that overthrowing a perceived tyrant by force can lead to the restoration of a society of ordered liberty? What about Leo Tolstoy's point that any use of force just replaces a bad government with a worse one?

3. *Further reading*: The Cambridge History of Medieval Political Thought (J.H. Burns ed., 1988); Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition (1983) (how the eleventh-century papal revolution against secular control, especially against the Holy Roman Emperor, whose territory included much of Italy and Germany, permanently changed Western political thought); Just Wars, Holy Wars, and Jihads: Christian, Jewish, and Muslim Encounters and Exchanges (Sohail H. Hashmi ed., 2012); The Ethics of War: Shared Problems in Different Traditions (Richard Sorabji & David Rodin eds., 2006); David B. Kopel, *The Catholic Second Amendment*, 29 Hamline L. Rev. 519 (2006).

D. Second-Millennium Europe

1. Italian Influence

From time immemorial, the Swiss cantons maintained a citizen militia. The crossbow was the symbolic national weapon, and William Tell the exemplar of civic virtue. With the militia, the Swiss cantons fought for and secured their independence from nearby empires. In the Renaissance and thereafter, Italian city-states followed the Swiss example. They mobilized their militias and won independence from various empires.

The pro-militia Italian writers were heavily influenced by Aristotle (*supra* Section B.1.c), who believed that citizenship and the possession of arms were coextensive. During the seventeenth century, militia advocates in England and Scotland carefully studied the Italian writers. The foundation of militia ideology

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was belief in active citizenship: that free states should be defended by the armed citizens of those states, that participation in the militia was the embodiment of virtuous active citizenship, and that reliance on professionals and mercenaries to defend a state was expensive, dangerous, and degrading to the citizenry's character.

For example, Leonardo Bruni, writing in the early fifteenth century, praised the city whose inhabitants "acted by themselves without the help of any foreign auxiliaries, fighting on their own behalf and contending as much as possible for glory and dignity." Unlike foreign mercenaries, native militia "fighting for the love of their city" would be fearless. 1 Quentin Skinner, The Foundations of Modern Political Thought: The Renaissance 76-77 (2002).

In Italy, reliance on militias was sometimes successful, and sometimes not. It was always in tension with the aristocracy's fear of the people being armed. *See* J.G.A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition (2d ed. 2003).

a. Machiavelli

Among the Italian militia authors, the one who is best known in the twenty-first century, and who was by far the most influential in Great Britain, was Niccolo Machiavelli. Here, he tells the story of how the ancient Roman Republic used the militia for self-defense, and argues that modern Italian city-states should do the same:

Niccolo Machiavelli, Discourses on the First Decade of Titus Livius
Bk. 2, ch. 30 (Ninian Hill Thomson trans., 1883)

Now, one of the tests whereby to gauge the strength of any State, is to observe on what terms it lives with its neighbours: for when it so carries itself that, to secure its friendship, its neighbours pay it tribute, this is a sure sign of its strength, but when its neighbours, though of less reputation, receive payments from it, this is a clear proof of its weakness. . . . And, to begin with our own republic of Florence, we know that in times past, when she was at the height of her renown, there was never a lordling of Romagna who had not a subsidy from her, to say nothing of what she paid to the Perugians, to the Castellans, and to all her other neighbours. But had our city been armed and strong, the direct contrary would have been the case, for, to obtain her protection, all would have poured money into her lap, not seeking to sell their friendship but to purchase hers.

