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THE HISTORY OF BANS ON TYPES OF ARMS BEFORE 1900

David B. Kopel[*]
Joseph G.S. Greenlee[**]

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INTRODUCTION

This Article describes the history of bans on particular types of arms in America, through 1899. It also describes arms bans in England until the time of American independence. Arms encompassed in this article include firearms, knives, swords, blunt weapons, and many others. While arms advanced considerably from medieval England through the nineteenth-century United States, bans on particular types of arms were rare.

The Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen* instructed lower courts to decide Second Amendment cases "consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history."[1] *Bruen* examined the legal history of restrictions on the right to bear arms through 1899.[2] This Article focuses on one aspect of the legal history of the right to keep arms: prohibitions on particular types of arms.

Part I describes prohibitions on possession of firearms and other arms in England. The launcegay, a type of light lance for horsemen, was banned, as were small handguns, although the handgun ban was widely ignored. A class-based handgun licensing law was apparently little enforced. While most firearms were single-shot, repeating firearms existed for centuries in England, with no special restrictions.

Part II covers America from the colonial period through the Early Republic. No colonial law banned any particular arm. The Dutch colony New Netherland came the closest when it limited the number of flintlocks colonists could bring into the colony, in an effort to quash the trading of flintlocks to Indians. The British colonies had no such law. But there were many laws requiring most people, including many women, to possess particular types of arms. This Article is the first to provide a complete, item-by-item list of every mandated arm. Some private individuals owned repeating (multi-shot) firearms and cannons, but such arms were far too expensive for a government to mandate individual possession.

As summarized in Part III, the nineteenth century was the greatest century before or since for firearms technology and affordability. When the century began, an average person could afford a single-shot flintlock musket or rifle. By the end of the century, an average person could afford the same types of firearms that are available today, such as repeaters with semiautomatic action, slide action, lever action, or revolver action. Ammunition improved even more.

The rest of this Article describes nineteenth-century laws forbidding particular types of arms. Part IV examines the four prohibitory laws on particular types of firearms: Georgia prohibited most handguns, Tennessee and Arkansas prohibited all but "Army & Navy" type handguns (i.e., large revolvers), and Florida enacted a race-based licensing system for Winchesters and other repeating rifles.

---

[1] 597 U.S. 1, 19 (2022) (referencing District of Columbia v. Heller, 554 U.S. 570 (2008)).

[2] The further from the Founding, the less useful the legal history. While the Court did address some laws from the late nineteenth century, laws after 1900 were pointedly not examined: "We will not address any the 20th-century historical evidence brought to bear by respondents or their *amici*. As with their late-19th-century evidence, the 20th-century evidence presented by respondents and their *amici* does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." 587 U.S. at 66 n.28.

Part V turns in depth to the most controversial arm of nineteenth-century America: the Bowie knife. Sales were banned in a few states, and possession was punitively taxed in a few others. The mainstream approach, adopted in most states that regulated Bowies, was to ban concealed carry, to forbid sales to minors, or to impose extra punishment for criminal misuse. As Part V explains, Bowie knife laws usually applied to various other weapons too.

Part VI summarizes the nineteenth-century restrictions on the various other weapons. These include other sharp weapons (such as dirks, daggers, and sword canes), flexible impact arms (such as slungshots and blackjacks), rigid impact arms (such as brass knuckles), and cannons. Possession bans were rare, whereas laws on concealed carry, sales to minors, or extra punishment for misuse were more common.

Part VII applies modern Second Amendment doctrine to the legal history presented in the Article. It suggests that some arms prohibitions and regulations may be valid but bans on modern semiautomatic rifles and magazines are not.

If this Article described only possession bans for adults, it would be very short. Besides outright bans on possession, the Article also describes bans on sales or manufacture. These are similar to possession bans, at least for future would-be owners.[3] Yet even with sales or manufacture bans included, this Article would still be very short. So for all non-firearms, the Article provides a comprehensive list of non-prohibitory regulations, such as concealed carry restrictions, limits on

---

[3] A sales ban that allows existing owners to continue possession is not as intrusive as a ban on all possession. But because a sales ban is a ban on new possession, it should be analyzed as a prohibition, rather than a regulation, as the Ninth Circuit explained in *Jones v. Bonta*:

> [E]ven though this is a commercial regulation, the district court's historical analysis focused not on the history of commercial regulations specifically but on the history of young adults' right to keep and bear arms generally. The district court was asking the right question.
>
> "Commerce in firearms is a necessary prerequisite to keeping and possessing arms for self-defense." We have assumed without deciding that the "right to possess a firearm includes the right to purchase one." And we have already applied a similar concept to other facets of the Second Amendment. For example, "[t]he Second Amendment protects 'arms,' 'weapons,' and 'firearms'; it does not explicitly protect ammunition." Still, because "without bullets, the right to bear arms would be meaningless," we held that "the right to possess firearms for protection implies a corresponding right" to obtain the bullets necessary to use them.
>
> Similarly, without the right to obtain arms, the right to keep and bear arms would be meaningless. "There comes a point . . . at which the regulation of action intimately and unavoidably connected with [a right] is a regulation of [the right] itself." For this reason, the right to keep and bear arms includes the right to purchase them. And thus laws that burden the ability to purchase arms burden Second Amendment rights.

34 F.4th 704, 715–16 (9th Cir. 2022) (first citing Jones v. Becerra, 498 F. Supp. 3d 1317, 1325–29 (S.D. Cal. 2020); then quoting Teixeira v. County of Alameda, 873 F.3d 670, 682 (9th Cir. 2017); then quoting Bauer v. Becerra, 858 F.3d 1216, 1222 (9th Cir. 2017); then quoting Jackson v. City & Cty. of S.F., 746 F.3d 953, 967 (9th Cir. 2014); then citing Ezell v. City of Chicago, 651 F.3d 684, 704 (7th Cir. 2011); and then quoting Luis v. United States, 578 U.S. 5 (2016)) (vacated on rehearing).

sales to minors, and extra punishment for use in a crime. This Article is the first to provide a full list of all colonial, state, and territorial restrictions on these arms. We also list some local restrictions, such as by a county or municipality, but we have not attempted a comprehensive survey of the thousands of local governments. To be sure, however, these non-prohibitory regulations were not as severe as arms prohibitions. They still allowed peaceable adults to keep and bear the regulated arms. Laws that forbade a particular arm to be kept or carried were historical rarities.

I. ENGLISH HISTORY

According to Bruen, old English practices that ended long before American independence are of little relevance.[4] The only applicable English precedents are those that were adopted in America and continued up through the Founding Era.[5] For prohibition of particular types of arms, there are no such English precedents. Section A describes what prohibitions did exist at some point in England. Section B describes the availability of repeating arms, which were expensive, in England and the Continent.

A. Arms Bans in England

In 1181, King Henry II enacted the Assize of Arms, which required all his free subjects to be armed, except for Jews, who were forbidden to have armor.[6] The Assize grouped people into wealth categories. Every male in a particular category had to have certain quantities of particular types of arms and armor—no more and no less.[7] The Assize was prohibitory in that a person could own only

---

4

> English common-law practices and understandings at any given time in history cannot be indiscriminately attributed to the Framers of our own Constitution . . . . . Sometimes, in interpreting our own Constitution, "it is better not to go too far back into antiquity for the best securities of our liberties," unless evidence shows that medieval law survived to become our Founders' law.

Bruen, 597 U.S. at 35 (quoting Funk v. United States, 290 U.S. 371, 382 (1933)).

5 "A long, unbroken line of common-law precedent stretching from Bracton to Blackstone is far more likely to be part of our law than a short-lived, 14th-century English practice." *Id.*

6 Assize of Arms (1181), *reprinted in* 2 ENGLISH HISTORICAL DOCUMENTS 449, 450 (David Douglas & G.W. Greenaway eds., 2d ed. 1981).

7

> Let every holder of a knight's fee have a hauberk, a helmet, a shield and a lance. And let every knight have as many hauberks, helmets, shields and lances, as he has knight's fees in his demesne.
>
> Also, let every free layman, who holds chattels or rent to the value of 16 marks, have a hauberk, a helmet, a shield and a lance. Also, let every layman who holds chattels or rent worth 10 marks an "aubergel" and a headpiece of iron, and a lance.
>
> Also, let all burgesses and the whole body of freemen have quilted doublets and a headpiece of iron, and a lance.
>
> . . . .
>
> Let every burgess who has more arms than he ought to have according to this assize, . . . otherwise bestow them on such a man as will retain them for

the specified arms and armor for his particular income group. But the Assize was more concerned with armor than with weapons and was not prescriptive about ownership of swords, knives, bows, or blunt weapons.[8]

The Assize of Arms was replaced in 1285 by the Statute of Winchester, under Edward I.[9] It required all males in certain income groups to have at least particular quantities of arms and armor.[10] The Statute of Winchester created only mandatory minima for arms, not maxima.[11] Persons could own whatever quantity they chose above the minima, and they could also own arms that were not mandatory for their income group.

> the service of the lord king of England. And let none of them according to this assize.
>
> Item, no Jew shall keep in his possession a hauberk or an "aubergel", but let him sell them or give them away or otherwise dispose of them that they may remain in the king's service.
>
> . . . .
>
> Item, let the justices cause it to be announced throughout all the counties through which they shall pass, that those who have not these arms, according as has been said, the lord king will seize their persons, but will on no account take from them their lands or chattels.

Id. at 449–51.

8 We use the distinct terms "arms" and "armor" in the modern sense; a knife is an "arm" and a Kevlar vest is "armor." In medieval England and early-nineteenth-century America, the two terms were not so different; the one often included the other. *See, e.g.*, 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (unpaginated) ("Armor") ("In English statutes, armor is used for the whole apparatus of war; including offensive as well as defensive arms.").

9 The Statute of Winchester [1285], 13 Edw. (Eng.), ch. 6 *reprinted in* 1 STATUTES OF THE REALM 96, 97–98 (Dawsons of Pall Mall 1965) (1800).

10

> It is commanded, That every Man have in his house Harness for to keep the Peace after the antient Assise; that is to say, Every Man between fifteen years of age, and sixty years, shall be assessed and sworn to Armor according to the quantity of their Lands and Goods; that is to wit, [from] Fifteen Pounds Lands, and Goods Forty Marks, an Hauberke, [a Breast-plate] of Iron, a Sword, a Knife, and an Horse; and [from] Ten Pounds of Lands, and Twenty Marks Goods, an Hauberke, [a Breast-plate of Iron,] a Sword, and a Knife; and [from] Five Pound Lands, [a Doublet,] [a Breast-plate] of Iron, a Sword, and a Knife; and from Forty Shillings Land and more, unto One hundred Shillings of Land, a Sword, a Bow and Arrows, and a Knife; and he that hath less than Forty Shillings yearly, shall be sworn to [keep Gis-armes,] Knives, and other [less Weapons]; and he that hath less than Twenty Marks in Goods, shall have Swords, Knives, and other [less Weapons]; and all other that may, shall have Bows and Arrows out of the Forest, and in the Forest Bows and [Boults.]

Id. at 97–98 (brackets in original).

11 *Id.*

In 1383, King Richard II outlawed the possession of "launcegays."[12] The ban was restated the following decade after its lack of enforcement led to a "great Clamour."[13] Launcegays were a type of light spears, "occasionally used as a dart," and considered "offensive weapons."[14] The heavier war lance was not prohibited.[15]

There were many English laws based on class rule. For example, a 1388 statute from the notorious Richard II forbade servants and laborers from carrying swords and daggers, except when accompanying their masters.[16] During the late seventeenth century, until the Glorious Revolution of 1688, laws against hunting by commoners were interpreted as making firearms possession illegal for most of the population; the bans were often evaded.[17]

A 1541 statute from King Henry VIII outlawed handguns less than one yard in length and arquebuses and demihakes (types of shoulder guns) less than three-fourths of a yard in length. Additionally, people with an annual income below 100 pounds were prohibited from possessing any handgun, crossbow, arqu-

---

12

> It is ordained and assented, and also the King doth prohibit, That from hencefo- rth no Man shall ride in Harness within the Realm, contrary to the Form of the Statute of Northampton thereupon made, neither with Launcegay within the Realm, the which Launcegays be clearly put out within the said Realm, as a Thing prohibited by our Lord the King . . . [.]

Statute Made at Westminster in the Seventh Year 1383, *reprinted in* 2 STATUTES OF THE REALM 32, 35 (Dawsons of Pall Mall 1963) (1816).

13

> Our Lord the King, considering the great Clamour made to him in this present Parliament, because that the said Statute is not holden, hath ordained and establ- ished in the said Parliament, That the said Statutes shall be fully holden and kept, and duly executed; and that the said Launcegayes shall be clear put out upon the Pain contained in the said Statute of Northampton, and also to make Fine and Ransom to the King.

Statute of the Twentieth Year 1396–97, *reprinted in* 2 STATUTES OF THE REALM 92, 93.

14 GEORGE CAMERON STONE, A GLOSSARY OF THE CONSTRUCTION, DECORATION AND USE OF ARMS AND ARMOR IN ALL COUNTRIES AND IN ALL TIMES 410 (1999) ("LANCE-AGUE, LANCEGAYE. A light lance, occasionally used as a dart. It was carried in place of the war lance in the fourteenth century; the latter, at the time, was about fourteen feet long and very heavy."); NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY BEING ALSO AN INTERPRETER OF HARD WORDS (2d ed. 1724) (unpaginated) ("LAUNCEGAYS, Offensive Weapons prohibited and disused.").

15 David Scott-Macnab, *Sir John Fastolf and the Diverse Affinities of the Medieval Lancegay*, 19 SA J. MEDIEVAL & RENAISSANCE STUDS. 97, 100 (2009) (the lancegay "was probably considerably lighter than a full-length war lance").

16 Statute Made at Cambridge in the Twlfth Year (1388), *reprinted in* 2 STATUTES OF THE REALM 55, 57 (Dawsons of Pall Mall 1963) (1816).

17 NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY 136 (Aspen Publishers, 3d ed. 2021).

ebus, or demihake without a license.[18] Licenses were granted at discretion, as a reward from one's superiors.[19]

No license was needed by inhabitants of market towns or boroughs, anyone with a house more than two furlongs (440 yards) outside of town, or persons who lived within five miles of the coasts, within twelve miles of the Scottish border, or on various small islands.[20] The Henrican 1541 statute gradually fell into disuse. Soon, only the £ 100 qualification was enforced.[21] The law was obviously contrary to *Heller* and is no precedent for today.[22]

In 1616, King James I outlawed dags—a type of small handgun.[23] As he noted, they were already technically illegal (due to the minimum barrel length rule from Henry VIII), but the law was being disregarded.[24] James's new order against dags was disregarded as well.[25]

We are unaware of any evidence that launcegays were ever an issue in colonial America. We are likewise unaware of any American source recognizing the Henry VIII or James I handgun laws at all, let alone their application in America.

18

> [T]hat noe pson or psons of what estate or degree he or they be, excepte he or they in their owne right or in the right of his or their Wyeffe to his or their owne uses or any other to the use of any suche pson or psons, have landes tente fees annuyties or Office to the yerely value of one hundred pounde, from or after the laste daye of June next comynge, shall shote in any Crosbowe handgun hagbutt or demy hake, or use or kepe in his or their houses or elswhere any Crosbowe handgun hagbut or demy hake, otherwise or in any other manner then ys hereafter in this Present Acte declared. . . .
>
> . . . [N]o pson or psons, of what estate or degree soever he or they be, from or after the saide laste daye of June shall shote in carye kepe use or have in his house or els where any handgune other then suche as shalbe in the stock and gonne of the lenghe of one hole Yarde, or any hagbutt or demyhake other then suche as shalbe in the stock and gune of the lenghe of thre quarters of one Yarde. . . .

An Acte Concerninge Crosbowes and Handguns (1541), *reprinted in* 3 STATUTES OF THE REALM 832, 832 (Dawsons of Pall Mall 1963) (1817).

Hackbut is an archaic spelling of arquebus, a type of long gun. A demihake was a short hackbut. JOHNSON ET AL., *supra* note 17, at 126.

19 The Tudor monarchs handed out many licenses—including to commoners whom the king wanted to reward, and to nobles to allow their servants to be able to use the arms outside the home. *See* LOIS G. SCHWOERER, GUN CULTURE IN EARLY MODERN ENGLAND 65–73 (2016).

20 An Acte Concerninge Crosbowes and Handguns 1541, *supra* note 18, at 832.

21 ROBERT HELD, THE AGE OF FIREARMS: A PICTORIAL HISTORY 65 (1957).

22 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 43 n.10 (2022) (noting that the last attempted prosecutions, which failed, were in 1693).

23 A Proclamation Against Steelets, Pocket Daggers, Pocket Dagges and Pistols 181 (Eng. & Wales 1616), https://ia801204.us.archive.org/25/items/bim_early-english-books-1475-1640_by-the-king-a-proclamat_1616-03-24_0/bim_early-english-books-1475-1640_by-the-king-a-proclamat_1616-03-24_0.pdf [https://perma.cc/N2CN-G9HD].

24 *Id.*

25 SCHWOERER, *supra* note 19, at 182.

B. Repeating Firearms in England

In the words of Harold Peterson, Curator for the National Park Service and one of the twentieth century's greatest experts on historic arms, "[t]he desire for . . . repeating weapons is almost as old as the history of firearms, and there were numerous attempts to achieve this goal, beginning at least as early as the opening years of the sixteenth century."[26]

The first known repeating firearms were ten-shot matchlock arquebuses that date to between 1490 and 1530.[27] "The cylinder was manually rotated around a central axis pin."[28] While it "failed to . . . become a popular martial or utilitarian firearm" due to its complicated and expensive design,[29] King Henry VIII (reigned 1509–1547) owned a similar gun.[30]

Henry VIII also was said to have owned a multi-shot combination weapon called the Holy Water Sprinkler. "It is a mace with four sperate steel barrels, each 9" long. These barrels are formed into a wooden cylinder held with four iron bands, two of which have six spikes each."[31] Although made in Germany, these were sometimes referred to as "Henry VIII's walking staff"[32] because "with it, he is represented to have traversed the streets at night, to see that the city-watch kept good order."[33]

A predecessor to the blunderbuss—a multi-shot firearm but not a repeater—was invented in the middle of the sixteenth century, as indicated by a 1566 account from Germany discussing weapons that fired between twelve and fifteen bullets at once.[34] Blunderbusses appeared by the end of the century[35] and

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[26] HAROLD L. PETERSON, ARMS AND ARMOR IN COLONIAL AMERICA 1526–1783, at 215 (1956) [hereinafter PETERSON, ARMS AND ARMOR IN COLONIAL AMERICA].

[27] M.L. BROWN, FIREARMS IN COLONIAL AMERICA: THE IMPACT ON HISTORY AND TECHNOLOGY 1492–1792, at 50 (1980).

[28] *Id.*

[29] *Id.* at 50–51.

[30] W.W. GREENER, THE GUN AND ITS DEVELOPMENT 81–82 (9th ed. 1910).

[31] LEWIS WINANT, FIREARMS CURIOSA 14 (1955) [hereinafter WINANT, FIREARMS CURIOSA].

[32] *A Looking-Glass for London—No. 1. The Tower*, THE LONDON MAG., Jan.–June, 1829, at 46. It was sometimes called by the similar name, "Henry VIII's walking-stick." *See* WILLIAM HOWITT, JOHN CASSELL'S ILLUSTRATED HISTORY OF ENGLAND 2303 (2d ed. 1873).

[33] *A Looking-Glass for London—No. 1. The Tower*, *supra* note 32. According to one popular anecdote, Henry VIII was arrested while making his rounds in disguise one winter night for carrying his Holy Water Sprinkler. When his jailer discovered his true identity the next morning, those responsible feared execution, but instead received a raise for fulfilling their duties. *See id.*

[34] D.R. BAXTER, BLUNDERBUSSES 10 (1970) (discussing LEONHARDT FRONSPERGER, VON DEN KAISERLICHEN KRIEGSRECHTEM (1566)).