Nor are the Florentines the only people who have lived on this dishonourable footing. The Venetians have done the same, nay, the King of France himself, for all his great dominions, lives tributary to the Swiss and to the King of England; and this because the French king and the others named, with a view to escape dangers rather imaginary than real, have disarmed their subjects; seeking to reap a present gain by wringing money from them, rather than follow a course which would secure their own safety and the lasting welfare of

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their country. Which ill-practices of theirs, though they quiet things for a time, must in the end exhaust their resources, and give rise in seasons of danger to incurable mischief and disorder. It would be tedious to count up how often in the course of their wars, the Florentines, the Venetians, and the kingdom of France have had to ransom themselves from their enemies, and to submit to an ignominy to which, once only, the Romans were very near being subjected. It would be tedious, too, to recite how many towns have been bought by the Florentines and by the Venetians, which, afterwards, have only been a trouble to them, from their not knowing how to defend with iron what they had won with gold. While the Romans continued free they adhered to this more generous and noble method, but when they came under the emperors, and these, again, began to deteriorate, and to love the shade rather than the sunshine, they also took to purchasing peace, now from the Parthians,[36] now from the Germans, and at other times from other neighbouring nations. And this was the beginning of the decline of their great empire.

Such are the evils that befall when you withhold arms from your subjects; and this course is attended by the still greater disadvantage, that the closer an enemy presses you the weaker he finds you. For any one who follows the evil methods of which I speak, must, in order to support troops whom he thinks can be trusted to keep off his enemies, be very exacting in his dealings with those of his subjects who dwell in the heart of his dominions; since, to widen the interval between himself and his enemies, he must subsidize those princes and peoples who adjoin his frontiers. States maintained on this footing may make a little resistance on their confines; but when these are passed by the enemy no further defence remains. Those who pursue such methods as these seem not to perceive that they are opposed to reason and common sense. For the heart and vital parts of the body, not the extremities, are those which we should keep guarded, since we may live on without the latter, but must die if the former be hurt. But the States of which I speak, leaving the heart undefended, defend only the hands and feet. The mischief which has thus been, and is at this day wrought in Florence is plain enough to see. For so soon as an enemy penetrates within her frontiers, and approaches her heart, all is over with her. . . .

But with the Romans the reverse of all this took place. For the nearer an enemy approached Rome, the more completely he found her armed for resistance; and accordingly we see that on the occasion of Hannibal's invasion of Italy, the Romans, after three defeats, and after the slaughter of so many of their captains and soldiers, were still able, not merely to withstand the invader, but even, in the end, to come off victorious.[37] This we may ascribe to the heart being well guarded, while the extremities were but little heeded. For the strength of Rome rested on the Roman people themselves, on the Latin league, on the confederate towns of Italy, and on her colonies, from all of which sources she

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36. [An empire based in northeastern Iran.—Eds.]

37. [Led by Hannibal, the forces of Carthage—an empire based in Tunisia—invaded Italy during the Second Punic War (218-204 B.C.). The three disasters were presumably Ticinus (driving Romans out of Lombardy), Lake Trasimene (the worse ambush suffered thus far by the Romans), and Cannae (at least 50,000 Romans killed or captured).—Eds.]

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drew so numerous an army, as enabled her to subdue the whole world and to keep it in subjection.

NOTES & QUESTIONS

1. Even if Machiavelli were right about the value of a well-armed militia for Italian city-states, does that mean militias are *necessarily* the best defense of the state? Does the answer depend on the circumstances of the time and place, including the kind of tools and technology available?

2. **CQ:** As described in Chapter 2, the United Kingdom, like the Italian city-states, also had tensions between the need of a well-armed public for national defense, and the aristocracy's worries about an armed populace.

b. Beccaria

The Italian Cesare Beccaria (1738-94) was the founder of the social science of criminology. His masterpiece *On Crimes and Punishments* (*Dei Delitti e Delle Pene*) proposed humanizing reforms of criminal justice, such as the abolition of torture and of secret trials. As soon as the book appeared in English, it was snapped up by John Adams, Thomas Jefferson, and other influential Americans. Jefferson liked Beccaria's passage on gun control so much that he copied it into his "commonplace book" of favorite sayings. The Commonplace Book of Thomas Jefferson: A Repertory of His Ideas on Government 314 (Gilbert Chinard ed., 1926). Two and a half centuries later, the passage is still oft-quoted in the American gun control debate.