[35] *Id.*

became popular in England during the seventeenth century.[36] They were made as pistols (in pairs), musketoons, and carbines.[37]

Around 1600, the Swedish orgelbössa, a sixteen-barrel gun that "meant to be rested on a rail and fired like a musket" was used to protect ships from boarders.[38] Related weapons called volley pistols were "made both in England and on the Continent" in the early eighteenth century.[39] These had seven barrels that shot simultaneously.[40] Volley pistols were predecessors of the Nock Volley Gun, which the British Royal Navy used during the Revolutionary War and likewise "fire[d] seven barrels at one time."[41]

The first known repeater capable of firing more than ten shots was invented by a German gunsmith in the sixteenth century.[42] It could fire sixteen superposed rounds in Roman candle fashion[43]—meaning that one load was stacked on top of another and the user "could not stop the firing once he had started it."[44]

Charles Cardiff seemingly had something similar in mind with this 1682 patent, which protected "an Expedient with Security to make Musketts, Carbines, Pistolls, or any other small Fire Armes to Discharge twice, thrice, or more severall and distincte Shotts in a Singell Barrell and Locke with once Primeing."[45] While his firearms have been lost to time, they apparently contained "two fixed locks, with a separate touch hole for each, the forward one to fire a Roman candle series

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[36] *Id.* at 14; *see also* 25 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, JULY 1 TO SEPTEMBER 30, 1683, at 18, 35, 44, 62, 65, 117, 159, 175, 180, 196, 299–301, 316 (F.H. Blackburne Daniell & Francis Bickley eds., 1934) (mentioning blunderbusses among manufactured or privately owned arms in England); *cf.* BAXTER, *supra* note 34, at 34 (in the eighteenth century, "[b]lunderbusses were carried on coaches, but large numbers were also carried by such people as farmers going to market, itinerant journeymen, and other wayfarers, while most large houses usual had a complement of at least one.").

[37] BAXTER, *supra* note 34, at 14–15.

[38] WILLIAM GILKERSON, BOARDERS AWAY II WITH FIRE: THE SAME FIREARMS AND COMBUSTIBLES OF THE CLASSICAL AGE OF FIGHTING SAIL, 1626–1826, at 121 (1993).

[39] BAXTER, *supra* note 34, at 30, 47 (image of volley pistol from 1720).

[40] *Id.* at 30.

[41] GILKERSON, *supra* note 38. In 1780, "the Admiralty was sufficiently impressed with [the] gun to contract for 500 of them from Nock. All of these were delivered within the year." *Id.*

[42] *16-Shot Wheel Lock*, AM.'S 1ST FREEDOM (May 10, 2014), http://bit.ly/2tngSDD [https://perma.cc/B8YB-XVNA].

[43] "[T]his oval-bore .67-caliber rifle . . . was designed to fire 16 stacked charges of powder and ball in a rapid 'Roman candle' fashion. One mid-barrel wheel lock mechanism ignited a fuse to discharge the upper 10 charges, and another rearward wheel lock then fired the remaining six lower charges." *Id.* There was some variety in the way such firearms functioned, as demonstrated by firearms historian Lewis Winant's description of another sixteen-shot German repeater from the sixteenth or seventeenth century. "The gun may be used as a single-shot, employing the rear lock only, or it may be charged with sixteen superposed loads so that the first pull of the trigger will release the wheel on the forward lock and fire nine Roman candle charges, a second pull will release the wheel on the rear lock and set off six more such charges, and finally a third pull will fire the one remaining shot." WINANT, FIREARMS CURIOSA, *supra* note 31, at 168.

[44] WINANT, FIREARM CURIOSA, *supra* note 31, at 166.

[45] *Id.* at 167.

of charges, and the rear one to fire one or more charges after the series of explosion started by the forward lock."[46]

By the time of Cardiff's patent, however, more effective repeating arms had existed for several decades. "Successful systems" of repeating arms "definitely had developed by 1640, and within the next twenty years they had spread throughout most of Western Europe and even to Moscow."[47] "[T]he two principal magazine repeaters of the era" were "the Kalthoff and the Lorenzoni. These were the first guns of their kind to achieve success."[48]

1. The Kalthoff Repeating Rifle

"The Kalthoff repeater was a true magazine gun. In fact, it had two magazines, one for powder and one for balls. The earliest datable specimens that survive are two wheel-lock rifles made by Peter Kalthoff in Denmark in 1645 and 1646."[49] "[T]he number of charges in the magazines ran all the way from six or seven to thirty."[50]

Kalthoff repeaters "were undoubtedly the first magazine repeaters ever to be adopted for military purposes. About a hundred flintlock rifles of their pattern were issued to picked marksmen of the Royal Foot Guards and are believed to have seen active service during the siege of Copenhagen in 1658, 1659, and again in the Scanian War of 1675–1679."[51]

Kalthoff-type repeaters "spread throughout Europe wherever there were gunsmiths with sufficient skill and knowledge to make them, and patrons wealthy enough to pay the cost."[52] There were nineteen known gunsmiths and perhaps others who "made such arms in an area stretching from London on the west to Moscow on the east, and from Copenhagen south to Salzburg."[53]

2. The Lorenzoni repeating handguns and rifles

"The Lorenzoni also was developed during the first half of the Seventeenth Century."[54] It was a magazine-fed, Italian repeating pistol that "used gravity to

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46 *Id.*

47 HAROLD L. PETERSON, THE TREASURY OF THE GUN 229 (1962) [hereinafter PETERSON, TREASURY OF THE GUN].

48 *Id.*

49 *Id.* The wheellock was invented by Leonardo da Vinci in the late sixteenth century. Vernard Foley, *Leonardo and the Invention of the Wheellock*, 278 SCI. AM. 96 (1998). "When a wound-up steel wheel was released, the serrated wheel struck a piece of iron pyrite. A shower of sparks would ignite the powder in the pan. The wheellock mechanism is similar to the ignition for today's disposable cigarette lighters." JOHNSON ET AL., *supra* note 17, at 2151. The wheel-lock was superior to its predecessor, the matchlock, because it could be kept always ready for sudden use and was more reliable, albeit much more expensive. *Id.*

50 PETERSON, TREASURY OF THE GUN, *supra* note 47, at 230.

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.* at 231.

self-reload."[55] The Lorenzonis' ammunition capacity was typically around seven shots. The gun's repeating mechanism quickly spread throughout Europe and to the American colonies, and the mechanism was soon applied to rifles as well.[56]

On July 3, 1662, famed London diarist Samuel Pepys wrote about seeing "a gun to discharge seven times, the best of all devices that ever I saw, and very serviceable, and not a bawble; for it is much approved of, and many thereof made."[57] Abraham Hill patented the Lorenzoni repeating mechanism in London on March 3, 1664.[58] The following day, Pepys wrote about "several people . . . trying a new-fashion gun" that could "shoot off often, one after another, without trouble or danger, very pretty."[59] It is believed that Pepys was referring to a Lorenzoni-style firearm in his March 4, 1664 entry,[60] and perhaps he also was in his 1662 entry.

Despite Hill's patent, "[m]any other English gunsmiths also made guns with the Lorenzoni action during the next two or three decades."[61] Most notably, famous English gunsmiths John Cookson and John Shaw adopted the Lorenzoni action for their firearms. The Cookson rifle, "one of many similar designs to make an appearance on the world stage beginning in the late 17th century," utilized "two magazines contained within the buttstock" with "seven-shot capacities."[62] "[A] host of others" made related firearms "throughout the 18th century."[63]

> Kalthoff and Lorenzoni actions . . . were probably the first and certainly the most popular of the early magazine repeaters. But there were many others. Another version, also attributed to the Lorenzoni family, boasted brass tubular magazines beneath the forestock . . . . Guns of this type seem to have been made in several parts of Europe during the Eighteenth Century and apparently functioned well.[64]

Repeaters were expensive in the seventeenth and eighteenth centuries and so were presumably owned almost entirely by economic elite. By around the middle of the nineteenth century, however, they would become broadly affordable.

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[55] MARTIN DOUGHERTY, SMALL ARMS VISUAL ENCYCLOPEDIA 34 (2011).

[56] PETERSON, TREASURY OF THE GUN, *supra* note 47, at 232.

[57] 4 THE DIARY OF SAMUEL PEPYS 258 (Henry B. Wheatley ed., 1893) [hereinafter PEPYS DIARY].

[58] The patent was for a "gun or pistol for small shot carrying seven or eight charges of the same in the stock of the gun . . . ." CLIFFORD WALTON, HISTORY OF THE BRITISH STANDING ARMY. A.D. 1660 TO 1700, at 337 (1894).

[59] 4 PEPYS DIARY, *supra* note 57, at 65.

[60] PETERSON, TREASURY OF THE GUN, *supra* note 47, at 232.

[61] *Id.*

[62] JIM SUPICA ET AL., TREASURES OF THE NRA NATIONAL FIREARMS MUSEUM 27 (2013); *see id.* (featuring a photo of Cookson-type volitional repeater).

[63] PETERSON, ARMS AND ARMOR IN COLONIAL AMERICA, *supra* note 26, at 215.

[64] PETERSON, TREASURY OF THE GUN, *supra* note 47, at 233.

No English law before 1776, or, for that matter, in the following two hundred years, made any distinction regarding repeating firearms.[65]

II. THE COLONIAL PERIOD AND EARLY REPUBLIC

This Part describes the arms rights, arms mandates, and most common arms in the American colonies and Early Republic. According to *Bruen*, colonial laws are relevant to the extent that they show a wide tradition that existed when the Second Amendment was ratified.[66]

Sections A–C describe the arms prohibitions of the British, Dutch, and Swedish colonies within the future thirteen original United States. As with English traditions that did not survive American independence, Dutch and Swedish traditions not practiced in America's Founding Era are of little relevance—especially those that the British did not accept upon assuming control of the colonies.[67]

Section D lists the types of arms that were so common in America that colonial governments could mandate their ownership. Arms possession mandates applied to militiamen, some women, and some men who were exempted from militia duty.

Sections E and F describe the prevalence of repeating arms and cannons, which were far too expensive for mandatory general ownership. There were no laws against private ownership of such arms. Section G summarizes the situation in the United States at the time of the ratification of the Second Amendment.

A. The English Colonies

The 105 colonists who set sail on December 20, 1606 to establish the first permanent English settlement in North America embarked with express and perpetual rights granted by the Royal Charter of King James I. Among the perpetual rights was to bring "sufficient Shipping, and Furniture of Armour, Weapons, Ordinance, Powder, Victual, and other things necessary for the said Plantations and for their Use and Defence there."[68] There were no restrictions on the types of arms that they could bring or import.

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[65] In 1871, an annual tax was imposed for persons who wanted to carry handguns in public, and in 1920, a licensing system for handgun and rifle possession was introduced. Neither law distinguished single-shot guns from repeaters. JOHNSON ET AL., *supra* note 17, at 2168–69.

[66] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 46 (2022) ("[W]e doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation.").

[67] It is dubious "to rely on an 'ancient' practice that had become 'obsolete in England at the time of the adoption of the Constitution' and never 'was acted upon or accepted in the colonies.'" *Id.* at 35 (quoting Dimick v. Schiedt, 293 U.S. 474, 477 (1935)).

[68] 7 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3783, 3786 (Francis Newton Thorpe ed., 1909) [hereinafter CONSTITUTIONS, CHARTERS, AND OTHER ORGANIC LAWS]; RICHARD MIDDLETON, COLONIAL AMERICA: A HISTORY, 1565–1776, at 48 (3d. ed. 2002) (2003 reprint).

The 105 colonists included "some 35 gentlemen, an Anglican minister, a doctor, 40 soldiers, and a variety of artisans and laborers." *Id.*

A previous attempt in 1585 to establish a colony at Roanoke Island, North Carolina, had failed.

The arms rights had been granted to the Virginia Company in perpetuity by the 1606 charter issued by King James I and reiterated in a 1609 charter. The rights applied to all settlers of the Virginia Colony. The Virginia Charter was the first written arms rights guarantee for Englishmen; back in England, the first written guarantee would not come until the 1689 English Bill of Rights.[69]

The 1620 Charter of New England gave the inhabitants the same rights, including arms rights, as the Virginia colony.[70] Like the Virginia Charter, the Charter of New England contained no restrictions on the types of arms.

The 1606 Virginia Charter covered such a vast territory that it is a founding legal document of all the original thirteen states, plus West Virginia, Kentucky, and Maine.[71] Similarly, the 1620 Charter of New England is a founding legal document of the New England states (except Vermont), Pennsylvania, New York, and New Jersey.[72]

To encourage immigration to America, all emigrants from England "and every of their children" born in America were guaranteed "all Liberties, Franchises and Immunities . . . as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions."[73] Subsequent colonial charters often declared that American colonists had the rights of Englishmen.[74] So in

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[69] 1 WM. & MARY, sess. 2, in 6 Statutes of the Realm 143 (1689).

[70] The New England Charter declared that it was lawful for,

> our loving Subjects, or any other Strangers who become our loving Subjects, to att all and every time and times hereafter, out of our Realmes or Dominions whatsoever, to take, load, carry, and transports in . . . Shipping, Armour, Weapons, Ordinances, Munition, Powder, Shott, Victuals, and all Manner of Cloathing, Implements, Furniture, Beasts, Cattle, Horses, Mares, and all other Things necessary for the said Plantation, and for their Use and Defense, and for Trade with the People there.

CONSTITUTIONS, CHARTERS, AND OTHER ORGANIC LAWS, *supra* note 68, at 1834–35 (internal quotation marks omitted). For the New England and Virginia colonies, such imports and exports were untaxed for the first seven years. *Id.* at 3787–88.

[71] Before becoming separate states, West Virginia and Kentucky were part of Virginia, and Maine part of Massachusetts. *The Admission of Kentucky and Vermont to the Union*, FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-19-02-0103-0001 [https://perma.cc/MA8Q-Q9MG]; Act of Dec. 31, 1862, ch. 6, 12 Stat. 633, 633–34 (1862) (West Virginia); Virginia v. West Virginia, 78 U.S. (11 Wall.) 39 (1870); Act of Mar. 3, 1820, ch. 19, 3 Stat. 544 (1820) (Maine).

[72] CONSTITUTIONS, CHARTERS, AND OTHER ORGANIC LAWS, *supra* note 68, at iv–xiii.

[73] *Id.* at 3788 (Virginia) (1606); *id.* at 1839 (New England) (1620) (slight differences in phrasing and spelling).

The colonists who sailed to establish the New England colony, unlike their Virginian predecessors, included many families, and thus women and children. MIDDLETON, *supra* note 68, at 70. "Most couples" in New England "raised large families, with between five and seven children commonly surviving to adulthood," providing the population growth that made the colonies viable. *Id.* at 89. "Twenty thousand people came to New England in the 1630s; thereafter the flow slowed to a trickle. The natural population increase, however, caused the number of towns in Massachusetts to grow from twenty-one in 1641 to thirty-three by 1647." *Id.*

[74] *See* CONSTITUTIONS, CHARTERS, AND OTHER ORGANIC LAWS, *supra* note 68, at 533 (Connecticut) (1662); *id.* at 773 (Georgia) (1732); *id.* at 1681 (Maryland) (1632); *id.* at 1857 (Massachusetts) (1629); *id.* at 2747 (Carolina, later divided into North and South Carolina) (1663); *id.* at 3220 (Rhode Island) (1663).

addition to the express arms guarantees in the early colonial charters, the colonists were protected by the 1689 English Bill of Rights, which secured the right of "the subjects which are Protestants [to] have arms for their defence."[75]

All colonies except Pennsylvania required that arms be kept in most homes.[76] In addition to militia statutes, which typically covered males ages sixteen to sixty, many people not in the militia had to have the same arms as militiamen. The non-militia mandates applied to men exempt from militia duties because of occupation (e.g., doctors), infirmity, or advanced age. Arms possession mandates sometimes applied to heads of households, including women. Besides that, arms carrying was often mandatory, and to comply with a carry mandate, a person at least had to have access to arms.[77]

There were no prohibitions on any particular type of arm, ammunition, or accessory in any English colony that later became an American state. The only restriction in the English colonies involving specific arms was a handgun and knife carry restriction enacted in Quaker-owned East New Jersey in 1686.[78]

Today's New Jersey was once part of New Netherland. New Netherland was not subdivided into different colonies. After the English seized New Netherland from the Dutch in 1664, East Jersey, West Jersey, and New York were created as separate colonies. The 1684 East Jersey restriction on carry was in force at most eight years and was not carried forward when East Jersey merged with West Jersey in 1702.[79] That law imposed no restriction on the possession or sale of any arms.

B. New Sweden

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[75] English Bill of Rights, 1 WM. & MARY, sess. 2, ch. 2 (1689) ("The subjects which are protestants may have arms for their defence suitable to their conditions and as allowed by law.").

[76] Pennsylvania did not have a militia mandate until the adoption of the 1776 state constitution following Independence. PA. CONST. of 1776, § 5; 9 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801, at 77 (1903) (enacted 1777). During the French & Indian War, in 1755, the colonial legislature had enacted a statute for voluntary militia companies. *Id.* at 197 (1898).

[77] *See infra* Part II.D.

[78] The East Jersey law forbade the concealed carry of "any Pocket Pistol, Skeines [Irish-Scottish dagger], Stilladoes [stilettos], Daggers or Dirks, or other unusual or unlawful Weapons." Further, no "Planter" (frontiersman) could "Ride or go Armed with Sword, Pistol, or Dagger," except when in government service or if "Strangers" (*i.e.* travelers). AARON LEAMING & JACOB SPICER, THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW-JERSEY 289–90 (1758).

[79]

> By 1694, East New Jersey provided that no slave "be permitted to carry any gun or pistol . . . into the woods, or plantations" unless their owner accompanied them. *Id.* at 341. If slave-owning planters were prohibited from carrying pistols, it is hard to comprehend why slaves would have been able to carry them in the planter's presence. Moreover, there is no evidence that the 1686 statute survived the 1702 merger of East and West New Jersey. *See* 1 SAMUEL NEVILL, ACTS OF THE GENERAL ASSEMBLY OF THE PROVINCE OF NEW-JERSEY (1752). At most eight years of history in half a Colony roughly a century before the founding sheds little light on how to properly interpret the Second Amendment.

N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 49 (2022)

New Sweden existed from 1638 to 1655. It included parts of the future states of Delaware, New Jersey, Maryland, and Pennsylvania. Its core was the region around the lower Delaware River and the Delaware Valley. The area abounded in excellent locations for trade with Indians. In the course of trading, the colonists often sold firearms and cannons to Indians.

At the time, the Swedish Empire ruled Finland, and Finns constituted a large portion of New Sweden's settlers. A substantial subpopulation of the Finnish settlers were the Savo-Karelians, who, unlike many newcomers to North America, already had extensive experience inhabiting wooded frontiers and trading with indigenous peoples, namely the Lapps. In the New World, the Savo-Karelian Finns learned more woodcraft from the Delaware Indians. "On no other part of the colonial American frontier was such rapid and comprehensive acceptance of Indian expertise in hunting and gathering achieved."[80] The Finns hunted with flintlock rifles and shotguns, and many settlers were capable of manufacturing and repairing their own arms.[81]

We are aware of no law in New Sweden against the possession of any type of arm, ammunition, or accessory. Rather, the New Swedes used modern firearms (flintlocks) and cannons. Having friendly relations with nearby Indians, they traded these arms freely with them.