Cesare Beccaria, An Essay on Crimes and Punishments
ch. 40, Edward D. Ingraham trans., 1819 (1764)

A principal source of errors and injustice are false ideas of utility. For example: that legislator has false ideas of utility who considers particular more than general conveniencies, . . . who would sacrifice a thousand real advantages to the fear of an imaginary or trifling inconvenience; who would deprive men of the use of fire for fear of their being burnt, and of water for fear of their being drowned; and who knows of no means of preventing evil but by destroying it.

The laws of this nature are those which forbid to wear arms, disarming those only who are not disposed to commit the crime which the laws mean to prevent. Can it be supposed, that those who have the courage to violate the most sacred laws of humanity, and the most important of the code, will respect the less considerable and arbitrary injunctions, the violation of which is so easy, and of so little comparative importance? Does not the execution of this law deprive the subject of that personal liberty, so dear to mankind and to the wise legislator? And does it not subject the innocent to all the disagreeable circumstances that should only fall on the guilty? It certainly makes the situation of the

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assaulted worse, and of the assailants better, and rather encourages than prevents murder, as it requires less courage to attack unarmed than armed persons.

NOTES & QUESTIONS

1. Is Beccaria's analysis sound? Can one accept Beccaria's analysis and still support some gun controls, such as laws forbidding convicted violent criminals from possessing guns, or attempt to prevent such criminals from acquiring guns?

2. French Influence

a. The Huguenot Struggles, and Vindication Against Tyrants

The Reformation in France led many people, especially in southeast France, to become Protestants. Known as *Huguenots*, they were Calvinists, following the theology of reformer John Calvin. They fought against the French Catholic majority in 1562, 1567, 1568, 1572, 1574, 1577, and 1580—the "Wars of Religion." The Huguenots lost every time. Although the French monarchy was sometimes willing to tolerate the Huguenots, the Catholic leadership and intellectuals were not.

In the infamous Saint Bartholomew's Eve massacre in August 1572, Catholic mobs used edged weapons to hack to death thousands of Huguenots in Paris and elsewhere. Ordered by King Charles IX, the massacre radicalized many French Calvinists.

One of them took the pseudonym Marcus Junius Brutus (the Roman Senator who assassinated Julius Caesar). In 1579 he wrote *Vindication Against Tyrants*. Marcus Junius Brutus, Vindiciae, Contra Tyrannos: or, Concerning the Legitimate Power of a Prince over the People, and of the People over a Prince (George Garnett ed., Cambridge Univ. Press 1994) (1579). The book owed a great debt to Catholic thought on the subject of Just Revolution.

Brutus praised the heavenly merit of the Crusaders, and then advanced the lesson of the Crusades, arguing that the French Catholic kings who oppressed Protestants were even worse than the Holy Land Muslims who had oppressed Christians. The Muslims did not deny Christian subjects liberty of religion, but the French government did. Accordingly, resisting the French government was even more meritorious than crusading, which was even more meritorious than martyrdom. *Id.* at 9, 65-66, 178.

Vindiciae presented four basic questions, along with objections and responses to the objections. Like Scholastic works, the book was organized in the form of geometric proofs.

The first question was whether subjects must obey a ruler who commands an act that is contrary to God's law. "No" was the easy answer in Christian tradition. Because disobedience could include passive resistance, the answer did not necessarily imply a right to revolution.

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Question two asked about forceful resistance, in the context of a king breaking God's law and trying to destroy the church. *Vindiciae* argued that resistance was required. However, individuals without the leadership of intermediate magistrates were not supposed to fight against government. Individuals should fight tyrants without title, a mere conqueror who had no claim to legitimacy. *Id.* at 60, 150.

Brutus acknowledged that there were cases where private individuals had fought tyrants who had legitimate title—such as Ehud in the *Book of Judges*, who assassinated Moab's corpulent King Eglon. But these were special cases of direct orders from God, said *Vindiciae*. A person who thinks that he may be the recipient of such orders "should certainly make sure that he is not puffed up with pride, that he is not God to himself, that he does not derive the great spirit for himself from within himself." The failed Second Jewish Revolt in Roman-ruled Israel (*supra* Section C.1.e), and the failed Peasants' War led by Thomas Müntzer "not long ago in Germany" were cited as examples of unwise rebellion led by individuals. *Id.* at 62, 168-69, 172.