The Dutch Republic conquered New Sweden in 1655, assimilating it into New Netherland. The Dutch hoped the Swedes would continue to immigrate because "the Swedish people are more conversant with, and understand better than any other nation . . . hunting and fowling."[82] When the English gained control of the region a decade later, they, too, acknowledged the Finns' unique and welcome backwoods expertise.[83]

C. New Netherland

New Netherland stretched from Cape Henlopen (on the south side of the Delaware Bay) north to Albany, New York, and eastward to Cape Cod (in far southeastern Massachusetts). The colony included parts of present-day New York, New Jersey, Connecticut, and Delaware, in addition to small outposts that the colony claimed in Rhode Island and Pennsylvania.[84] New Netherland was part of the Dutch Republic, an industrial powerhouse that led the world in arms manufacturing. Dutch arms earned a reputation for reliability and affordability, and often made their way to America.[85]

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[80] TERRY G. JORDAN & MATTI E. KAUPS, THE AMERICAN BACKWOODS FRONTIER: AN ETHICAL AND ECOLOGICAL INTERPRETATION 232 (1988).

[81] *See id.* at 222–24.

[82] 2 JOHN R. BRODHEAD, DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK PROCURED IN HOLLAND, ENGLAND, AND FRANCE 242 (E. B. O'Callaghan ed., 1858).

[83] JORDAN & KAUPS, *supra* note 80, at 150.

[84] 5 CHARLES MCLEAN ANDREWS, THE AMERICAN NATION: A HISTORY, Colonial Self-Government, 1652–1689, at 74 (1904).

[85] *See* DAVID J. SILVERMAN, THUNDERSTICKS: FIREARMS AND VIOLENT TRANSFORMATION OF NATIVE AMERICA 25 (2016); H. Ph. Vogel, *The Republic as an Arms Exporter 1600–1650, in* THE ARSENAL OF THE WORLD: THE DUTCH ARMS TRADE IN THE SEVENTEENTH CENTURY 13, 13–21

The West India Company—a Dutch chartered company of merchants—founded New Netherland in 1624 and ruled it autocratically. The founding of New Netherland being motivated by commerce, the colonists soon began trading firearms.[86] This caused a problem that would last as long as the colony itself because their customers were often Indians who threatened the colony's existence.[87]

In 1639, "the Director General and Council of New Netherland hav[ing] observed that many persons . . . presumed to sell to the Indians in these parts, Guns, Powder and Lead, which hath already caused much mischief," made it "most expressly forbidden to sell any Guns, Powder or Lead to the Indians, on pain of being punished by Death."[88] In 1645, having been "informed with certainty, that our enemies [the Indians] are better provided with Powder than we," New Netherland reaffirmed the death penalty for "all persons . . . daring to trade any munitions of War with the Indians," and required vessels to obtain permission to travel with munitions, to ensure that they were not secretly engaging in such trade.[89] This prohibition was renewed in 1648.[90]

New Netherland continued to wrestle with the problem of colonists providing arms to Indians in the 1650s. A 1652 ordinance established another ban on the trading of firearms from "[p]rivate persons" to Indians.[91] But the ordinance "is not among the Records, and seems, indeed, not to have been very strictly enforced."[92] Indeed, in 1653, New Netherland's Directors noted that the colony's Director General had "been obliged . . . to connive somewhat in regard to the" trading ban; they instructed him "to deal herein with a sparing hand, and take good care that through this winking no more ammunition be sold to the Indians than each one has need of for the protection of his house and for obtaining the necessaries of life, so that this cruel and barbarous Nation may not be able, at any time, to turn and employ their weapons against ourselves there."[93] The Director General and his Council did not deal sparingly enough; instead, as a 1656 law pointed out, they personally profited from the Indian arms trade.[94]

(Jan Peit Puype & Macro van der Hoeven eds., B.J. Martens, G. de Vries & Jan Peit Puype trans., 1996) (Dutch ed. 1993).

[86] SILVERMAN, *supra* note 85, at 96–98.

[87] *See generally* Shaun Sayres, "A Daingerous Liberty": Mohawk-Dutch Relations and the Colonial Gunpowder Trade, 1534–1665 (May 2018) (Master's Thesis, University of New Hampshire) (on file with the University of New Hampshire Scholars Repository).

[88] LAWS AND ORDINANCES OF NEW NETHERLAND, 1638–1674, at 18–19 (E. B. O'Callaghan ed., 1868).

[89] *Id.* at 47.

[90] *Id.* at 101.

[91] *Id.* at 128.

[92] *Id.*

[93] *Id.*

[94]

> [T]he Director General and Council of New Netherland are to their regret informed and told of the censure and blame under which they are lying among Inhabitants and Neighbors on account of the non-execution of their previously enacted and frequently renewed Edicts . . . some not only presuming that the Director General and Council connive with the violators, but even publicly declaring that the Director General and Council aforesaid have made free the

Consequently, previous restrictions were "revive[d] and renew[ed]," with "the following amplification":

> That henceforth no person, of what nation or quality soever he may be, shall be at liberty to bring into the Country for his own or ship's use any sort of Snaphance or Gunbarrels, finished or unfinished, not even on the Company's permit, save only, according to order, one Carbine, being a firelock of three to three and a half feet barrel and no longer.[95]

In addition to limiting the number of flintlocks colonists could bring into the colony, the law targeted the smuggling of arms by requiring all private ships to submit to searches "both on their arrival and departure."[96]

In 1664, after the Duke of York's English forces conquered New Netherland with ease, New Netherland became the British colony of New York.[97]

The one-flintlock law of 1656 is the only restriction on a particular type of arm in what would become the original thirteen American states. It was enacted out of desperation at the end of a futile decades-long attempt to restrict gun sales to adversaries who threatened the colony's survival. The law did not ban any colonist from possessing flintlocks or limit how many they could own; it limited the number they could bring into the colony. No English colony enacted a similar restriction. The one-flintlock import limit vanished upon the British takeover of New Netherland.

D. *Arms Mandates in Colonial America*

Subsection 1 describes who was required to possess or carry arms. Subsection 2 lists the various types of arms whose possession was mandatory. In colonial America, "the gun was more abundant than the tool. It furnished daily food; it maintained its owner's claims to the possession of his homestead among the aboriginal owners of the soil; it helped to win the mother country's wars for possession of the country as a whole."[98]

1. Who was required to keep or bear arms?

> importation and trade in Contraband which, for that reason, is carried on with uncommon licentiousness and freedom.

Id. at 236–37.

[95] *Id.* Another 1656 law "forb[ade] the admission of any Indians with a gun or other weapon, either in this City or in the Flatland, into the Villages and Hamlets, or into any Houses or any places." *Id.* at 235.

[96] *Id.* at 237–38.

[97] CARL P. RUSSELL, GUNS ON THE EARLY FRONTIERS 10 (1957).

[98] 1 CHARLES WINTHROP SAWYER, FIREARMS IN AMERICAN HISTORY 1 (1910).

The most common age for militia service in the colonies was sixteen to sixty years of age. Typical militia statutes required militia-eligible males to own at least one cutting weapon (such as a sword or bayonet) and at least one firearm.[99]

Many colonies also required ownership by people who were not in the militia. These included males with occupational exemptions from the militia and males who were too old for militia service.[100] No state authorized female service in the militia, but several—Massachusetts, Maryland, Virginia, New Hampshire, Vermont, and Connecticut—at least sometimes required females to have the same arms as militiamen.[101] Like males who were militia-exempt because of age or

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[99] *See* David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. 495, 533–89 (2019).

[100] For example, Delaware exempted certain occupations from routine militia service, but still ordered exempt persons to be armed and ready to serve in an emergency:

> [A]ll Justices of the Peace, Physicians, Lawyers, and Millers, and Persons incapable through Infirmities of Sickness or Lameness, shall be exempted and excused from appearing to muster, except in Case of an Alarm [an attack on the locality]: They being nevertheless obliged, by this Act, to provide and keep by them Arms and Ammunition as aforesaid, as well as others. And if an Alarm happen, then all thofe, who by this Act are obliged to keep Arms as aforesaid . . . shall join the General Militia . . . .

LAWS OF THE GOVERNMENT OF NEW-CASTLE, KENT AND SUSSEX UPON DELAWARE 176–77 (1741).

[101] In order of enactment:

Maryland: "every house keeper or housekeepers within this Province shall have ready continually upon all occasions within *his her or their house* for him or themselves and for every person within his her or their house able to bear armes one Serviceable fixed gunne of bastard muskett boare . . . ," plus, a pound of gunpowder, four pounds of shot, and firearms ignition accessories. 1 ARCHIVES OF MARYLAND 77 (William Hand Browne ed., 1885) (enacted 1639) (emphasis added).

Virginia: "ALL persons except negroes to be provided with arms and ammunition or be fined at pleasure of the Governor and Council." 1 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 226 (1823) (enacted 1639).

Massachusetts: "all inhabitants." 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 84 (Nathaniel B. Shurtleff ed., 1853) (enacted 1645) [hereinafter MASSACHUSETTS BAY RECORDS]. *Cf.* 2 *Id.* at 99 (requiring arms training for children of both sexes, ages ten through sixteen).

Rhode Island: "that every Inhabitant of the Island above sixteen or under sixty years of age, shall always be provided with a Musket," a pound of gunpowder, twenty bullets, a sword, and other accessories. *Acts and Orders of 1647*, *in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 183–84 (Donald S. Lutz ed., 1998).

Connecticut: "all persons that are aboue the age of sixteene yeares, except Magistrates and Church officers, shall beare Arms . . . ; and euery male person within this Jurisdiction aboue the said age, shall haue in continuall readines, a good muskitt or other gunn, fitt for service, and allowed by the Clark of the Band." THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, PRIOR TO THE UNION WITH NEW HAVEN COLONY, MAY 1665, 542 (J. Hammond Trumbull ed., 1850) (enacted 1650) [hereinafter CONNECTICUT, PRIOR TO THE UNION].

New Hampshire: every "Householder" to have a musket, a cartridge box, bandoliers, bullets, powder, cleaning tools, and a sword. 2 LAWS OF NEW HAMPSHIRE INCLUDING PUBLIC AND PRIVATE ACTS AND RESOLVES AND THE ROYAL COMMISSIONS AND INSTRUCTIONS WITH HISTORICAL AND DESCRIPTIVE NOTES, AND AN APPENDIX 285 (Albert Stillman Batchellor ed., 1913) (enacted 1718).

occupation, armed females were part of their communities' emergency defense. Whenever a small town was attacked, everybody who was able would fight as needed, including women, children, and the elderly.[102]

As *Heller* observed, "Many colonial statutes required individual arms-bearing for public-safety reasons."[103] Colonies required arms carrying to attend church[104] or public assemblies,[105] travel,[106] and work in the field.[107]

The carry mandates referred to a "man" or "he," except in Massachusetts, which mandated carry by any "person."[108] They did not require that the individual carry a specific type of firearm, and sometimes allowed a sword instead of a firearm. Nor did they require that the carrier personally own the firearm; the statutes presumed that a person engaged in the listed activities would have ready access to a firearm.

2. Types of mandatory arms

Vermont: "every listed soldier and other householder" must have a firearm, a blade weapon, gunpowder, bullets, and cleaning equipment. WILLIAM SLADE, VERMONT STATE PAPERS, BEING A COLLECTION OF RECORDS AND DOCUMENTS, CONNECTED WITH THE ASSUMPTION AND ESTABLISHMENT OF GOVERNMENT BY THE PEOPLE OF VERMONT; TOGETHER WITH THE JOURNAL OF THE COUNCIL OF SAFETY, THE FIRST CONSTITUTION, THE EARLY JOURNALS OF THE GENERAL ASSEMBLY, AND THE LAWS FROM THE YEAR 1779 TO 1786, INCLUSIVE 307 (1823) (enacted 1779).

[102] *See* STEVEN C. EAMES, RUSTIC WARRIORS: WARFARE AND THE PROVINCIAL SOLDIERS ON THE NEW ENGLAND FRONTIER, 1689–1748, at 28–29 (2011).

[103] District of Columbia v. Heller, 554 U.S. 570, 601 (2008)

[104] *Proceedings of the Virginia Assembly, 1619*, *in* NARRATIVES OF EARLY VIRGINIA, 1606–1625, at 273 (Lyon Gardiner Tyler ed.,1959) (1907) (enacted 1619); 1 HENING, *supra* note 101, at 198 (1632); VIRGINIA LAWS 1661–1676, at 37 (1676) (enacted 1665); THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH: TOGETHER WITH THE CHARTER OF THE COUNCIL AT PLYMOUTH, AND AN APPENDIX, CONTAINING THE ARTICLES OF CONFEDERATION OF THE UNITED COLONIES OF NEW ENGLAND, AND OTHER VALUABLE DOCUMENTS 102 (William Brigham ed., 1836) (enacted 1656) (April 1 through November 30, militiamen only); *id.* at 115 (1658) (changing April 1 to March 1); *id.* at 176 (1675) (year-round); 3 ARCHIVES OF MARYLAND, *supra* note 101, at 103 (enacted 1642); CONNECTICUT, PRIOR TO THE UNION, *supra* note 101, at 95–96 (enacted 1643); CHARLES J. HOADLY, RECORDS OF THE COLONY AND PLANTATION OF NEW HAVEN, FROM 1638–1649, at 132 (1857) (enacted 1644) (New Haven was a separate colony from Connecticut until 1662); 7 DAVID J. MCCORD, STATUTES AT LARGE OF SOUTH CAROLINA 417–19 (1840) (enacted 1740, re-enacted 1743) (militiamen only); ALLEN D. CHANDLER, 19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA 137–40 (1904) (enacted 1770) (militiamen only).

[105] 1 MASSACHUSETTS BAY RECORDS, *supra* note 101, at 190 (enacted 1637); 2 *id.* at 38 (1638 repeal of 1637 law; replaced in 1643 with instruction for each town's militia head to "appoint what armes to bee brought to the meeting houses on the Lords dayes, & other times of meeting."); 1 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 94 (John Russell Bartlett ed., 1856) (enacted 1639) [hereinafter RECORDS OF RHODE ISLAND] ("[N]one shall come to any public Meeting without his weapon.").

[106] 1 HENING, *supra* note 101, at 127 (Virginia, 1623); *id.* at 173 (1632); 1 MASSACHUSETTS BAY RECORDS, *supra* note 105, at 85 (1631, travel to Plymouth); *id.* at 190 (1636) ("travel above one mile from his dwelling house, except in places wheare other houses are neare together"); 1 RECORDS OF RHODE ISLAND, *supra* note 105, at 94 ("noe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword"); 3 ARCHIVES OF MARYLAND, *supra* note 101, at 103 ("any considerable distance from home").

[107] 1 HENING, *supra* note 101, at 127 (Virginia, 1624); *id.* at 173 (1632).

[108] 1 MASSACHUSETTS BAY RECORDS, *supra* note 101, at 190 (1637, meetings), repealed the next year; *id.* at 190; *id.* at 85 (travelers, 1631); *id.* at 190 (travelers, 1636).

The statutes that required the keeping of arms—by all militia and some nonmilitia—indicate some of the types of arms that were so common during the colonial period that it was practical to mandate ownership. Collectively, the colonial statutes mandated ownership of a wide range of arms.

We will list the different types of mandated arms, starting with cutting weapons.

Knives, swords, and hatchets

- Backsword.[109] "A kind of sabre. A sword having a straight, or very slightly curved, single-edged blade."[110]
- Bayonet.[111] A knife attached to the muzzle of a gun.[112]
- Broad Sword.[113] "A sword with a straight, wide, single-edged blade. It was the military sword of the 17th century" and "also the usual weapon of the common people."[114]
- Cutlas, Cutlass, Cutlace.[115] "A broad curving sword; a hanger; used by soldiers in the cavalry, by seamen, etc."[116]
- Cutting-Sword.[117] A category of "short, single-edged" swords, which included cutlasses and hangers.[118]

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109 BACKGROUNDS OF SELECTIVE SERVICE: MILITARY OBLIGATION: THE AMERICAN TRADITION, pt. 2, at 14 (Arthur Vollmer ed., 1947) (Connecticut) (1650) [hereinafter BACKGROUNDS OF SELECTIVE SERVICE].

110 STONE, *supra* note 14, at 84 ("Back Sword").

111 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 176, 177 (Connecticut) (1775), 205 (1775), 256 (1784); *id.* pt. 3, at 28 (Delaware) (1785); *id.* pt. 4, at 7 (Georgia) (1755), 57 (1765), 80 (1773), 122 (1778); *id.* pt. 5, at 102 (Maryland) (1756); *id.* pt. 6, at 200 (Massachusetts) (1758), 223 (1776), 231 (1776–77), 246 (1781); *id.* pt. 7, at 82 (New Hampshire) (1776), 104, 105 (1780), 116 (1780); *id.* pt. 8, at 12 (New Jersey) (1713), 16 (1722), 20 (1730), 25, 26, 27 (1746), 33, 35, 37 (1757), 41 (1777), 64 (1779), 70 (1781); *id.* pt. 9, at 267 (New York) (1778), 271 (1778), 311 (1782), 326 (1783); *id.* pt. 12, at 37 (Rhode Island) (1705), 90 (1767), 99 (1774), 184 (1781), 197 (1781), 201 (1781), 203 (1781), 204, 206 (1793), 217, 219 (1798); *id.* pt. 13, at 9 (South Carolina) (1703), 24 (1721), 40 (1747), 67 (1778); *id.* pt. 14, at 78 (Virginia) (1723), 105 (1738), 146, 150 (1755), 206, 210 (1757), 258, 274, 277 (1775), 306 (1775), 322, 323 (1777).

112 *See* STONE, *supra* note 14, at 107 ("Bayonet").

113 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 8, at 81 (New Jersey) (1781); *id.* pt. 9, at 311 (New York) (1782); *id.* pt. 10, at 21 (North Carolina) (1756), 29 (1760), 35 (1764), 42 (1766), 52 (1774).

114 STONE, *supra* note 14, at 150–51.

115 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 131 (Connecticut) (1741); *id.* pt. 8, at 41, 45 (New Jersey) (1777); *id.* pt. 10, at 11 (North Carolina) (1746), 39 (1766), 49 (1774); *id.* pt. 13, at 68 (South Carolina) (1778).

116 1 WEBSTER, *supra* note 8 (unpaginated) ("Cutlas"); *see also* STONE, *supra* note 14, at 198 ("a family of backswords").

117 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 6, at 223 (Massachusetts) (1776), 231 (1776–77); *id.* pt. 14, at 78 (Virginia) (1723), 105 (1738), 145, 146 (1755), 150, 151 (1755), 211 (1757).

118 PETERSON, ARMS AND ARMOR IN COLONIAL AMERICA, *supra* note 26, at 79–80.

- Hanger.[119] "A short broad sword, incurvated towards the point."[120]
- Hatchet.[121] "A small ax with a short handle, to be used with one hand."[122] A popular substitute for a sword.[123]
- Jack-knife.[124] A folding pocket-knife, with blades ranging from three to twelve inches.[125]
- Rapier.[126] "A sword especially designed for thrusting and provided with a more or less elaborate guard."[127]
- Scabbards.[128] "The sheath of a sword."[129]
- Scimeter, scymiter, simeter, semeter, cimeter.[130] "The strongly curved Oriental sabre."[131]

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119 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 4, at 122 (Georgia) (1778); *id.* pt. 5, at 91 (Maryland) (1756); *id.* pt. 7, at 105 (New Hampshire) (1780); *id.* pt. 9, at 4 (New York) (1694), 16 (1691), 46 (1702), 53 (1702), 80 (1721), 89 (1724), 116 (1739), 134 (1743), 148 (1744), 165 (1746), 188 (1755), 227 (1764), 243 (1772), 252 1775); *id.* pt. 10, at 10 (North Carolina) (1746), 19 (1756), 26 (1760), 32 (1764), 39 (1766), 49 (1774); *id.* pt. 12, at 204, 206 (Rhode Island) (1793), 217 (1798).

120 1 WEBSTER, *supra* note 8 (unpaginated) ("Hanger").

121 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 4, at 7, 35 (Georgia) (1755), 69 (1765), 80, 109 (1773), 122 (1778); *id.* pt. 6, at 133 (Massachusetts) (1689), 199 (1758), 223 (1776), 231 (1776–7); *id.* pt. 7, at 31 (New Hampshire) (1692), 82 (1776), 117 (1780); *id.* pt. 8, at 10 (New Jersey) (1693); *id.* pt. 13, at 9 (South Carolina) (1703), 17 (1707), 24 (1721), 40, 52 (1747).

122 1 WEBSTER, *supra* note 8 (unpaginated) ("Hatchet").

123 *See* PETERSON, ARMS AND ARMOR IN COLONIAL AMERICA, *supra* note 26, at 87–88.

124 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 6, at 223 (Massachusetts) (1776); *id.* pt. 7, at 82 (New Hampshire) (1776).

125 GEORGE G. NEUMANN, SWORDS & BLADES OF THE AMERICAN REVOLUTION 231 (3d ed. 1991).

126 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 9, at 4 (New York) (1694), 16 (1691), 46 (1702), 53 (1702).

127 STONE, *supra* note 14, at 524–26.

128 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 6, at 200 (Massachusetts) (1758), 223 (1776), 246 (1781), 263 (1789); *id.* pt. 7, at 82 (New Hampshire) (1776), 104 (1780).

129 2 WEBSTER, *supra* note 8 ("Scabbard").

130 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 14, at 59 (Virginia) (1701).

131 STONE, *supra* note 14, at 545 ("Scymiter, Scimeter"). "Guard" means a handguard, a barrier between the handle and the blade. *Id.* at 254.

- Sword.[132] "An offensive weapon worn at the side, and used by hand either for thrusting or cutting."[133]
- Tomahawk.[134] "An Indian hatchet."[135]

Pole arms

- Halberd, Halbard, Halbart.[136] "[A] polearm bearing an axehead balanced by a break or fluke and surmounted by a sharp point."[137]
- Half-Pike.[138] "A small pike carried by officers."[139]
- Lance.[140] "A spear, an offensive weapon in form of a half pike, used by the ancients and thrown by the hand. It consisted of the shaft or handle, the wings and the dart."[141]

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132 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 5 (Connecticut) (1638), 12 (1650), 18 (1658), 28 (1673), 30 (1673), 44 (1677), 46 (1687), 60, 61, 63 (1702), 92, 94, 95 (1715), 123, 124, 129 (1741), 131, 138 (1741), 150, 151, 156 (1754), 256 (1784); *id.* pt. 4, at 57 (Georgia) (1765), 80 (1773), 122 (1778); *id.* pt. 5, at 6 (Maryland) (1638), 17 (1678), 25 (1681), 32 (1692), 39 (1695), 42 (1699), 51 (1704), 66 (1715), 91 (1756); *id.* pt. 6, at 21 (Massachusetts) (1643), 25 (1643), 29 (1645), 39 (1647), 59 (1649), 68 (1658), 86, 91 (1671), 100, 105 (1672), 129 (1685), 133 (1689), 139 (1693); *id.* pt. 7, at 12, 13 (New Hampshire) (1687), 31 (1692), 52 (1718), 82 (1776), 105 (1780); *id.* pt. 8, at 5 (New Jersey) (1675), 8 (1682), 12 (1713), 16 (1722), 20 (1730), 25, 27, 30 (1746), 33, 35, 37 (1757), 41, 45 (1777); *id.* pt. 9, at 4 (New York) (1694), 16 (1691), 46 (1702), 52, 53 (1702), 80 (1721), 89, 90 (1724), 116 (1739), 118 (1739), 134 (1743), 148, 150 (1744), 164, 165 (1746), 188 (1755), 227, 229 (1764), 243, 245 (1772), 252, 255 (1775), 273 (1778), 311 (1782); *id.* pt. 10, at 7 (North Carolina) (1715), 10, 13 (1746), 19 (1754), 26 (1760), 32 (1764), 39 (1766), 49 (1774), 123 (1781); *id.* pt. 11, at 10, 14 (Pennsylvania) (1676), 16 (1676); *id.* pt. 12, at 3 (Rhode Island) (1647), 26 (1701), 34, 37 (1705), 42 (1718), 90, 95 (1767), 204, 206 (1793), 217, 219 (1798); *id.* pt. 13, at 9 (South Carolina) (1703), 17 (1707), 24, 31 (1721), 40 (1747); *id.* pt. 14, at 48 (Virginia) (1684), 50 (1684), 65, 66 (1705), 211 (1757), 277 (1775), 322 (1777), 424 (1784).

133 2 WEBSTER, *supra* note 8 (unpaginated).

134 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 6, at 223 (Massachusetts) (1776), 231 (1776–77); *id.* pt. 7, at 82 (New Hampshire) (1776); *id.* pt. 8, at 41 (New Jersey) (1777), 70 (1781); *id.* pt. 10, at 57 (North Carolina) (1777), 62 (1777), 69 (1778); *id.* pt. 13, at 68 (South Carolina) (1778); *id.* pt. 14, at 274 (Virginia) (1775), 322 (1777).

135 2 WEBSTER, *supra* note 8 (unpaginated).

136 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 14, at 151 (Virginia) (1755), 211 (1757). Some towns and counties were required to provide halberds. *See, e.g.*, *id.* pt. 3, at 5 (Delaware) (1741), 14 (1756), 22 (1757); *id.* pt. 6, at 49 (Massachusetts) (1653), 68 (1658), 80 (1669), 88 (1671), 102 (1672), 130 (1685), 135 (1690), 143 (1693), 168 (1738), 170 (1742), 201 (1758); *id.* pt. 7, at 57 (New Hampshire) (1718); *id.* pt. 11, at 12 (Pennsylvania) (1676); *id.* pt. 14, at 277 (Virginia) (1775).

137 PETERSON, ARMS AND ARMOR IN COLONIAL AMERICA, *supra* note 26, at 93; *see also* STONE, *supra* note 14, at 275 ("Halbard, Halbart, Halberd").

138 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, FROM 1665 TO 1678, at 208 (J. Hammond Trumbull ed., 1852) (Connecticut) (enacted 1673) [hereinafter CONNECTICUT, FROM 1665 TO 1678] ("Halfe-picke"); BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 7, at 105 (New Hampshire) (1780).

139 1 WEBSTER, *supra* note 8 (unpaginated) ("Half-pike").

140 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 9, at 4 (New York) (1694), 16 (1691), 46 (1702), 52 (1702).

141 2 WEBSTER, *supra* note 8 (unpaginated) ("Lance").

- Partisan.[142] "A broad-bladed pole arm usually having short, curved branches at the base of the blade."[143]
- Pike.[144] "A military weapon consisting of a long wooden shaft or staff, with a flat steel head pointed; called the spear."[145]
- Spontoon, Espontoon.[146] A six-foot-long pole arm.[147] Sometimes, "spontoon" was used interchangeably with "half-pike," but "spontoon" sometimes described a more decorative type.[148]

Firearms

- Bastard muskets[149] "In military affairs, bastard is applied to pieces of artillery which are of an unusual make or proportion."[150] Bastard muskets were shorter and lighter than typical muskets.
- Caliver.[151] "A kind of handgun, musket or arquebuse."[152]
- Carbine.[153] "A short gun or fire arm, carrying a ball of 24 to the pound, borne by light horsemen, and hanging by a belt over the left shoulder. The barrel is two-and-a-half feet long, and sometimes furrowed."[154]

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142 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 14, at 151 (Virginia) (1755).

143 STONE, *supra* note 14, at 484 ("Partizan").

144 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 25 (Connecticut) (1666), 46 (1687); *id.* pt. 6, at 22 (Massachusetts) (1643), 86 (1671), 100 (1672); *id.* pt. 9, at 4 (New York) (1694), 16 (1691), 53 (1702).

145 2 WEBSTER, *supra* note 8 (unpaginated) ("Pike").

146 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 7, at 105 (New Hampshire) (1780); *id.*, pt. 12, at 204 (Rhode Island) (1793), 217 (1798); *id.*, pt. 14, at 424 (Virginia) (1784).

147 *See* NEUMANN, *supra* note 125, at 191.

148 *See* PETERSON, ARMS AND ARMOR IN COLONIAL AMERICA, *supra* note 26, at 286–87.

149 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 30 (Connecticut) (1673), 60 (1702); *id.* pt. 5, at 6 (Maryland) (1638); *id.* pt. 6, at 41 (Massachusetts) (1647), 45 (1647), 56 (1660), 86 (1671), 129 (1685), 139 (1693); *id.* pt. 7, at 52 (New Hampshire) (1718).

150 1 WEBSTER, *supra* note 8 (unpaginated) ("Bastard").

151 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 30 (Connecticut) (1673) ("Coliver, Colliver"); *id.*, pt. 6, at 124 (Massachusetts) (1677).

152 1 WEBSTER, *supra* note 8 (unpaginated) ("Caliver").

153 CONNECTICUT, FROM 1665 TO 1678, *supra* note 138, at 207 ("Kirbine"); BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 28 (Connecticut) (1673), 30 (1673), 46 (1687), 57 (1696), 60 (1702), 92 (1715), 124 (1741), 131 (1741), 151 (1754), 202 (1775); *id.* pt. 5, at 17 (Maryland) (1678), 25 (1681), 32 (1692), 39 (1695), 42 (1699), 51 (1704), 66 (1715), 91 (1756); *id.* pt. 6, at 59 (Massachusetts) (1660), 91 (1671), 105 (1672), 116 (1675), 132 (1685), 139 (1693); *id.* pt. 7, at 13 (New Hampshire) (1688), 52 (1718); *id.* pt. 8, at 30 (New Jersey) (1746), 45 (1777); *id.* pt. 9, at 5 (New York) (1694), 16 (1691), 47 (1710), 53 (1702), 80 (1721), 116 (1739), 134 (1743), 148 (1744), 165 (1746), 188 (1755), 243 (1772), 252 (1775), 273 (1778), 311 (1782); *id.* pt. 10, at 21 (North Carolina) (1756), 29 (1760), 35 (1764), 42 (1766), 52 (1774), 75 (1778); *id.* pt. 11, at 14, 16 (Pennsylvania) (1676); *id.* pt. 12, at 29 (Rhode Island) (1701), 45 (1730), 95 (1767); *id.* pt. 13, at 31 (South Carolina) (1721); *id.* pt. 14, at 50 (Virginia) (1684), 65, 66 (1705), 78 (1723), 105 (1738), 145 (1755).

154 1 WEBSTER, *supra* note 8 (unpaginated) ("Carbine").

- Case of pistols.[155] Handguns were often sold in matched pairs. A "case of pistols"—sometimes called a "brace of pistols"—is such a pair.[156]
- Firelock.[157] "A musket, or other gun, with a lock, which is discharged by striking fire with flint and steel."[158] Today, it is commonly called a flintlock. As of the late eighteenth century, all modern firearms were flintlocks.
- Fowling piece.[159] "A light gun for shooting fowls."[160]
- Fusee, fuse, fuze, fuzee, fusil.[161] "[A] light, smoothbore shoulder arm of smaller size and caliber than the regular infantry weapon."[162]
- Matchlock.[163] "[T]he lock of a musket which was fired by a match."[164] The standard firearm of the early seventeenth century. During the same century, Americans shifted from matchlocks to flintlocks (also known as firelocks), which were more reliable and faster to reload.

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155 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 46 (Connecticut) (1687), 92 (1715), 131 (1741), 151 (1754), 256 (1784); *id.* pt. 6, at 139 (Massachusetts) (1693); *id.* pt. 8, at 30 (New Jersey) (1746), 45 (1777); *id.* pt. 9, at 4 (New York) (1694), 16 (1691), 46 (1702), 53 (1702), 80 (1721), 89 (1724), 116 (1739), 134 (1743), 148 (1744), 188 (1755), 227 (1764), 243 (1772), 252 (1775), 273 (1778), 311 (1782); *id.* pt. 10, at 13 (North Carolina) (1746), 21 (1756), 29 (1760), 35 (1764), 42 (1766), 52 (1774), 75 (1778); *id.* pt. 12, at 45 (Rhode Island) (1730); *id.* pt. 14, at 65, 66 (Virginia) (1705), 78 (1723), 105 (1738), 145, 150 (1755).

156 Clayton E. Cramer & Joseph Edward Olson, *Pistols, Crime, and Public: Safety in Early America*, 44 WILLAMETTE L. REV. 699, 709, 719 (2008).

157 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 18 (Connecticut) (1656), 60 (1702), 92 (1715), 123, 129 (1741), 131, 138 (1741), 150, 156 (1754), 236 (1780); *id.* pt. 3, at 2, 3 (Delaware) (1741), 28 (1785); *id.* pt. 5, at 6 (Maryland) (1638), 102 (1756); *id.* pt. 6, at 25 (Massachusetts) (1643), 124 (1677), 139 (1693), 255 (1781); *id.* pt. 7, at 52 (New Hampshire) (1718), 116 (1780); *id.* pt. 8, at 5 (New Jersey) (1675), 8 (1682); *id.* pt. 9, at 267 (New York) (1778), 271 (1778), 282 (1779), 287 (1780), 310 (1782), 326 (1783); *id.* pt. 11, at 10 (Pennsylvania) (1676); *id.* pt. 12, at 204 (Rhode Island) (1793), 217 (1798); *id.* pt. 14, at 65 (Virginia) (1705), 78 (1723), 146, 150 (1755), 206, 211 (1757), 274 (1775), 322 (1777).

158 1 WEBSTER, *supra* note 8 (unpaginated) ("Firelock").

159 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 4, at 146 (Georgia) (1784).

160 1 WEBSTER, *supra* note 8 (unpaginated) ("Fowlingpiece").

161 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 3, at 11 (Delaware) (1756), 17 (1757); *id.* pt. 4, at 146 (Georgia) (1784); *id.* pt. 7, at 105 (New Hampshire) (1780); *id.* pt. 8, at 12 (New Jersey) (1713), 16, 18 (1722), 20 (1730), 25–27 (1746), 33, 35, 37 (1757); *id.* pt. 9, at 16 (New York) (1691), 46 (1702), 52 (1702), 80 (1721), 90 (1724), 118 (1739), 136 (1743), 150 (1744), 164 (1746), 188 (1755), 229 (1764), 245 (1772), 255 (1775); *id.* pt. 10, at 13 (North Carolina) (1746); *id.* pt. 12, at 42 (Rhode Island) (1718), 90 (1767), 99 (1744), 206 (1793), 219 (1798); *id.* pt. 13, at 30, 32 (South Carolina) (1721); *id.* pt. 14, at 59 (Virginia) (1701), 65 (1705), 78 (1723), 105 (1738).

162 GEORGE C. NEUMANN, BATTLE WEAPONS OF THE AMERICAN REVOLUTION 19 (2011).

163 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 8 (Connecticut) (1638), 14 (1650), 18, 19 (1656), 30 (1673); *id.* pt. 5, at 6 (Maryland) (1638); *id.* pt. 6, at 2 (Massachusetts) (1631), 25 (1643), 29 (1645), 34 (1645), 39 (1647), 86 (1671); *id.* pt. 11, at 10 (Pennsylvania) (1676); *id.* pt. 12, at 3 (Rhode Island) (1647) ("Match").

164 2 WEBSTER, *supra* note 8 (unpaginated) ("Matchlock").

- Musket.[165] "The term 'musket' has always referred to a heavy military gun. In the 16th an 17th century it was a matchlock."[166] "Later the name came to signify any kind of a gun used by regular infantry."[167]
- Pistol.[168] "A small fire-arm, or the smallest fire-arm used, differing from a musket chiefly in size. Pistols are of different lengths, and borne by horsemen in cases at the saddle bow, or by a girdle. Small pistols are carried in the pocket."[169]
- Rifle.[170] "A gun about the usual length and size of a musket, the inside of whose barrel is rifled, that is, grooved, or formed with spiral channels."[171]
- Snaphaunce.[172] "During the 17th century, snaphaunce commonly referred to any flintlock system."[173]

Armor

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[165] CONNECTICUT, FROM 1665 TO 1678, *supra* note 138, at 207; BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 5 (Connecticut) (1638), 12 (1650), 28 (1673), 30 (1673), 46 (1687), 60 (1702), 92 (1715), 256 (1784); *id.* pt. 3, at 2 (Delaware) (1741), 3 (1741), 11 (1756), 17 (1757); *id.* pt. 4, at 6 (Georgia) (1755), 80 (1773), 146 (1784); *id.* pt. 5, at 6 (Maryland) (1638); *id.* pt. 6, at 2 (Massachusetts) (1631), 10 (1634), 25 (1643), 29 (1645), 39 (1646), 45 (1647), 56 (1660), 86 (1671), 116 (1675–76), 124 (1677), 129, 131 (1685), 139 (1693); *id.* pt. 7, at 12 (New Hampshire) (1687), 52 (1718), 104 (1780); *id.* pt. 8 (New Jersey), at 25, 27 (1746), 12 (1713), 18 (1722), 20, 23 (1730), 33, 35, 37 (1757), 41 (1777), 64 (1779), 70 (1781); *id.* pt. 9, at 16 (New York) (1691), 4 (1694), 46 (1702), 52 (1702), 80 (1721), 90 (1724), 118 (1739), 136 (1743), 150 (1744), 164 (1746), 180 (1746), 188 (1755), 229 (1764), 245 (1772), 255 (1775), 271, 273 (1778), 282 (1779), 233 (1780), 310, 311 (1782), 326 (1783); *id.* pt. 12, at 3 (Rhode Island) (1647), 22 (1677), 26 (1701), 42 (1718), 147 (1779), 184 (1781), 204 (1793), 217 (1798); *id.* pt. 13, at 40 (South Carolina) (1747), 67 (1778); *id.* pt. 14, at 59 (Virginia) (1701), 65 (1705), 78 (1723), 105 (1738), 258 (1775), 306 (1775), 312 (1775), 424 (1784).

[166] PETERSON, ARMS AND ARMOR IN COLONIAL AMERICA, *supra* note 26, at 14.

[167] STONE, *supra* note 14, at 461 ("Musquet, Musket"). Stone notes that the musket was originally "a matchlock gun too heavy to be fired without a rest, therefore the smallest of cannon. As many cannons were given the names of birds and animals, this was called a musket, the falconer's name for the male sparrow hawk, the smallest of hawks." *Id.*

[168] BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 57 (Connecticut) (1696); *id.* pt. 4, at 74 (Georgia) (1766); *id.* pt. 5, at 17 (Maryland) (1678), 25 (1681), 32 (1692), 39 (1695), 42 (1699), 51 (1704), 66 (1715), 91 (1756); *id.* pt. 6, at 91 (Massachusetts) (1671), 105 (1672), 132 (1685); *id.* pt. 8, at (New Jersey) (1781); *id.* pt. 9, at 4 (New York) (1694), 16 (1691), 46 (1702), 52 (1702), 53 (1702); *id.*, pt. 10, at 123 (North Carolina) (1781); *id.* pt. 11, at 14 (Pennsylvania) (1676), 16 (1676); *id.* pt. 12, at 29 (Rhode Island) (1701), 95 (1676), 206 (1793), 219 (1798); *id.* pt. 13, at 31 (South Carolina) (1721); *id.* pt. 14, at 59 (Virginia) (1701), 150 (1755), 419 (1782).

[169] 2 WEBSTER, *supra* note 8 (unpaginated) ("Pistol").

[170] BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 4, at 146 (Georgia) (1784); *id.*, pt. 8, at 41 (New Jersey) (1777), 70 (1784); *id.* pt. 9, at 310 (New York) (1782); *id.* pt. 12, at 274 (Rhode Island) (1793), 217 (1798); *id.* pt. 14, at 68 (South Carolina) (1778); *id.* pt. 14, at 258 (Virginia) (1775), 274 (1775), 306 (1775), 322 (1777), 425 (1784).