Question three went beyond the traditional Lutheran-Calvinist focus on resisting kings who suppressed Protestantism and asked the broader question of the lawfulness of resisting a king who oppressed the people. The general rightfulness of self-defense was obvious: "natural law teaches us to preserve and protect our life and liberty—without which life is scarcely life at all—against all force and injustice. Nature implants this in dogs against wolves . . . the more so in man against himself, if he has become a wolf to himself. So he who disputes whether it is lawful to fight back seems to be fighting nature itself." *Id.* at 149, 172.

Among differences between good and evil rulers were their treatment of weapons and self-defense. A good prince ruled according to law. "He will punish a bandit with death, but should acquit someone who killed a bandit while repelling force with force." *Id.* at 105.

A tyrant used foreign armies to protect himself from his subjects. Then, "[h]e disarms the people, and expels it from fortifications." In contrast, a lawful king relied on the nation's armed people for defense. Thus, the Old Testament kings of Canaan were "truly tyrants" because "they forbade free passage and arms." *Id.* at 145, 160.

Looking at the Old Testament, *Vindiciae* argued that kingly rule was based on covenant with the people. *Id.* at 67-76. If the tyrant could not be otherwise expelled, it would be lawful for the magistrates "to call the people to arms, to conscript an army, and to move against him [the tyrant] with force. . . ." *Id.* at 156.

Finally, question four inquired whether neighboring kings could rescue the subjects of a tyrant. *Vindiciae* answered "yes." Brutus used Cicero (*supra* Section B.2.c) and the parable of the Good Samaritan to prove that failure to come to the aid of an innocent victim was contrary to natural law. *Id.* at 181-83; *Luke* 10:25-37.

Vindiciae won extremely wide influence—printed 12 times in Latin, and translated into English in 1581, 1648, and 1689 (the latter two being revolutionary years in England). Philip Benedict, Christ's Churches Purely Reformed: A Social History of Calvinism 147 (2002); Robert M. Kingdon, *Calvinism and Resistance Theory, 1550-1580, in* The Cambridge History of Political Thought 1450-1700, at

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211 (J.H. Burns ed., 1996). The English government ordered the book burned in 1683. George Garnett, Vindiciae, *supra*, at xvi (Acknowledgements).

While the early Protestant resistance writers had been mainly concerned with governments that violated religious laws, Huguenot writers (known as the Tractarians) broadened the purely religious focus to a more inclusive vision of just government. When the Dutch people rose against Spanish domination, and eventually won their independence, they drew inspiration from the Tractarians. Douglas F. Kelly, The Emergence of Liberty in the Modern World: The Influence of Calvin on Five Governments from the 16th Through 18th Centuries 47 (1992). The English who twice overthrew a dictatorial monarchy in the next century also looked to the Tractarians. *Id.* (For the English revolutions, see Ch. 2.H.)

John Adams called *Vindiciae* one of the leading books by which England's and America's "present liberties have been established." 3 John Adams, A Defence of the Constitutions of the United States of America 210-11 (The Lawbook Exchange, 2001) (1797).[38] Adams also praised John Poynet, author in 1556 of *A Shorte Treatise of Politike Power, and of the true obedience which subjects owe to kynges and other civil governours*. According to Adams, Poynet set forth "all the essential principles of liberty, which were afterward dilated on by Sidney and Locke." *Id.* at 210.

Defeated, the Huguenots learned how to operate self-governing communities, strictly separating themselves from the French government and its church. Huguenots who committed serious crimes would not be turned over to the French authorities. The Huguenots thus learned practical lessons in the separation of church and state. Benedict, *supra* at 147-48.

At the same time, resistance theory became less popular. Like Jews in some other nations, the Huguenots realized that they were quite unpopular with most of the population, so their safety lay in strict adherence to all royal decrees—the better to encourage the monarchy to enforce the limited protections that the 1598 Edict of Nantes gave to Huguenots. *Id.* at 534-35.