[171] 2 WEBSTER, *supra* note 8 (unpaginated) ("Rifle").

[172] BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 6, at 124 (Massachusetts) (1677).

[173] NEUMANN, *supra* note 162, at 8; *see also* RICHARD M. LEDERER, JR., COLONIAL AMERICAN ENGLISH 216 (1985) ("snaphance (*n.*) A flintlock.").

In the usage of the time, "arms" included missile weapons (e.g., guns, bows, cannons), cutting weapons (e.g., knives, swords, bayonets), and blunt impact weapons (e.g., clubs, slungshots, canes). As *Heller* explained, "arms" also included armor: "Timothy Cunningham's important 1771 legal dictionary defined 'arms' as 'any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.'"[174] Also cited in *Heller*, Samuel Johnson's and Thomas Sheridan's dictionaries defined "arms" as "weapons of offence, or armour of defence."[175] Also cited was the first dictionary of American English, by Noah Webster, defining "arms" as "Weapons of offense, or armor for defense and protection of the body."[176]

As described in Part 1.A., England's 1181 Assize of Arms mandated ownership of certain armor and also restricted types of armor by economic class. No armor restrictions existed in America.

- Breastplate.[177] "A plate, or set of plates, covering the front of the body from the neck to a little below the waist."[178]
- Buff coat.[179] "A heavy leather coat . . . . originally made of buffalo leather."[180] "It was a long skirted coat, frequently without a collar."[181]
- Corslet.[182] "Originally it meant leather armor . . . . [l]ater its meaning was strictly plate armor for the body only."[183]

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174 District of Columbia v. Heller, 554 U.S. 570, 581 (2008) (quoting 1 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (1771) (unpaginated)).

175 1 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE 107 (4th ed. 1818); T. SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1796) (unpaginated) (slightly different capitalization in Sheridan).

176 1 WEBSTER, *supra* note 116, (unpaginated).

The *Heller* Court relied on Johnson, Sheridan, and Webster in its analysis of the Second Amendment's text. For Johnson, see *Heller*, 554 U.S. at 581 ("arms"), 582 ("keep"), 584 ("bear"), 597 ("regulate"); for Sheridan, see *id.* at 584; for Webster, see *id.* at 595 ("militia").

177 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 46 (Connecticut) (1687); *id.* pt. 7, at 13 (New Hampshire) (1687); *id.* pt. 9, at 4 (New York) (1694), 16 (1691), 46 (1702), 53 (1702), 80 (1721), 89 (1724), 116 (1739), 134 (1743), 148 (1744), 165 (1746), 188 (1755), 227 (1764), 243 (1772), 252 (1775), 273 (1778), 311 (1782); *id.* pt. 10, at 29 (North Carolina) (1760), 35 (1764), 41–42 (1766), 52 (1774); *id.* pt. 12, at 45 (Rhode Island) (1718), 206 (1793), 219 (1798); *id.* pt. 14, at 65 (Virginia) (1705), 78 (1723), 105 (1738), 145, 150 (1755).

178 STONE, *supra* note 14, at 143.

179 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 6, at 78 (Massachusetts) (1666), 95 (1671), 107 (1672).

180 STONE, *supra* note 14, at 152.

181 *Id.*

182 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 6, at 29 (Massachusetts) (1646), 56 (1660), 86 (1671), 100 (1672); CONNECTICUT, PRIOR TO THE UNION, *supra* note 101, at 14 (enacted1637) ("Harteford 21 Coslets, Windsor 12, Weathersfeild 10, Agawam 7 . . . ."); BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 7–8 (Connecticut) (1638, "corseletts or cotton coates": Wyndsor (9), Hartford (20), Weathersfield (8), Seabrook (3), Farmington (3), Fairfield (6), Strattford (6), Southhampton (3), Pequett (3)); *id.* at 13–14 (1650, "cotton coates or corseletts": Wyndsor (9), Hartford (12), Weathersfield (8), Seabrook (3), Farmington (3), Fairfield (6), Strattford (6), Southhampton (3), Pequett (3)).

183 STONE, *supra* note 14, at 192 ("Corselet, Corslet").

- Cotton coat.[184] "[A] thick cotton coat which covered part of the arms and thighs, made in one piece," which protected against arrows.[185]
- Crupper.[186] "The armor for the hind quarters of a horse."[187]
- Helmet.[188] "Generally any headpiece, specifically the open headpiece of the time of the Norman conquest."[189]
- Pectoral.[190] "A covering for the breast, either defensive or ornamental."[191]
- Quilted coat.[192] "Armor made of several thicknesses of linen, or other cloth, quilted or pour-pointed together."[193]

<u>Ammunition</u>

Of course, ammunition and gunpowder were mandatory. While numerous laws required owning certain quantities of gunpowder and ammunition, some required specific types of ammunition.

- Buck shot.[194] Multiple large pellets often used for deer hunting.[195]

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[184] A 1638 act required Connecticut towns to keep "corseletts" or "cotton coates": Wyndsor (9), Hartford (20), Weathersfield (8), Seabrook (3), Farmington (3), Fairfield (6), Strattford (6), Southhampton (3), Pequett (3). BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, *id.* pt. 2, at 7–8 Connecticut). A 1642 act ordered ninety coats "basted with cotton wooll and made defensive against Indean arrowes; Hartford 40, Wyndsor 30, Wethersfield 20." *Id.* at 10. A 1650 act required Connecticut towns to keep "cotton coates" or "corseletts": Wyndsor (9), Hartford (12), Weathersfield (8), Seabrook (3), Farmington (3), Fairfield (6), Strattford (6), Southhampton (3), Pequett (3). *Id.* at 13–14.

[185] Walter Hough, *Primitive American Armor*, *in* ANNUAL REPORT OF THE BOARD OF REGENTS THE SMITHSONIAN INSTITUTION 647 (1895).

[186] BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 46 (Connecticut) (1687); *id.* pt. 7, at 13 (New Hampshire) (1687); *id.* pt. 9, at 4 (New York) (1694), 16 (1691), 46 (1702), 53 (1702), 80 (1721), 89 (1724), 116 (1739), 134 (1743), 148 (1744), 165 (1746), 188 (1755), 227 (1764), 243 (1772), 252 (1775), 273 (1778), 311 (1782); *id.* pt. 10, at 29 (North Carolina) (1760), 35 (1764), 42 (1766), 52 (1774); *id.*, pt. 12, at 45 (Rhode Island) (1718), 206 (1793), 219 (1798); *id.* pt. 14, at 65 (Virginia) (1705), 78 (1723), 105 (1738), 145 (1755), 150.

[187] STONE, *supra* note 14, at 195 ("Crupper, Croupiere Bacul").

[188] BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 256 (Connecticut) (1784); *id.* pt. 6, at 29 (Massachusetts) (1646) ("head peeces"), 56 (1660) ("head peece"), 86 (1671) ("head piece"), 100 (1672) ("head-piece").

[189] STONE, *supra* note 14, at 289.

[190] BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 60 (Connecticut) (1702).

[191] STONE, *supra* note 14, at 492.

[192] BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 6, at 78 (Massachusetts) (1666), 95 (1671), 107 (1672).

[193] STONE, *supra* note 14, at 520 ("Quilted Armor").

[194] BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 6, at 223, 228 (Massachusetts) (1776); *id.* pt. 7, at 82 (New Hampshire) (1776).

[195] R.A. STEINDLER, THE FIREARMS DICTIONARY 250 (1970) (explaining that the largest shotgun pellets are "small & large buck shot").

- Swan shot, Goose shot.[196] "Large shot, but smaller than buckshot, used for hunting large fowl, small game, and occasionally used in battle."[197]

Equipment

Mandatory equipment included tools for carrying or loading ammunition, and for cleaning or repairing firearms.

- Bandoleer.[198] "A large leathern belt, thrown over the right shoulder, and hanging under the left arm; worn by ancient musketeers for sustaining their fire arms, and their musket charges, which being put into little wooden cases, and coated with leather, were hung, to the number of twelve, to each bandoleer."[199]
- Worm.[200] A corkscrew-shaped device attached to the end of a ramrod that is used for cleaning and for extracting unfired bullets and other ammunition components from firearms.[201]
- Horn, powderhorn.[202] "A horn in which gunpowder is carried by sportsmen."[203] Most horns came from cattle, rams, or similar animals.[204]

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196 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 10, at 8 (North Carolina) (1715), 10 (1746), 19 (1756), 26 (1760), 32 (1764), 39 (1766), 49 (1774); *id.* pt. 13, at 68 (South Carolina) (1778); *id.* pt. 14, at 59 (Virginia) (1701).

197 MARK M. BOATNER III, ENCYCLOPEDIA OF THE AMERICA REVOLUTION 1085 (3d ed. 1994) ("Swan Shot").

198 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 5 (Connecticut) (1650).

199 1 WEBSTER, *supra* note 8 (unpaginated) ("Bandoleers").

200 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 18 (Connecticut) (1656), 60 (1702), 92 (1714), 123 (1741), 131 (1741), 150 (1754); *id.* pt. 3, at 11 (Delaware) (1756), 17, 18 (1757); *id.* pt. 4, at 7 (Georgia) (1755), 57 (1765), 80 (1773), 122 (1778); *id.* pt. 6, at 25 (Massachusetts) (1643), 41 (1645), 45 (1647), 56 (1649), 86 (1671), 129 (1685), 139 (1693), 223 (1776), 246 (1781), 263 (1789); *id.* pt. 7, at 52 (New Hampshire) (1718), 82 (1776), 104 (1780); *id.* pt. 8, at 5 (New Jersey) (1758), 8 (1758), 41 (1777), 64 (1779), 70 (1781); *id.* pt. 10, at 19 (North Carolina) (1756), 26 (1760), 32 (1764), 39 (1766), 49 (1774); *id.* pt. 11, at 10 (Pennsylvania) (1676); *id.* pt. 12, at 147 (Rhode Island) (1779), 191 (1781); *id.* pt. 13, at 9 (South Carolina) (1703), 17 (1707), 24 (1721), 40 (1747), 68 (1778).

201 GEORGE C. NEUMANN & FRANK J. KRAVIC, COLLECTOR'S ILLUSTRATED ENCYCLOPEDIA OF THE AMERICAN REVOLUTION 264 (1975); STEINDLER, *supra* note 195, at 278; LEDERER, JR., *supra* note 173, at 246 ("wormer").

202 BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 18 (Connecticut) (1656), 166 (1758), 169 (1759); *id.* pt. 4, at 6 (Georgia) (1755), 57, 69 (1765), 80, 109 (1773), 122 (1778), 146 (1784); *id.* pt. 6, at 133 (Massachusetts) (1689), 199 (1758), 229 (1776), 250 (1781); *id.* pt. 7, at 31 (New Hampshire) (1692); *id.* pt. 8, at 5 (New Jersey) (1758), 8 (1682), 12 (1713), 16, 18 (1722), 20, 23 (1730), 25, 27 (1746), 33, 35, 37 (1757); *id.* pt. 9, at 271 (New York) (1778), 310 (1782); *id.* pt. 10, at 57 (North Carolina) (1777), 62 (1777), 69 (1778), 101 (1781); *id.* pt. 11, at 10 (Pennsylvania) (1676) ("Powder, Pouder"); *id.* pt. 12, at 204 (Rhode Island) (1793), 217 (1798); *id.* pt. 13, at 24 (South Carolina) (1721), 40 (1747), 52 (1747); *id.* pt. 14, at 323 (Virginia) (1777).

203 2 WEBSTER, *supra* note 8 (unpaginated) ("Powder-horn").

204 RAY RILING, THE POWDER FLASK BOOK 12–13 (1953).

- Rest.[205] "A staff with a forked head to rest the musket on when fired, having a sharp iron ferule at bottom to secure its hold in the ground."[206]
- Shot bag, shot pouch, pouch.[207] This term may refer to a charger or to a bag for carrying bullets.[208]
- Scourer.[209] A ramrod.[210]
- Charger.[211] A bulb-shaped flask for carrying powder, attached to metal components that release a premeasured quantity of the powder.[212]
- Priming wire, picker.[213] Used to clean the flashpan and the touch hole (the small hole where the fire from the priming pan connected with the main powder charge).[214]

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[205] BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 5 (Connecticut) (1638), 12 (1650), 18 (1656); *id.* pt. 6, at 25 (Massachusetts) (1643), 29 (1645), 86 (1671); *id.* pt. 12, at 3 (Rhode Island) (1647).

[206] 2 F. W. FAIRHOLT, COSTUME IN ENGLAND: A HISTORY OF DRESS TO THE END OF THE EIGHTEENTH CENTURY 293 (H. A. Dillon ed., 4th ed. 1910) ("Musket-Rest"); *see also* STEPHEN BULL, ENCYCLOPEDIA OF MILITARY TECHNOLOGY AND INNOVATION 184 (2004) ("[A] forked pole about four feet in length.").

[207] BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 18 (Connecticut) (1656), 166 (1758), 169 (1759); *id.* pt. 4, at 69 (Georgia) (1765), 80 (1773); *id.* pt. 9, at 271 (New York) (1778), 310 (1782); *id.* pt. 10, at 57 (North Carolina) (1777), 62 (1777), 69 (1778), 101 (1781); *id.* pt. 11, at 10 (Pennsylvania) (1676); *id.* pt. 12, at 204 (Rhode Island) (1793), 217 (1798); *id.* pt. 13, at 24 (South Carolina) (1721), 40 (1747); *id.* pt. 14, at 258 (Virginia) (1775), 274, 306 (1775), 323 (1777).

[208] RILING, *supra* note 204, at 256–57, 430–31; JIM MULLINS, OF SORTS FOR PROVINCIALS: AMERICAN WEAPONS OF THE FRENCH AND INDIAN WAR 43–44 (2008).

[209] BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 18 (Connecticut) (1656); *id.* pt. 6, at 41 (Massachusetts) (1645), 45 (1647), 86 (1671), 100 (1672); *id.* pt. 11, at 10 (Pennsylvania) (1676) ("Seowerer").

[210] CHARLES JAMES, AN UNIVERSAL MILITARY DICTIONARY 791 (4th ed. 1816).

[211] BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 18 (Connecticut) (1656); *id.* pt. 7, at 31 (New Hampshire) (1692); *id.* pt. 11, at 10 (Pennsylvania) (1676).

[212] STONE, *supra* note 14, at 563.

[213] BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 18 (Connecticut) (1656), 60 (1702), 92 (1715), 123 (1741), 131 (1741), 150 (1754), 256 (1784); *id.* pt. 3, at 11 (Delaware) (1756), 17 (1757), 18 (1757), 28 (1785); *id.* pt. 4, at 7 (Georgia) (1755), 57 (1765), 80 (1773), 122 (1778) ("Pricker"); *id.* pt. 6, at 41 (Massachusetts) (1645), 86 (1671), 100 (1672), 129 (1685), 139 (1693), 223 (1776), 246 (1781), 263 (1789); *id.* pt. 7, at 52 (New Hampshire) (1718), 82 (1776), 104 (1780); *id.* pt. 8, at 5 (New Jersey) (1675), 41 (1777), 64 (1779), 70 (1781); *id.* pt. 10, at 19 (North Carolina) (1756), 26 (1760), 32 (1764), 39 (1766), 49 (1774); *id.* pt. 11, at 10 (Pennsylvania) (1676); *id.* pt. 12, at 147 (Rhode Island) (1779), 191 (1781), 211 (1793), 230 (1798); *id.* pt. 13, at 9 (South Carolina) (1703), 17 (1707), 24 (1721), 40 (1747), 68 (1778) ("Wier, Wire, Picker").

[214] NEUMANN & KRAVIC, *supra* note 201, at 264.

- Cartridge Box, cartouch-boxes, cartridges.[215] A box for storing and carrying cartridges.[216]

In America, unlike England, militiamen were never required to own bows and arrows. By the time that immigration to America began, the age of the bow was passing away. Only Massachusetts, which always valued education highly, required girls and boys to be taught archery. A 1645 statute ordered "that all youth within this jurisdiction, from ten years old to the age of sixteen years, shall be instructed . . . in the exercise of arms," including "small guns, halfe pikes, bows & arrows, &c."[217]

E. Repeating Arms

Repeating arms were far too expensive to mandate. But some did end up in North America.[218] In the mid-1600s, some American repeaters contained a revolving cylinder that was rotated by hand.[219] An English Cookson repeater with a ten-round magazine is "believed to have found its way into Maryland with one of the early English colonists." It later became "the capstone of the collection of arms in the National Museum at Washington, D.C."[220] "Beginning about 1710 commerce brought wealth to some of the merchants in the northern Colonies, and with other luxuries fancy firearms began to be in demand."[221]

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[215] BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 2, at 123 (Connecticut) (1741), 131 (1741), 150 (1754); *id.* pt. 3, at 2 (Delaware) (1741), 3 (1741), 11 (1756), 17 (1757), 28 (1785); *id.* pt. 4, at 6 (Georgia) (1755), 57 (1765), 122 (1778), 146 (1784); *id.* pt. 6, at 131 (Massachusetts) (1685), 133 (1689), 139 (1693), 223 (1776), 231 (1776), 246 (1781), 255 (1781), 263 (1789); *id.* pt. 7, at 12 (New Hampshire) (1687), 52 (1718), 82 (1776), 104 (1780), 116 (1780); *id.* pt. 8, at 8 (New Jersey) (1682), 12 (1713), 16 (1722), 18 (1722), 20 (1730), 22 (1730), 25 (1746), 27 (1746), 30 (1746), 33 (1757), 35 (1757), 37 (1757), 41 (1777), 45 (1777); *id.* pt. 9, at 4 (New York) (1694), 16 (1691), 52 (1702), 53 (1702), 80 (1721), 90 (1724), 91 (1724), 118 (1739), 136 (1743), 150 (1744), 154 (1746), 164 (1746), 180 (1746), 188 (1755), 230 (1764), 245 (1772), 252 (1775), 255 (1775), 267 (1778), 271 (1778), 273 (1778), 282 (1779), 310 (1782), 311 (1782), 326 (1783); *id.* pt. 10, at 11 (North Carolina) (1746), 19 (1756), 21 (1756), 39 (1766), 49 (1774), 101 (1781), 108 (1781); *id.* pt. 12, at 206 (Rhode Island) (1793), 219 (1798), 230 (1798); *id.* pt. 13, at 9 (South Carolina) (1703), 16 (1707), 24 (1721), 40 (1747); *id.* pt. 14, at 65 (Virginia) (1705), 66 (1705), 78 (1723), 105 (1738), 145 (1755), 146 (1755), 150 (1755), 206 (1757), 210 (1757), 274 (1775), 322 (1777), 323 (1777), 425 (1784).

[216] RILING, *supra* note 204, at 483. "Cartouche" is the French word for "cartridge." Cartouche boxes were used for carrying paper cartridges; these contained the bullet and a measured quantity of gunpowder, wrapped in paper. *Id.*

[217] BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 6, at 26 (Massachusetts) (1645), 31 (1645).

[218] "A few repeating arms were made use of in a military way in America." 1 SAWYER, *supra* note 98, at 28–29. For example, there is "record that [France's Louis de Buade de] Frontenac in 1690 astonished the Iroquois with his three and five shot repeaters." *Id.* at 29.

[219] *See, e.g.*, 2 SAWYER, *supra* note 98, at 5 (six-shot flintlock); CHARLES EDWARD CHAPEL, GUNS OF THE OLD WEST 202–03 (1961) (revolving snaphance).

[220] Sniper, *The Cookson Gun and the Mortimer Pistols*, 63 ARMS & THE MAN, Sept. 1917, at 3–4. Note: ARMS & THE MAN was a publication acquired by the NRA in 1916, and was renamed in 1923 to AMERICAN RIFLEMAN, a name it bears to this day. Some citations to that article may use its current name.

[221] 1 SAWYER, *supra* note 98, at 31.