Reliance on the monarch's good will, however, no longer worked when the ruler hated minorities just as much as the public did. As the Catholic counter-reformation gained strength, the new French king, Louis XIII, decided to reclaim some Huguenot areas for Catholicism. The Huguenots resisted, and were defeated. The 1629 Peace of Alais eliminated the military rights that had been granted to the Huguenots by the Edict of Nantes. *Id.* at 371.

In 1685, the Edict of Fontainebleau fully revoked the Edict of Nantes, and so Huguenots had no legal protection against unlimited persecution. The victims disarmed, the oppressions multiplied. "[T]he most atrocious—and effective—were the *dragonnades*, or billeting of dragoons [mounted soldiers] on Huguenot families with encouragement to behave as viciously as they wished. Notoriously rough and undisciplined, the enlisted troops of the dragoons spread carnage, beating and robbing the householders, raping the women, smashing and wrecking and leaving filth. . . ." Barbara W. Tuchman, The March of Folly: From Troy to Vietnam 21 (1984).

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38. *Defence of the Constitutions* is also reprinted in *The Works of John Adams*. The above quote is at 6 The Works of John Adams 3 (Charles Frances Adams ed., 1851).

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The billeting of soldiers, which had been introduced in 1681, would continue until the family converted to Catholicism. Benedict, *supra* at 372-74. The first use of billeting (or quartering) to force conversions to Catholicism may have taken place in parts of Germany during the 1620s. *Id.* at 379-80. In England, the Stuart kings of the seventeenth century used billeting against their political opponents—among the many abuses that eventually led to them being deposed (Ch. 2.H).

After the revocation of the Edict of Nantes, hundreds of thousands of Huguenots fled France, even though they had to be smuggled across the border. Some came to British North America. Paul Revere was among the many patriots of Huguenot ancestry. The American Founders were acutely aware of the torments to which the French Huguenots were subjected after they were disarmed. Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 Const. Comment. 87, 99-100 (1992). The Third Amendment to the U.S. Constitution forbids the peacetime quartering of soldiers and allows wartime quartering only when according to law; it was likely influenced by the Huguenot experience and by similar abuses in England.

In the response to the revocation of the Edict of Nantes, the world's first international law professor, Samuel Pufendorf (online Ch. 13.C.4) wrote a famous book, *On the Nature and Qualification of Religion in Reference to Civil Society*. Arguing in favor of religious toleration, Pufendorf insisted that citizens had a duty to obey their religious conscience, and this duty could not be handed over to the government. According to Pufendorf, "as it is the greatest piece of Injustice to compel Subjects by force of Arms to any Religion, so these may justly defend their Religion by force of Arms, especially if they live under a Government where they have a Right belonging to them of Protecting their Liberties against any Invaders." Samuel Pufendorf, Of the Nature and Qualification of Religion in Reference to Civil Society 114, § 52 (Simone Zurbuchen ed., Jodocus Crull trans., Liberty Fund 2002) (1687).

NOTES & QUESTIONS

1. Does the history above help explain why the First, Second, and Third Amendments are next to each other?

2. The right of resistance is one thing, but the practical ability to exercise that right is another. The theory of resistance led by "intermediate magistrates" (e.g., the nobility, state governments) presumes at least a semi-open society, with mediating institutions about which resistance might rally. The theory does not work so well in efficiently totalitarian societies, such as today's People's Republic of China, where the government is able to suppress or control all the mediating institutions. Likewise, in Germany by 1935, the Nazi regime had taken control of most of civil society (except for, most notably, the Catholic Church), thereby preventing the rise of a resistance movement powerful enough to overthrow the dictatorship. *See* Stephen P. Halbrook, Gun Control in Nazi Occupied-France: Tyranny and Resistance (2018); *see also* Mark Riebling, Church of Spies: The Pope's

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Secret War Against Hitler (2016) (describing the Catholic Church's efforts to overthrow Hitler).

The existence of mediating institutions is related to the distribution of physical force. If only the government has arms, then resistance may be impossible. One article examines the divergence in political structure between the Muslim world and Christian Western Europe from the eighth century until 1500 A.D. As of the eighth century, there were many similarities. But under the feudal system as it developed in the West, financial necessity required kings to rely for fighting power on the feudal arrays raised by the nobles from their vassals. So military power was decentralized. In contrast, Muslim sultans used central standing armies of *mamluks*—that is, warrior-slaves. Accordingly, the sultans had much more of a practical monopoly on the use of force. The differing systems produced greater political stability in the West, where kings could maintain power as long as a consensus of nobles agreed. In contrast, the centralized sultanates were prone to palace coups by whomever had the military's favor. The decentralization of force in the West made it relatively easier to get rid of monarchs who were becoming too despotic. Thus, "Muslim societies' reliance on *mamluks*, rather than local elites, as the basis for military leadership, may explain why the Glorious Revolution occurred in England, not Egypt." Lisa Blaydes & Eric Chaney, *The Feudal Revolution and Europe's Rise: Political Divergence in the Christian West and the Muslim World before 1500 CE*, 107 Am. Pol. Sci. Rev. 16, 16 (2013).

b. Jean Bodin

Perhaps no French political philosopher was more important to the development of absolutism than Jean Bodin (1530-1596). Bodin's major work was *Six Livres de la République* (Six Books of a Commonweal), published in 1576. France had just suffered 5 Catholic versus Huguenot civil wars in the last 15 years. Bodin's solution was to make the subjects' obedience to the king the central fact of life. One's duty to God was subordinate to one's duty to the king. The king, however, had no obligation to obey the laws he made. In Bodin's view, absolutist government necessitated the subjects' disarmament.

Jean Bodin, The Six Bookes of a Commonweal
542-43, 615 (Kenneth Douglas McRae ed., 1962) (1576)

[T]he most useful way to prevent sedition, is to take away the subjects arms . . . . For so *Aristotle*, speaking of the Barbarians, accounteth it for a strange thing, that a man should in a quiet and peaceable city wear a sword or a dagger in time of peace: which by our laws, as also by the manners and customs of the Germans and Englishmen is not only lawful; but by the law and decrees of the Swissers even necessarily commanded: the cause of an infinite number of murders, he which weareth a sword, a dagger, or a pistol, being more fierce and insolent to offer unto others injury, as also to commit murder if any injurie be offered

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him: whereas if he were disarmed, he should doe neither the one nor the other; neither should he incur the infamy and disgrace which followeth them, who when they are wronged, dare not to draw their weapons. The Turks herein go yet farther, not only in punishing with all severity the seditious and mutinous people, but also forbidding them to bear arme, yea even in time of war, expect it be when they are to give battle . . . .

Amongst many the laudable manners and customs of the policy of Paris, there is . . . a very good one . . . which is, That no car-man or porter shall wear a sword, dagger, knife, or any other offensive weapon . . . . For it is not the part of a wise politician, neither of a good governour, to expect until the murder be committed, or that the sedition be raised, before he forbid the bearing of arms, but as a good [physician] preventeth diseases: and if chance be that the parties be [suddenly] attainted with any violent grief, he first [assuages] the present pain, and that done applyeth convenient remedies unto the causes of the diseases . . . .

. . . It was an antient custom among the Romans towards those with those whom they had not joined in league, nor contracted friendship upon equal terms, never to govern them peaceably, until they had [yielded] up all, delivered hostages, disarmed them, and put garrisons in their towns. For we may not think ever to keep that people in subjection which hath always lived in liberty, if they not be disarmed. . . .

NOTES & QUESTIONS

1. Is it necessarily true that absolutist governments must disarm their subjects? Even if the regime is generally popular?

2. Why does Bodin link anti-government speech with the right to bear arms? For a pre-*Heller* analysis of the relationship between the First and Second Amendments, see L.A. Powe, Jr., *Guns, Words, and Constitutional Interpretation*, 38 Wm. & Mary L. Rev. 1311 (1997).