In 1722 Boston's John Pim demonstrated a gun he had built. According to an observer, the gun "loaded but once" "was discharged eleven times following, with bullets, in the space of two minutes, each which went through a double door at fifty yards' distance."[222] Samuel Miller, another Boston gunsmith, advertised a twenty-shot repeater, which he would demonstrate for a fee.[223] A 1736 estate sale for the deceased South Carolinian Joseph Massey included "a six times repeating Gun" among the firearms he owned.[224] On April 12, 1756, a *Boston Gazette* advertisement provided: "MADE by JOHN COOKSON, and to be Sold by him at his House in Boston: A handy Gun . . . having a Place convenient to hold 9 Bullets" that "will fire 9 Times distinctly, as quick, or slow as you please, with one turn with the Handle of the said Gun."[225]

With the Revolution underway in 1777, Joseph Belton of Philadelphia demonstrated a musket that shot sixteen rounds all at once. The observers included top military leaders General Horatio Gates and Major General Benedict Arnold and one of America's greatest scientists, David Rittenhouse.[226] At their recommendation, the Continental Congress ordered one hundred Belton guns, but wanted them to fire eight shots, not sixteen.[227] (Gunpowder availability was very tight.) Belton, however, demanded what the Congress deemed "an extraordinary allowance," which the Continental Congress could not afford.[228]

The first US Congress under the Constitution, which in 1789 sent the Second Amendment to the States for ratification, included men who had served in

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[222] Samuel Niles, *A Summary Historical Narrative of the Wars in New England*, *in* 5 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 347 (1861).

[223] NEW ENG. WKLY. J., Mar. 2, 1730, at C4.

[224] THE S.C. GAZETTE, June 12–19, 1736, at 3. The authors thank Andrew Fagal for bringing this paper to their attention.

[225] THE BOS. GAZETTE & COUNTRY J., Apr. 12, 1756. It is possible the seller was the famed English gunmaker John Cookson, selling one of his masterpieces made before emigrating to America. *See* David S. Weaver & Brian Godwin, *John Cookson, Gunmaker*, 19 ARMS & ARMOUR 43 (2022).

[226] Letter from Joseph Belton to the Continental Congress (July 10, 1777), *in* 1 PAPERS OF THE CONTINENTAL CONGRESS, COMPILED 1774–1789, at 137, 139 (John P. Butler ed., 1978) ("Having Carefully examined M. Beltons New Constructed Musket from which He discharged Sixteen Balls loaded at one time, we are fully of Opinion that Muskets of his Construction with some small alterations, or improvements might be Rendered, of great Service, in the Defense of lives, Redoubts, Ships &c, & even in the Field, and that for his Ingenuity, & improvement he is Intitled to a hansome reward from the Publick.").

[227] Report of the Continental Congress (May 3, 1777), *in* 7 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 323, 324 (Worthington Chauncey Ford ed., 1907). ("Resolved, That John Belton be authorized and appointed to superintend, and direct, the making or altering of one hundred muskets, on the construction exhibited by him, and called 'the new improved gun,' which will discharge eight rounds with once loading; and that he receive a reasonable compensation for his trouble, and be allowed all just and necessary expences.").

[228] Report of the Continental Congress (May 15, 1777), *in* 7 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, *supra* note 227, at 361 (responding to Belton's letter to Congress: ". . . I should be intitled to a thousand pound from each State, and if equal to four times their number I should be intitled to fifteen hundred from each State, so on riseing five hundred for every greater number." Letter from John Belton to John Hancock (May 8, 1977) (on file with editors).

the Continental Congress, and who were therefore well aware that sixteen-shot repeaters were possible, albeit very expensive.[229]

After the war, Belton moved to England, where "he produced an unknown number of different repeating guns with detachable chambers and sliding flintlocks in partnership with London gunmaker Wm. Jover for ships of the British East India Company"[230]—these included a four-shot flintlock pistol and a seven-shot flintlock musket.[231] During the war, some British forces used the breechloading single-shot Ferguson Rifle, which "fired six shots in one minute" in a government test on June 1, 1776.[232] The Royal Navy's 1779 Nock volley gun had seven barrels (six outer barrels around a center barrel) that fired simultaneously.[233]

When the Second Amendment was ratified, the state-of-the-art repeater was the Girardoni air rifle. The Girardoni was invented for the Austrian army around 1779; 1,500 were issued to sharpshooters and remained in service for twenty-five years, including in the Napoleonic Wars.[234] It could consecutively shoot twenty-one or twenty-two rounds in .46 or .49 caliber, utilizing a tubular spring-loaded magazine.[235] Although an air gun, the Girardoni was ballistically equal to a powder gun,[236] and could take an elk with one shot.[237] The tubular

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[229] Delegates who served in the Second Continental Congress in 1777 include: Roger Sherman, Lyman Hall, both Charles Carroll(s), future Supreme Court Justice Samuel Chase, John Adams, Samuel Adams, Elbridge Gerry, John Hancock, John Witherspoon, future first Supreme Court Chief Justice John Jay, future Supreme Court Justice James Wilson, Benjamin Harrison (father and grandfather of two future Presidents), Richard Henry Lee, and Francis Lightfoot Lee. H.R. Doc. No. 108-222, at 34–38 (2005).

[230] GILKERSON, *supra* note 38, at 123.

[231] It could be reloaded by switching in a preloaded metal magazine. *See* Royal Armouries, *Flintlock Repeating Musket–1786*, YOUTUBE (Aug. 30, 2017), youtube.com/watch?v=-wOmUM40G2U [https://perma.cc/NH8P-D2MM]; *see also* WINANT, FIREARMS CURIOSA, *supra* note 31, at 175 (including an image of a four-shot repeating flintlock pistol made by Belton and Jover).

[232] ROGER LAMB, AN ORIGINAL AND AUTHENTIC JOURNAL OF OCCURRENCES DURING THE LATE AMERICAN WAR 309 (1809). Because the Ferguson was loaded from the breech, not the muzzle, reloading was much faster. PAUL LOCKHART, FIREPOWER: HOW WEAPONS SHAPED WARFARE 173 (2021).

[233] SUPICA ET AL., *supra* note 62, at 28 (including a photo of the Nock Volley Gun).

[234] GERALD PRENDERGHAST, REPEATING AND MULTI-FIRE WEAPONS 100–01 (2018); JAMES B. GARRY, WEAPONS OF THE LEWIS AND CLARK EXPEDITION 91–94 (2012). As a testament to the rifle's effectiveness, "[t]here are stories that Napoleon had captured air riflemen shot as terrorists, making it hard to recruit men for the air rifle companies." *Id.* *See also* NORM FLAYDERMAN, FLAYDERMAN'S GUIDE TO ANTIQUE AMERICAN FIREARMS AND THEIR VALUES 775 (9th ed. 2007) ("[W]hen issued to units of the Austrian army each gun was fully loaded and accompanied by a pack containing two additional pressurized butt reservoirs plus four additional tubes, each containing 20 balls. Thus, 100 shots were quickly available for each soldier.").

[235] GARRY, *supra* note 234, at 100–01 (2012).

[236] JOHN PLASTER, THE HISTORY OF SNIPING AND SHARPSHOOTING 69–70 (2008).

[237] SUPICA, ET AL., *supra* note 62, at 31 (2013); *see id.* (including a photo of Girardoni Repeating Air Rifle).

By the turn of the nineteenth century, "there were many gunsmiths in Europe producing compressed air weapons powerful enough to use for big game hunting or as military weapons." GARRY, *supra* note 234, at 92.

magazine was quick to reload with speed loading tubes. And the rifle could fire forty times before the air bladder needed to be pumped up again.[238]

"There were a number of designs for repeating air guns at the beginning of the nineteenth century,"[239] and "many makers in Austria, Russia, Switzerland, England, and various German principalities" manufactured Girardoni-type rifles in particular.[240]

Meriwether Lewis famously carried a Girardoni rifle on the Lewis and Clark Expedition. Lewis mentioned it in his journal thirty-nine times.[241] Most often, Lewis was demonstrating the rifle to impress various Indian tribes encountered on the expedition—often "astonishing" or "surprising" them and making the point that although the expedition was usually outnumbered, the smaller group could defend itself.[242]

F. Cannons

Cannons were manufactured and privately owned in colonial America. When the Quaker-dominated Pennsylvania legislature would not fund a militia in 1747, Benjamin Franklin and some friends arranged a lottery to purchase some cannons and borrowed other cannons from New York.[243] During the French and Indian War, Georgia's legislature authorized militia officers to impress privately owned cannons for use by the militia.[244]

On the frontiers, cannons were kept to defend fortified buildings against attacks by Indians, the French, or the Spanish. In a seaport, the greatest concern might be resistance to bombardment by an enemy fleet.[245]

In December 1774, when tensions with Great Britain were rising towards war, a meeting of "Freeholders and other Inhabitants of the Town," chaired by revolutionary firebrand Samuel Adams, complained that "a Number of Cannon,

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[238] Pumping was not fast. It took about 1,500 strokes to completely fill the air reservoir. A modern writer called the Girardoni "a stone cold killer at up to 100 yards." He reported from test firing that the muzzle velocity of the .46 caliber bullet was 900 foot-pounds per second—comparable to a twenty-first century 45 ACP handgun. But the Girardoni could be too delicate. "The rudimentary fabrication methods of the day engineered weak threading on the [air] reservoir neck and this was the ultimate downfall of the weapon. The reservoirs were delicate in the field and if the riveted brazed welds parted the weapon was rendered into an awkward club as a last resort." John Paul Jarvis, *The Girandoni Air Rifle: Deadly Under Pressure*, GUNS.COM (Mar. 15, 2011), https://www.guns.com/news/2011/03/15/the-girandoni-air-rifle-deadly-under-pressure [https://perma.cc/57AB-X2BE].

[239] GARRY, *supra* note 234, at 99.

[240] *Id.*

[241] 2–8 MERIWETHER LEWIS & WILLIAM CLARK, THE JOURNALS OF THE LEWIS & CLARK EXPEDITION (Gary E. Moulton & Thomas Dunlay eds., Neb. ed.1986–1993) (2002).

[242] *See, e.g.*, 6 *id.* at 233 (January 24, 1806 entry) ("My Air-gun also astonishes them very much, they cannot comprehend it's shooting so often and without powder; and think that it is *great medicine* which comprehends every thing that is to them incomprehensible.").

[243] 1 JAMES PARTON, LIFE AND TIMES OF BENJAMIN FRANKLIN 267 (1864). The authors thank Clayton Cramer for bringing this example to our attention.

[244] BACKGROUNDS OF SELECTIVE SERVICE, *supra* note 109, pt. 4, at 24 (Georgia).

[245] *See, e.g.*, James H. Sears, *The Coast in Warfare*, *in* 27 PROCEEDINGS NAVAL INST. 449 (1901).

the Property of a respectable Merchant in this Town were seized & carried off by force" by the British.[246]

As during the French & Indian war, private contributions of cannons to the common cause were necessary. In New Jersey in September 1777, Brigadier-General Forman lent the state militia his personal "three Pieces of Field Artillery." These would establish a militia artillery company.[247]

A Pennsylvania law to disarm "disaffected" persons authorized militia officers to "take from every such person" various weapons. The weapons listed were apparently common enough that some members of the public possessed them: "any cannon, mortar, or other piece of ordinance, or any blunderbuss, wall piece, musket, fusee, carbine or pistols, or other fire arms, or any hand gun; and any sword, cutlass, bayonet, pike or other warlike weapon."[248]

In 1783, Boston passed a fire-prevention law forbidding citizens who kept cannons in their home or outbuildings from keeping them loaded with gunpowder.[249] Any "cannon, swivels, mortars, howitzers, cohorns, fire-arms, bombs, grenades, and iron shells of any kind" that were stored loaded with gunpowder could be confiscated and "sold at public auction" back to private individuals.[250]

At sea, privately owned cannons were especially important. As long as there had been American vessels, some merchant or other civil ships carried cannons for protection against pirates.

Under longstanding international law, governments during wartime issued letters of marque and reprisal.[251] The letters authorized privately owned ships, privateers, to attack and capture the military or commercial ships of the enemy.[252] The captured property (prizes) would be divided among the privateer's crew and owners, according to contract. Typically, prizes were put up for auction in a friendly port. A captured ship might be kept by the privateers or sold.

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[246] William Cooper, BOS. GAZETTE, Jan. 2, 1775, at 640.

[247] Act of Sept. 24, 1777, ch. 47, 1776–1777 N.J. Laws 107, 107 (1777).

[248] Act of April 2, 1779, ch. 101, § 5, 1779 Pa. Laws 192, 193.

[249] Act of March 1, 1783, ch. 13, 1783 Mass. Acts 218, 218–19. The law also applied to firearms. According to *Heller*, "That statute's text and its prologue, which makes clear that the purpose of the prohibition was to eliminate the danger to firefighters posed by the 'depositing of loaded Arms' in buildings, give reason to doubt that colonial Boston authorities would have enforced that general prohibition against someone who temporarily loaded a firearm to confront an intruder (despite the law's application in that case)." 554 U.S. 570, 631–32 (2008).

[250] Act of March 1, 1783, ch. 13, 1783 Mass. Acts 218, 219.

[251] To be precise, a letter of marque authorizes the holder to enter enemy territory. A letter of reprisal authorizes the holder to transport a captured prize to the holder's nation.

Cases on letters of marque and reprisal include Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800) (Quasi-War with France); Schooner Exch. V. McFaddon, 11 U.S. (7 Cranch) 116 (1812); The Thomas Gibbons, 12 U.S. (8 Cranch) 421 (1814) (War of 1812); Prize Cases, 67 U.S. (2 Black) 635 (1862) (Civil War).

For legal history, a leading survey is Theodore M. Cooperstein, *Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering*, 40 J. MAR. L. & COM. 221 (2009) (including a thorough bibliography of authorities).

[252] *See* ERIC J. DOLIN, REBELS AT SEA: PRIVATEERING IN THE AMERICAN REVOLUTION (2022). Capturing a military ship happened only rarely. A privateer had a much better chance of outgunning an enemy merchant ship.

Naval combat at the time used cannon fire, so anyone issued a letter of marque or reprisal would have to buy a significant number of cannons to turn his civil vessel into a warship for offensive use.

In the American Revolution, the Massachusetts Bay Colony was the first to issue letters of marque and reprisal, in November 1775.[253] The Continental Congress followed suit later that month.[254]

During the war, the number of American privateers far exceeded the combined number of warships of the Continental Navy and the State naval militias. Every privateer, by definition, was armed at private expense.[255]

Operating up and down the Atlantic seaboard, in the British West Indies, and even off the West African coast, American privateers were rarely strong enough to engage a British navy warship. Instead, they massively damaged British commercial shipping. The captured prizes—including gunpowder, firearms, and silver—were crucial to the American war effort.[256] The privateers did not win the war by themselves; the war could not have been won without them.[257]

The US Constitution grants Congress the powers to "grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."[258] The congressional power is predicated on the existence of ships that can be outfitted with privately purchased cannon, and of small arms for seamen, such as firearms and swords.

Wartime privateering aside, cannons were outfitted on commercial ships for protection against pirates. A peacetime 1789 advertisement in Philadelphia touted a store "where owners and commanders of armed vessels may be supplied,

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[253] Act of Feb. 14, 1776, ch. 15, § 3, 1775–1776 Mass. Acts 462, 463 (1776) (The title of the act: "Encouraging the fixing out of armed vessels to defend the sea-coast of America, and for erecting a court to try and condemn all vessels that shall be found infesting the same"); DOLIN, *supra* note 252, at 11.

[254] 3 J. CONT'L CONG. 373 (Nov. 25, 1775); 4 J. CONT'L CONG. 229–30 (Mar. 23, 1776).

[255] Acquiring at private expense was achieved by purchase in the United States, often with shareholder financing, or by seizure from enemy vessels.

Privateers frequently sought investors for outfitting a ship, in exchange for a share of the prize. Among such investors were George Washington and Robert Morris. *See* FORREST MCDONALD, WE THE PEOPLE 38, 43 (1958); Francis R. Stark, *The Abolition of Privateering and the Declaration of Paris*, 8 STUD. IN HIST., ECON. & PUB. L. 221 (1897).

[256] DOLIN, *supra* note 252, at xix.

[257] JOHN LEHMAN, ON SEAS OF GLORY: HEROIC MEN, GREAT SHIPS, AND EPIC BATTLES OF THE AMERICAN NAVY 41 (2001) (In the words of Secretary of the Navy John Lehman (1981–87): "[f]rom the beginning of the American Revolution until the end of the War of 1812, America's real naval advantage lay in its privateers. It has been said that the battles of the American Revolution were fought on land, and independence was won at sea. For this we have the enormous success of American privateers to thank even more than the courageous actions and valuable diplomatic service of the small Continental Navy.").

[258] U.S. CONST. art. I, § 8. Pursuant to the text, the power to grant such letters lies in the federal legislative branch, not the executive, although the former may delegate to the latter. *See* William Young, *A Check on Faint-Hearted Presidents: Letters of Marque and Reprisal*, 66 WASH. & LEE L. REV. 895, 905–06 (2009). A unified national approach to international war being necessary, the Constitution restricts State international warfare, including issuing letters of marque and reprisal. U.S. CONST. art. I, § 10.

for either the use of small arms or cannon, at the shortest notice."[259] A similar ad was published again in 1799.[260] In 1787, Paul Revere, already famous as a silversmith, opened an iron and brass foundry and copper mill that soon went into the business of casting bells and cannons.[261]

The freedom Americans always enjoyed possessing the arms of one's choosing was reflected in Ira Allen's defense when he was seized by British forces in 1796 while transporting 20,000 muskets and twenty-four "field pieces" (cannons and other artillery) from France to America. Allen said the arms were for Vermont's militia, whereas the British suspected he planning to arm a Canadian revolt against the British. He was prosecuted in Britain's Court of Admiralty. At trial, the idea of one individual possessing 20,000 arms was received with skepticism. Allen retorted that in America, "[a]rms and military stores are free merchandise, so that any who have property and ch[oo]se to sport with it, may turn their gardens into parks of artillery, and their houses into arsenals, without danger to Government."[262] The arms were restored to Allen.[263]

G. Overview

The Revolution had started when Americans resisted with arms the Redcoats' attempt to confiscate arms at Lexington and Concord on April 19, 1775. Before that, to effectively disarm the Americans, the British had banned the import of firearms and gunpowder into the colonies,[264] prevented Americans from accessi-

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[259] Edward Pole, Advertisement, *Military laboratory, at No. 34, Dock street, near the Drawbridge, Philadelphia*, 1789, https://www.loc.gov/item/rbpe.1470090a/ [https://perma.cc/RSU6-CHMH] (last visited Apr. 10, 2024).

[260] THE GAZETTE OF U.S. & PHILA. DAILY ADVERTISER, July 1, 1799, https://chroniclingamerica.loc.gov/lccn/sn83025881/1799-07-01/ed-1/seq-2/ [https://perma.cc/575T-KW2Z] (last visited Apr. 10, 2024).

[261] *See Revere's Foundry & Copper Mill*, THE PAUL REVERE HOUSE, https://www.paulreverehouse.org/reveres-foundry-copper-mill/ [https://perma.cc/7C67-V6CJ] (last visited Apr. 10, 2024).

[262] 1 IRA ALLEN, PARTICULARS OF THE CAPTURE OF THE SHIP OLIVE BRANCH 403 (1798).

[263] *See, e.g.*, Ilya Shapiro & James Knight, *A Second Amendment Challenge in the Green Mountain State*, CATO INST. (Apr. 7, 2020, 11:17 AM), https://www.cato.org/blog/second-amendment-challenge-green-mountain-state [https://perma.cc/R6SR-J3DP].

[264] King George III imposed an embargo on arms and gunpowder imports on October 19, 1774. 5 ACTS OF THE PRIVY COUNCIL OF ENGLAND 401 (James Munro & Almeric W. Fitzroy eds., 1912). Secretary of State Lord Dartmouth sent a letter that day "to the Governors in America," announcing "[h]is Majesty's Command that [the governors] do take the most effectual measures for arresting, detaining, and securing any Gunpowder, or any sort of arms and ammunition, which may be attempted to be imported into the Province under your Government." Letter of Earl of Dartmouth to the Governors in America (October 19, 1774), *reprinted in* 8 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 509 (E.B. O'Callaghan, M.D., LL.D. ed., 1857). The order, initially set to expire after six months, was "repeatedly renewed, remaining in effect until the Anglo-American peace treaty in 1783." David B. Kopel, *How the British Gun Control Program Precipitated the American Revolution*, 6 CHARLESTON L. REV. 283, 297 (2012).

ng arms stored in town magazines,[265] and confiscated arms and ammunition.[266] During the Revolution the British government devised a plan for the permanent disarmament of the Americans after an American surrender.[267]

Naturally, after facing the threat of disarmament and thus certain destruction, America's Founders were extremely protective of the right to arms. Before, during, and after the Revolution, no state banned any type of arm, ammunition, or accessory. Nor did the Continental Congress, the Articles of Confederation Congress, or the federal government created by the US Constitution in 1787.[268] Instead, the discussions about arms during the ratification of the Constitution and the Bill of Rights centered on ensuring that the people had enough firepower to resist a tyrannical government. There is no evidence that any of the Founders

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[265] For example, Massachusetts's Royal Governor Thomas Gage "order'd the Keeper of the Province's Magazine not to deliver a kernel of powder (without his express order) of either public or private property." JOHN ANDREWS, LETTERS OF JOHN ANDREWS, ESQ., OF BOSTON 19–20 (Winthrop Sargent ed., 1866); *id.* at 39 ("a Guard of soldiers is set upon the Powder house at the back of ye. Common, so that people are debar'd from selling their own property."); Extract of a Letter from Thomas Gage to the Earl of Dartmouth, Dated Boston, October 30 and November 2, 1774, *in* 1 AMERICAN ARCHIVES 950–51 (M. St. Clair Clarke & Peter Force eds., 1837) (stating that Gage issued "an order to the Storekeeper not to deliver out any Powder from the Magazine, where the Merchants deposit it.").

[266] *See* O.W. Stephenson, *The Supply of Gunpowder in 1776*, 30 AM. HIST. REV. 271 (1925) ("Within a few hours of the time when the minute-men faced the redcoats on Lexington green and at Concord bridge, Governor Dunmore, down in Virginia, laid hold of the principal supplies in the Old Dominion."); BROWN, *supra* note 27, at 298 ("[T]he American Revolution was nearly precipitated in Virginia on the night of April 20–21[1775], for in Williamsburg Gov. Dunmore had ordered the Royal Marines to remove the colony gunpowder supply from the magazine. As in Massachusetts the plan was discovered and the militia called to arms . . . . Lord Dunmore . . . placated the irate populace by making immediate restitution for the powder."). The British had wanted to confiscate arms door-to-door, but Governor Gage deemed it too dangerous a proposition. *See* Extract of a Letter from The Honourable Governor Gage to the Earl of Dartmouth, Dated Boston, December 15, 1774 ("Your Lordship's idea of disarming certain Provinces, would doubtless be consistent with prudence and safety; but it neither is or has been practicable, without having recourse to force, and being master of the Country."), *reprinted in* 1 AMERICAN ARCHIVES *supra* note 265, at 1046.

[267] Colonial Under Secretary of State, William Knox, presented the plan to disarm Americans. William Knox Asks What is Fit to be Done with America (1777) ("The Militia Laws should be repealed and none suffered to be re-enacted, & the Arms of all the People should be taken away . . . nor should any Foundery or manufactuary of Arms, Gunpowder, or Warlike Stores, be ever suffered in America, nor should any Gunpowder, Lead, Arms or Ordnance be imported into it without Licence."), *reprinted in* 1 SOURCES OF AMERICAN INDEPENDENCE: SELECTED MANUSCRIPTS FROM THE COLLECTIONS OF THE WILLIAM L. CLEMENTS LIBRARY 163, 176 (Howard Peckham ed., 1978).

[268] As far as we know, only one person has ever claimed the contrary. That person is President Joseph Biden, who has repeatedly stated that when the Second Amendment was ratified, people could not possess cannons. He has repeated the claim despite repeated debunking by factcheckers. *See* Glenn Kessler, *Biden's False Claim that the 2nd Amendment Bans Cannon Ownership*, WASH. POST (June 28, 2021), https://www.washingtonpost.com/politics/2021/06/28/bidens-false-claim-that-2nd-amendment-bans-cannon-ownership/ [https://perma.cc/NYV6-B8TW]; D'Angelo Gore, *Biden Repeats False Claims at Gun Violence Meeting*, FACTCHECK.ORG, (Feb. 7, 2022), https://www.factcheck.org/2022/02/biden-repeats-false-claims-at-gun-violence-meeting/ [https://perma.cc/2CJ4-FL9Y]; Louis Jacobson, *Joe Biden's Dubious Claim About Revolutionary War Cannon Ownership*, POLITIFACT (June 29, 2020), https://www.politifact.com/factchecks/2020/jun/29/joe-biden/joe-bidens-dubious-claim-about-revolutionary-war-c/ [https://perma.cc/V8CP-4X5V].

were concerned about individuals having too much firepower. After a long, grueling war against the world's strongest military, limiting individuals' capabilities was not a concern.

Americans' hostility to any limit on their ability to resist a tyrannical government was demonstrated by their response to a Pennsylvania order—issued while the States were debating the Constitution—directing lieutenants of the militia "to collect all the public arms" to "have them repaired" and then reissued.[269] "Public arms" were firearms owned by a government and given to militiamen who could not afford to purchase a firearm themselves.[270]

Pennsylvanians fiercely opposed the recall. Even though militiamen were free to acquire whatever personal arms they could afford, they denounced the order as "a temporary disarming of the people."[271] They suggested that "our Militia . . . may soon be called to defend our sacred rights and privileges, against the despots and monarchy-men" who supported the order.[272]

Because "the people were determined not to part with" and "refused to deliver up the arms," the Pennsylvania government "cancelled the order."[273] If the people threatened armed resistance to the government's attempt to temporarily recover its own arms, an attempt to ban any privately owned arms would have been met with even greater opposition.[274]

Firearms and cutting weapons were ubiquitous in the colonial era, and a wide variety existed of each. Repeating arms and cannons were freely owned by those who could afford them. The historical record up to 1800 provides no suppo-rt for general prohibitions on any type of arms or armor.

III. NINETEENTH CENTURY ADVANCES IN ARMS

This Part describes how the nineteenth century brought the greatest advances in firearms before or since. The century began with the single-shot muzzleloading blackpowder muskets and ended with semiautomatic pistols empl-oying detachable magazines and centerfire ammunition with modern smokeless

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[269] NEWSPAPER REPORT OF SUPREME EXECUTIVE COUNCIL PROCEEDINGS, THURSDAY, 10 JANUARY 1788, *reprinted in* 33 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 739 (Merrill Jensen et al. eds., 2019).

[270] David B. Kopel & Stephen P. Halbrook, *Tench Coxe and the Right to Keep and Bear Arms, 1787–1823*, 7 WM. & MARY BILL RTS. J. 347, 380 (1999) (describing public arms programs of the Jefferson and Madison administrations).

[271] AN OLD MILITIA OFFICER OF 1776, PHILADELPHIA INDEPENDENT GAZETTEER, JAN. 18, 1788, *reprinted in* 33 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 269, at 740.

[272] PHILADELPHIA FREEMAN'S JOURNAL, JAN. 23, 1788, *reprinted in* 33 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 269, at 740–41.

[273] PHILADELPHIA INDEPENDENT GAZETTEER, APR. 30, 1788, *reprinted in* 34 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, 1265, 1266 (Merill Jensen et al. eds., 2019).

[274] Pennsylvania's experience is relevant to modern-day confiscation laws. According to *Bruen*, "if some jurisdictions actually attempted to enact analogous regulations during this timeframe [the eighteenth century], but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 27 (2022).

powder. Then Part IV will examine the very small lawmaking response to the immense technological changes.

Here in Part III the technological changes are summarized. Many of the advances detailed below had already been invented long before 1791, as described in Parts I.B. and II.D. But firearms incorporating these advances were quite expensive. Compared to single-shot firearms, repeating firearms require closer fitting of their more intricate parts. As of 1750, firearms manufacture was a craft industry.[275] Firearms were built one at a time by a lone craftsman or perhaps in a workshop.[276] The labor cost of building an advanced firearm was vastly higher than for a one-shot musket, rifle, or handgun.[277]

Advanced firearms were made possible by the American industrial revolution. That revolution created machine tools—tools that can make uniform parts and other tools.[278] Thanks to machine tools, the number of human labor hours to manufacture advanced firearms plunged, while machinists prospered.[279]

A. James Madison and James Monroe, the Founding Fathers of Modern Firearms

US Representative James Madison is well known as the author of the Second Amendment and the rest of the Bill of Rights. What is not well known is how his presidency put the United States on the path to mass production of high-quality affordable firearms.

Because of weapons procurement problems during the War of 1812, President Madison's Secretary of War and successor to the presidency, James Monroe, proposed a program for advanced weapons research and production at the federal armories, which were located in Springfield, Massachusetts, and Harpers Ferry, Virginia. The Madison-Monroe program was to subsidize technological innovation.[280] It was enthusiastically adopted with the support of both the major parties in Congress: the Madison-Monroe Democratic-Republicans, and the opposition Federalists.[281] Generous federal arms procurement contracts had long lead times and made "much of the payment up-front, so that manufacturers could spend seve-

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[275] JOHNSON ET AL., *supra* note 17, at 2210. Some of this Part is based on *The Evolution of Firearms Technology from the Sixteenth Century to the Twenty-first Century*, which is Chapter 23 in JOHNSON ET AL., *supra* note 17. Much more detail about the technological developments described in this Part is presented in that chapter, available online at: http://firearmsregulation.org/www/FRRP3d_CH23.pdf [https://perma.cc/YW39-EXXN] (last visited Apr. 10, 2024).

[276] *Id.* at 2210.

[277] *Id.* at 2199.

[278] *Id.* at 2208–14.

[279] *See* FELICIA JOHNSON DEYRUP, ARMS MAKERS OF THE CONNECTICUT VALLEY: A REGIONAL STUDY OF THE ECONOMIC DEVELOPMENT OF THE SMALL ARMS INDUSTRY, 1798–1870, at 217 app'x A, tbl. 1 (1948) (demonstrating that from 1850 to 1940, average annual wages in the arms industry always exceeded wages in overall US industry, sometimes by large margins).

[280] ROSS THOMSON, STRUCTURES OF CHANGE IN THE MECHANICAL AGE: TECHNOLOGICAL INNOVATION IN THE UNITED STATES, 1790–1865, at 54–59 (2009). Madison's presidential predecessor, Thomas Jefferson, likewise "used state power to aid inventors whose technologies had the potential to change the face of war, or, at the very least, make it cheaper to wage war." Andrew J. B. Fagal, *Thomas Jefferson, Military Technology, and the State*, 110 TRANSACTIONS AM. PHIL. SOC'Y 147, 151 (2022).

[281] JOHNSON ET AL., *supra* note 17, at 2209.

ral years setting up and perfecting their factories."[282] The program succeeded beyond expectations, and helped to create the American industrial revolution.

B. The American System of Manufacture

The initial objective was interchangeability, so that firearms parts damaged in combat could be replaced by functional spare parts.[283] If there are two damaged firearms found after a battle, and their parts could be combined into one functional firearm, that was the first step. After that would come higher rates of factory production. And after that, it was hoped, production at lower cost than artisanal production. Achieving these objectives for the more intricate and closer-fitting parts of repeating firearms would be even more difficult.

To carry out the federal program, the inventors associated with the federal armories first had to invent machine tools. Consider for example, the wooden stock of a long gun. The back of the stock is held against the user's shoulder. The middle of the stock is where the action is attached. (The action is the part of the gun containing the moving parts that fire the ammunition.) For many guns, the forward part of the stock would contain a groove to hold the barrel. Making a stock requires many different cuts of wood, few of them straight. The artisanal gunmaker would cut with hand tools such as saws and chisels. Necessarily, one artisanal stock would not be precisely the same size as another.

To make stocks faster and more uniformly, Thomas Blanchard invented fourteen different machine tools. Each machine would be set up for one particular cut. As the stock was cut, it would be moved from machine to machine. By mounting the stock to the machine tools with jigs and fixtures, a manufacturer

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[282] *Id.*

[283] Thomas Jefferson had previously attempted to bring interchangeable gun parts to America after meeting with French inventor Honoré Blanc, who was developing such a system. While ambassador to France in 1785, Jefferson wrote to US Secretary of Foreign Affairs (under the Confederation government) John Jay about the meeting. Letter from Thomas Jefferson to John Jay (August 30, 1785) ("An improvement is made here in the construction of muskets, which it may be interesting to Congress to know. . . . It consists in the making every part of them so exactly alike, that what belongs to any one, may be used for every other musket in the magazine. . . . Supposing it might be useful to the United States, I went to the workman. He presented me the parts of fifty locks taken to pieces, and arranged in compartments. I put several together myself, taking pieces at hazard as they came to hand, and they fitted in the most perfect manner. The advantages of this, when arms need repair, are evident."), *in* 1 MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS, OF THOMAS JEFFERSON 298–99 (Thomas Jefferson Randolph ed., 1829). Jefferson also wrote to Patrick Henry and Henry Knox about Blanc. THOMAS JEFFERSON, Letter to the Governor of Virginia, January 24, 1786, *in* 9 THE PAPERS OF THOMAS JEFFERSON 212, 214 (Julian P. Boyd & Mina R. Bryan eds., 1954); 15 *id.* at 421–23, 454–55. In 1801, President Jefferson recounted his experience with Blanc to James Monroe, while expressing hope for Eli Whitney's plan for interchangeable gun parts. Letter from Thomas Jefferson to James Monroe, November 14, 1801 ("[M]r Whitney . . . has invented moulds & machines for making all the the pieces of his locks so exactly equal, that take 100 locks to pieces & mingle their parts, and the hundred locks may be put together as well by taking the first pieces which come to hand. [T]his is of importance in repairing, because out of 10. locks e.g. disabled for the want of different pieces, 9 good locks may be put together without employing a smith. Leblanc in France had invented a similar process in 1788. & had extended it to the barrel, mounting & stock. I endeavored to get the US to bring him over, which he was ready for on moderate terms. I failed & I do not know what became of him."), *in* 35 THE PAPERS OF THOMAS JEFFERSON 662 (Barbara B. Oberg ed., 2008).

could ensure that each stock would be placed in precisely the same position in the machine as the previous stock. The mounting was in relation to a bearing—a particular place on the stock that was used as a reference point. To check that the various parts of the firearm, and the machine tools themselves, were consistent, many new gauges were invented.[284] What Blanchard did for stocks, John H. Hall, of the Harpers Ferry Armory, did for other firearms parts.

Hall shipped some of his machine tools to Simeon North, in Connecticut. In 1834, Hall and North made interchangeable firearms. This was the first time that geographically separate factories had made interchangeable parts.[285]

Because Hall "established the efficacy" of machine tools, he "bolstered the confidence among arms makers that one day they would achieve in a larger, more efficient manner, what he had done on a limited scale. In this sense, Hall's work represented an important extension of the industrial revolution in America, a mechanical synthesis so different in degree as to constitute a difference in kind."[286]

The technological advances from the federal armories were widely shared among American manufacturers. The Springfield Armory built up a large network of cooperating private entrepreneurs and insisted that advances in manufacturing techniques be widely shared. By mid-century, what had begun as the mass production of firearms from interchangeable parts had become globally known as "the American system of manufacture"—a system that encompassed sewing machines, and, eventually typewriters, bicycles, and automobiles.[287]

Springfield, located along the Connecticut River in western Massachusetts, had been chosen for the federal armory in part because of its abundance of waterpower and for the nearby iron ore mines. Many private entrepreneurs, including Colt and Smith & Wesson, made the same choice. The Connecticut River Valley became known as the Gun Valley.[288] It was the Silicon Valley of its times, the center of industrial revolution.[289]

C. The Revolution in Ammunition

The gunpowder charge in a gun's firing chamber must be ignited by a primer. Before 1800, the primer was a small quantity of gunpowder in the gun's firing pan. The gunpowder in the firing pan was connected to the main powder charge in the firing chamber via a small opening, the touch-hole. In a flintlock, the priming powder in the firing pan is ignited by a shower of sparks from flint striking steel. In the older matchlock guns, the powder charge was ignited by the lowering of a slow-burning hemp cord to touch the firing pan. In either system, the user pressed the trigger to start the process.

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[284] DEYRUP, *supra* note 279, at 97–98; THOMSON, *supra* note 280, at 56–57.

[285] THOMSON, *supra* note 280, at 58; MERRITT ROE SMITH, HARPERS FERRY ARMORY AND THE NEW TECHNOLOGY: THE CHALLENGE OF CHANGE 212 (1977).

[286] SMITH, *supra* note 285, at 249.

[287] *See, e.g.*, DAVID R. MEYER, NETWORKED MACHINISTS: HIGH-TECHNOLOGY INDUSTRIES IN ANTEBELLUM AMERICA 81–84, 252–62, 279–80 (2006).

[288] *Id.*

[289] *Id.* at 73–103, 229–80.

Then in the 1810s, the percussion cap began to spread.[290] It used a primer made of chemical compounds, known as fulminate. The percussion cap sat on a nipple next to the firing chamber. When the user pressed the trigger, a hammer would strike the fulminate. The explosion would then ignite the gunpowder charge. Percussion ignition was faster and far more reliable than priming pan ignition.[291] Percussion cap guns "shot harder and still faster than the best flintlock ever known."[292]

Retrofitting flintlocks to convert them to percussion ignition was easy.[293] So starting in the 1810s, anyone's old flintlock from 1791 could suddenly became more powerful than any firearm that had existed in 1791.

The bullets of 1791 were spheres. That is why a unit of ammunition today is still called a "round." In the early nineteenth century, conoidal bullets were invented. These are essentially the same type of bullets used today. The shape is far more aerodynamically stable, allowing longer shots with much better accuracy. The back of the bullet helped to prevent the expanding gas of the gunpowder explosion from exiting the barrel before the bullet did. As the result, the gas gave the bullet a stronger push, imparting more energy and making the bullet more powerful.[294]

In 1846, modern metallic cartridge ammunition was invented. Instead of the bullet, gunpowder, and primer being three separate items to insert into a firearm one at a time, ammunition was now a single unit: the cartridge. The bullet, gunpowder, and primer were all contained in a metal case.[295]

An initial result of the cartridge was to make breechloading firearms become very common.[296] Instead of loading from the front of the barrel (the muzzle),

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[290] "[T]he percussion cap was developed as a result of Reverend Alexander John Forsyth's bringing out in 1807 his detonator lock—the most important development in guns since gunpowder." WINANT, FIREARMS CURIOSA, *supra* note 31, at 23; *see* Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 ST. MARY'S L.J. 35, 72 (2023). There were other systems of percussion ignition. For example, Washington, D.C., dentist Edward Maynard invented the tape primer; similar to the tapes still used today in toy cap guns. The percussion cap proved to be the best system. Dana B. Shoaf, *How A Dentist Developed A Clever, But Flawed, System for Discharging Firearms*, HISTORYNET (Dec. 18, 2020), https://www.historynet.com/how-a-dentist-developed-a-clever-but-flawed-system-for-discharging-firearms/ [https://perma.cc/25MU-VQGP].

[291] J.F.C. FULLER, ARMAMENT AND HISTORY 113 (Da Capo Pr. 1998) (1946).