3. *Death penalty and Malaysia.* Bodin favored the death penalty for illegally carrying weapons. His proposal was later adopted in 1940, after France was conquered by Nazi Germany, and came under German military occupation. *See* Stephen P. Halbrook, Gun Control in Nazi Occupied-France: Tyranny and Resistance (2018). Malaysia adopted a similar law in 1975, when a revision of the Internal Security Act imposed the death penalty for unlicensed carrying or possession of firearms or ammunition. Frederic A. Mortiz, *Carrying a Gun in Malaysia Means Death Penalty*, Christian Sci. Mon., Mar. 31, 1980; Internal Security Act 1960, § 57 (as revised through Jan. 1, 2006). A person could avoid the death penalty by proving that he acquired the arms or ammunition lawfully, and that he never "acted in a manner prejudicial to public security or the maintenance of public order." *Id.* § 57(3).

Instead of seeking capital punishment, Malaysian prosecutors sometimes exercise discretion to charge offenders under the Firearms (Increased Penalties) Act, for which the maximum sentence is 14 years, plus whipping.

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Moritz, *supra*; Firearms (Increased Penalties) Act 1971, art. 8 (2006). The 1971 Act does have a death penalty for arms trafficking, which is presumed to include any case of possession of more than two illegal guns. *Id.* art. 7. Discharge of a firearm during burglary, robbery, kidnapping, resisting arrest, or escape is a capital crime. *Id.* at art. 3(A). All participants in the above crimes are subject to the death penalty, even if only one of them fired a gun; a participant may avoid a capital sentence by proving that he took all reasonable steps to prevent the gun from being fired. *Id. See generally* Malaysia, Cornell Center on the Death Penalty Worldwide. Recently, Malaysia has been considering whether to reduce or eliminate its 32 capital crimes. *Malaysia Cabinet Agrees to Scrap Death Penalty*, The Straits Times (Singapore), Nov. 14, 2018.

The base Malaysia gun law is the Arms Act 1960. It prohibits possession of guns or ammunition without a license, and bans shotguns that can fire more than two cartridges without reloading, machine guns, and self-defense sprays. Rewards are provided to informers.

Would Malaysia-style laws help reduce crime? Reduce the dangers of overthrow of the government?

4. *Further reading*: The Cambridge History of Political Thought 1450-1700 (J.H. Burns ed., 1996); Quentin Skinner, The Foundations of Modern Political Thought, vol. 1, The Renaissance (Cambridge Univ. Press 2002) (1978); David Knowles, The Evolution of Medieval Thought (1962); Encyclopedia of Religion and War (Gabriel Palmer-Fernandez ed., 2004); online Ch. 13.C (self-defense, Just War, and Just Revolution views of the Classical founders of international law).

5. As this chapter shows, some ideas recur millennia apart and in very different places. Some of these ideas—such as the personal and community right of self-defense against criminals and criminal governments—have been described as part of Natural Law. That was the view of the classical founders of international law. *See* Ch. 14.C. In this view, the Second Amendment, like some other provisions of the Bill of Rights, does not "grant" any new rights. Rather, it recognizes and protects "inalienable rights that pre-existed all government." *McDonald v. City of Chicago*, 561 U.S. 742, 842 (2010) (Thomas, J., concurring) (Ch. 10.B) (citing *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008)(Ch. 10.A)). In diverse times, places, and cultures, arms have also been associated with civic duty, responsible self-sufficiency, sportsmanship, and self-discipline. Conversely, in equally diverse settings, arms have been associated with criminal misuse, violence against legitimate authority, and refusal to submit to government.

The printed textbook and the online chapters cover the United States and the United Kingdom from early days to the present. The chapters also survey the globe, examining arms and arms control throughout human history. Taking into account the full spectrum, what conclusions can you draw about how arms possession or arms deprivation have helped or hindered life, liberty, and the pursuit of happiness? If a new nation asked your advice on what its arm policies should be, what would you say? To give the best advice, what would you need to know about the nation's past and present?

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