[292] HELD, *supra* note 21, at 171.

[293] *See* LOCKHART, *supra* note 232, at 167.

[294] *See* JOHNSON ET AL., *supra* note 17, at 435. For example, in the Minié ball, the base of the bullet was hollowed out. Therefore, the gunpowder explosion would force the rim at the base to expand outward to the size of the rifle bore. HELD, *supra* note 21, at 183. *See* LOCKHART, *supra* note 232, at 178–80.

[295] *See* GREENER, *supra* note 30, at 773; DEYRUP, *supra* note 279, at 28; HELD, *supra* note 21, at 183–84.

[296] Breechloaders had always existed, and their inherent advantage in faster reloading was obvious. The great firearms designer John M. Hall patented a breechloader in 1811 that was adopted by the US Army in 1819. About 50,000 Hall Rifles were produced through the 1840s. ROY THEODORE HUNTINGTON, HALL'S BREECHLOADERS: JOHN H' HALL'S INVENTION AND DEVELOPMENT OF A BREECHLOADING RIFLE WITH PRECISION-MADE INTERCHANGEABLE PARTS AND ITS INTRODUCTION INTO THE UNITED STATES SERVICE 4, 16 (1972). It could shoot as far as a thousand yards, at a rate of eight or nine shots per minute. However, before the invention of the metallic cartridge, all breechloaders, including the British Ferguson Rifle of the American War of

a firearm could be loaded from the back of the barrel (the breech), near the trigger. Even a novice could quickly learn to shoot nine shots a minute from the single-shot breechloading Sharps' rifle, brought to market in 1850.[297]

The combination of the modern cartridge and breechloading ammunition greatly facilitated the development of repeating firearms, as will be described in the next section.

In 1866 the centerfire metallic cartridge was invented. In a rimfire (the metallic cartridge created in 1846), the primer is contained in the base of the cartridge, next to the cartridge wall. In a centerfire, the primer is contained in a small cup at the center of the base of the cartridge. The centerfire is more reliable and easier to manufacture.[298] Today, most firearms use centerfire ammunition, while the venerable rimfire is still widely used for .22 caliber or smaller guns.

A stupendous development in ammunition was the invention of a new type of gunpowder in 1884. Previously, all gunpowder had been "blackpowder," the same product the Chinese had first formulated in the 900s.[299] In the West ever since the 1400s, blackpowder had always been improving, with changes in the ratio of ingredients and refinements in the shapes of individual grains of powder.[300] Then in 1884 came white powder (a/k/a smokeless powder), with an entirely different formulation.[301] Smokeless powder burned far more efficiently, imparting much more power to bullets.[302] Firearms now shot further and with a flatter trajectory than ever before.[303] White, smokeless powder is still the gunpowder in use today, with continuing refinements.

Independence, shared a basic problem. In a muzzleloader, the opening at bottom of the barrel, near the trigger, is sealed shut by a breechblock. The barrel is open only at the muzzle. When the gunpowder charge in the barrel explodes, the breechblock at the base of the muzzle prevents gas from blowing back to the user. For a breechloader, the breechblock must be movable. The user moves the breechblock, inserts the bullet and ammunition into the empty barrel bore at the base of the muzzle, and then moves the breechblock back into place. If all goes well, the breechblock prevents any expanding gas from escaping the breech. However, the breechblock's fit on the barrel must be absolutely tight and perfect. Over time, wear and tear on a movable breechblock would weaken the seal. As a result, some gunpowder gas would escape and blow back towards the user. This could make shooting much less comfortable. The metallic cartridge solves the problem. The base of the metal shell has a wide rim that seals the bottom of the barrel. LOCKHART, *supra* note 232, at 173–75 (2021). King Henry VIII had metal cartridges in some of his guns. *See* JOHN NIGEL GEORGE, ENGLISH GUNS AND RIFLES 17-18 (Palladium Press 1999) (1947). The first metallic cartridge in the modern lines had been invented in 1812, but not until 1846 was a metallic cartridge invented that would seal (*obturate*) the breech. LOCKHART, *supra* note 232, at 180, 256–57.

[297] *Sharps' Breech-Loading Patent Rifle*, SCI. AM., Mar. 9, 1850; *see* SUPICA ET AL., *supra* note 62, at 32 (including a photo of Sharps Model 1853 breechloading carbine).

[298] *See* LOCKHART, *supra* note 232, at 264.

[299] The ingredients of blackpowder are sulfur, charcoal, and saltpeter. JOHNSON ET AL., *supra* note 17, at 2126, 2225.

[300] *See, e.g.*, ARTHUR PINE VAN GELDER & HUGO SCHLATTER, HISTORY OF THE EXPLOSIVES INDUSTRY IN AMERICA 13–28 (1927).

[301] Insoluble nitrocellulose, soluble nitrocellulose, and paraffin. JOHNSON ET AL., *supra* note 17, at 2225.

[302] GREENER, *supra* note 30, at 560–61.

[303] *See* LOCKHART, *supra* note 232, at 271–72.

Because lead bullets are relatively soft, they abrade from friction when being spun by the rifling as they travel down the barrel. Built-up lead residue makes the gun barrel less accurate. That problem was solved in 1882 with the invention of the jacketed bullet. A thin coating of copper or nickel on the lead bullet would keep it intact during its movement through the barrel.[304] With blackpowder, the muzzle velocity of a good firearm was around 1,000 feet per second (fps).[305] Smokeless powder promptly doubled that to about 2,000 fps. The change increased range and stopping power.[306]

D. *Advances in Repeating Arms*

During the nineteenth century, repeating arms became some of America's most popular arms. "Flintlock revolving pistols had been given trials and some practical use very early in the nineteenth century, but the loose priming powder in the pan of each cylinder constituted a hazard that was never eliminated."[307] It was the invention of the percussion cap that made it possible for repeating firearms to become widely adopted.[308]

The first American military contract for repeating firearms was the US Navy's 1813 purchase of repeaters from Joseph Chambers, who also sold many to the State of Pennsylvania for its militia.[309] Chambers's "machine guns," as he called them, were "a class including both long and short swivel guns, as well as muskets and pistols, all of which went through various model changes during their short careers."[310] Indeed, Chambers "seems to have employed—in various combinations—most of the systems of repeating gunnery known at that time: i.e., multiple barrels, multiple lock plates, and Roman Candle ignition."[311]

Chambers's swivel guns were "composed of seven musket barrels . . . containing twenty-five shots in each and discharging one hundred-seventy-five bullets, by quick succession, in less than one minute."[312] Some models were made

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[304] *See id.* at 273.

[305] *See, e.g.*, Layne Simpson, *Bullet Velocity Evolution: The Need for Speed*, RIFLESHOOTER (May 3, 2021), https://www.rifleshootermag.com/editorial/bullet-velocity-evolution-need-for-speed/392248 [https://perma.cc/64JD-Q94H]. As a bullet travels downrange, air friction reduces velocity.

[306] The muzzle velocities of modern handguns are around 1,000 fps; modern rifles are around 2,000 to 3,000 fps. *See My Ideal Velocity for Long Range Shooting*, BALLISTIC ASSISTANT, https://www.theballisticassistant.com/my-ideal-velocity-for-long-range-shooting/ [https://perma.cc/CY6D-3YBL] (last visited Apr. 10, 2024).

[307] RUSSELL, *supra* note 97, at 91.

[308] *Id.*

[309] PETERSON, TREASURY OF THE GUN *supra* note 47, at 197; GILKERSON, *supra* note 38, at 123–24.

[310] GILKERSON, *supra* note 38, at 123 (emphasis omitted).

[311] *Id.* at 123–24.

[312] *Id.* at 129. A British officer wrote about encountering a weapon during the War of 1812, "resembling seven musket-barrels, fixed together" that "was discharged by a lock; and each barrel threw 25 balls, within a few seconds of each other; making 145 shots from the piece within two minutes." WILLIAM JAMES, A FULL AND CORRECT ACCOUNT OF THE CHIEF NAVAL OCCURRENCES OF THE LATE WAR BETWEEN GREAT BRITAIN AND THE UNITED STATES OF AMERICA 465 (1817); *see* GILKERSON, *supra* note 38, at 141, 142 (showing images of seven-barrel Chambers swivel gun).

with eight barrels, increasing the firing capacity even further.[313] The swivel guns made for the Pennsylvania militia had 224-shot capacities.[314]

Chambers's muskets sometimes contained a second lock and were made to fire eight, ten, or twelve shots.[315] His pistols were made to fire four or six shots.[316]

Chambers's guns were largely kept secret to ensure that the technology did not fall into the hands of other militaries around the world—although it eventually did; numerous Chambers guns were manufactured. These include "at least 150 Chambers multi-barrel guns, plus 900 repeating muskets either constructed or converted to the Chambers system, plus 150 pistols ditto, for a total of some 1,200 repeating guns of all kinds known to have been produced [for the U.S. Navy or Pennsylvania militia] in the Chambers system between 1812 and 1816."[317] There is evidence that even more Chambers guns were made, but the quantity for each order is unclear.[318]

While "the Navy's only significant interest in flintlock repeating arms terminated with the Chambers contracts, it flirted briefly with others, including two models of shoulder-fired rifles built by gunmaker Artemas Wheeler of Concord, Massachusetts."[319] Wheeler sold two of each model to the Navy in 1821; muskets with seven-chamber cylinders and carbines with seven barrels.[320] These were possibly "the first U.S. government purchase of revolvers."[321] The following year, Wheeler sold the government two "revolving self-priming guns, one of six and the other of seven barrels."[322] "Wheeler's colleague on the invention was Elisha Collier, who took the idea to England and there founded what is generally considered to be the first significant production of revolving arms."[323]

In 1821, the *New York Evening Post* lauded New Yorker Isaiah Jennings for inventing a repeater, "importan[t], both for public and private use," whose "number of charges may be extended to fifteen or even twenty . . . and may be fired in the space of two seconds to a charge."[324] "[T]he principle can be added to any musket, rifle, fowling piece, or pistol" to make it capable of firing "from two to twelve times."[325] "About 1828 a New York State maker, Reuben Ellis, made milit-

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[313] GILKERSON, *supra* note 38, at 140.

[314] *Id.* at 143.

[315] *Id.* at 124, 125, 149, 149–50.

[316] *Id.* at 125, 150; *see also id.* 151, 152 (images of Chambers repeating pistols).

[317] GILKERSON, *supra* note 38, at 139.

[318] *Id.*

[319] *Id.* at 155 ("In 1818 Wheeler was given a patent for a '[g]un to discharge 7 or more times.'").

[320] *Id.* (showing images of Wheeler repeaters).

[321] *Id.*

[322] *Id.*

[323] *Id.*

[324] *Newly Invented Muskets*, N.Y. EVENING POST, Apr. 10, 1822, *in* 59 ALEXANDER TILLOCH, THE PHILOSOPHICAL MAGAZINE AND JOURNAL: COMPREHENDING THE VARIOUS BRANCHES OF SCIENCE, THE LIBERAL AND FINE ARTS, GEOLOGY, AGRICULTURE, MANUFACTURERS, AND COMMERCE 467 (1822).

[325] *Id.* ("As a sporting or hunting gun, its advantages are not less important. It enables the sportsman to meet a flock with twice the advantage of a double barrel gun, without any of its incumbrances, and it enables the hunter to meet his game in any emergency. The gun has been shown

ary rifles under contract on the Jennings principle."[326] However, neither of the New York repeaters became major commercial successes.

Pepperbox handguns had been around for a long time and became a mass market product starting in the 1830s.[327] These pistols had multiple barrels that could fire sequentially; four to eight barrels were most common.[328] Starting in 1847, the leading American manufacturer was Ethan Allen.[329]

"Ethan Allen was a pioneer in the transition from handmade to machine-made and interchangeable parts."[330] "The Allen pepperbox was the first American double-action pepperbox and it was a big success. . . . As quickly as the trigger could be pulled fully back, the hammer was released and the gun fired."[331] "For a dozen years and more after the Colt revolver was first made, sales of Allen's far outstripped those of Colt's."[332] "The Allens were very popular with the Forty Niners," who headed to California in 1849 for the Gold Rush.[333] "The pepperbox was the fastest shooting handgun of its day. Many were bought by soldiers and for use by state militia. Some saw service in the Seminole Wars and the War with Mexico, and more than a few were carried in the Civil War."[334] Their last use in a major engagement by the US Cavalry was in an 1857 battle against the Cheyenne.[335]

The first American patent for a revolver was issued to Samuel Colt in 1836. Like pepperboxes, revolvers fire repeating rounds, but revolvers use a rotating cylinder that lines up each firing chamber, in sequence, behind a single barrel. The difference improves the balance of the gun, by reducing the front weight. The Colt revolvers were the best firearms of their time and priced accordingly.[336]

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to many different officers of our army and navy, and has been highly approved of, and indeed no one who has seen a fair trial of its powers has ever been able to find an objection to it.") *Id.* at 468.

[326] WINANT, FIREARMS CURIOSA, *supra* note 31, at 174; *see also id.* at 175 (image of a "common rifle" of the 1819 Jennings model); SUPICA ET AL., *supra* note 62, at 29 (photo of twelve-shot Jennings rifle built around 1818).

[327] Rusty S., Editorial, *Wheelgun Wednesday: A Closer Look at Pepperbox Pistols*, TFB NEWSLETTER (Dec. 8, 2021), https://www.thefirearmblog.com/blog/2021/12/08/wheelgun-wednesday-pepperbox-pistols/ [https://perma.cc/M83B-F3VW]. (The first pepperboxes were made with matchlock ignition. Around 1790, Henry Nock invented the "first commonly produced flintlock pepperbox, a six-barreled long gun.").

[328] JACK DUNLAP, AMERICAN BRITISH & CONTINENTAL PEPPERBOX FIREARMS 148–49, 167 (1964); LEWIS WINANT, PEPPERBOX FIREARMS 7 (1952) [hereinafter WINANT, PEPPERBOX FIREARMS]. An American-made ten-shot model was patented in 1849. The manufacturer, Pecare & Smith, was one of five American firearms manufacturers exhibiting at the famous 1851 Crystal Palace Exhibition in London. *Id.* at 62. So was Samuel Colt, who won a prize. Petra Moser & Tom Nicholas, *Prizes, Publicity and Patents: Non-Monetary Awards as a Mechanism to Encourage Innovation*, 61 J. INDUS. ECON. 763, 769 (2013).

[329] Note: This Ethan Allen was not the same person as the Revolutionary War Vermont patriot. WINANT, PEPPERBOX FIREARMS, *supra* note 328, at 27–30.

[330] *Id.* at 28.

[331] *Id.*

[332] *Id.*

[333] *Id.* at 30.

[334] *Id.*

[335] *Id.*

[336] *Samuel Colt*, HIST., https://www.history.com/topics/inventions/samuel-colt [https://perma.cc/UD4Z-96MD] (Mar. 29, 2023).

Colt's first notable sales were to the Navy of the Republic of Texas (1839) and then to the Texas Rangers.[337] For rapidity of fire, the ordinary single-shot firearm had always been far outmatched by the ordinary bow. The 1841 Battle of Bandera Pass was a turning point in the Texas-Indian wars. A Texan with two five-shot Colt revolvers could keep up with the Comanche rate of bow fire.[338]

Colt's first big success was the Colt Navy Revolver.[339] With one modification by the user, the Colt could be quickly reloaded by swapping out an empty cylinder for a fresh, preloaded cylinder.[340] In 1858, Remington made a revolver

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[337] SUPICA ET AL., *supra* note 62, at 34 (displaying a photo of Paterson Colt Holter Model No. 5, known also as the "Texas" model, and routinely associated with Jack Hays of the Texas Rangers). *See also* Kat Eschner, *On This Day in 1847, A Texas Ranger Walked Into Samuel Colt's Shop and Said, Make Me a Six-Shooter*, SMITHSONIAN MAG. (Jan. 4, 2017), https://www.smithsonianmag.com/smart-news/day-1847-texas-ranger-walked-samuel-colts-shop-and-said-make-me-six-shooter-180961621/ [https://perma.cc/E87C-VCSS].

[338] Like other Indians, the Comanche also had firearms and were highly proficient users. Like the Englishmen of 1500, the Indians were also highly proficient with the bow, which Americans were not. The heyday of English archery had ended long before the 1607 establishment of the Virginia Colony at Jamestown. An Indian raid might commence with firearms, and then transition to rapid fire from bows. *See, e.g.*, James Donovan, *Two Sams and Their Six-Shooter*, TEX. MONTHLY (Apr. 2016), https://www.texasmonthly.com/the-culture/two-sams-and-their-six-shooter/ [https://perma.cc/MV6C-KZYJ]; Jim Rasenberger, *Understanding the Origins of American Gun Culture Can Help Reframe Today's Gun Debate*, TIME (May 26, 2020, 12:30 PM), https://time.com/5842494/colt-gun-debate-history/ [https://perma.cc/5MZY-Z49Q].

The Comanche controlled a very large area, from eastern New Mexico to East Texas. As a regional power, they were the equals and sometimes the superiors of the Spanish, Mexicans, French, English, Americans, and Texans, all of whose expansion they bottled up for many years. The Comanche economy was based on the trade of slaves (people of any race, but mainly people of other Indian tribes, who were captured in war or raids) and horses (also captured from enemies) to adjacent powers for other goods, including firearms. *See* PEKKA HÄMÄLÄINEN, THE COMANCHE EMPIRE (Yale Univ. Press 2008). Like the economy of other tribes, such as the Utes, who were highly successful in capturing people for trade, the Comanche economy was based on predation of humans. *See* ANDRÉS RESÉNDEZ, THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA (Houghton Mifflin Harcourt 2016).

[339] SUPICA ET AL., *supra* note 62, at 42 (photo of Colt 1851 Navy Model with detachable stock).

[340] The Colt Navy was a cap and ball revolver. It was loaded from the front of the cylinder. The user would pour premeasured gunpowder into a chamber from a cup. Then the user would insert the bullet and wad. The wad is a small greased cloth; it fills the empty space around the bullet, and prevents expanding gunpowder gas from escaping the muzzle before the bullet does. The powder, bullet, and the wad surrounding the bullet would be rammed into place by a hinged ramrod underneath the barrel. Next, the user would insert a percussion cap on a nipple on the back of the just-loaded cylinder chamber. Finally, the user would rotate the cylinder, to bring the next chamber into loading position. So although a cap and ball revolver could quickly fire five or six shots, reloading took a while.

As a result, users developed an expedient. In the Colt Navy, the barrel is attached to the frame of the gun by a single pin. Users would file the pin so that it was easy to remove. Then, the user could speedily detach the barrel, replace the empty cylinder with a fresh preloaded cylinder, and then put the barrel back into place and reinsert the pin. The process was slower than swapping detachable magazines today, but it allowed continuous fire with only a short pause to reload. *See, e.g.*, SUPICA ET AL., *supra* note 61, at 42; *1851 Colt Navy Revolver*, NAT'L PARK SERV.: WEAPONS OF FORT SMITH, https://www.nps.gov/fosm/learn/historyculture/1851-colt-navy-revolver.htm [https://perma.cc/XG52-RNV3] (last visited Apr. 10, 2015); Immersive Engineering, *How Colt 1851 Works? (Animation)*, YOUTUBE (Feb. 29, 2024), https://www.youtube.com/watch?v=__r-zvD8io8 [https://perma.cc/87GQ-EC8A].

designed and advertised for fast swaps, with each revolver sold with a pair of cylinders.[341]

The 1857 expiration of Colt's patent for its cap and ball revolvers brought new companies into the revolver business. During the Civil War, combatants used revolvers from thirty-seven different companies.[342] In a cap and ball revolver, the bullet, gunpowder, and percussion cap must be inserted one at a time into each of the five or six firing chambers.[343]

Smith and Wesson brought out a revolver entirely different from the Colt patent. The 1857 Smith & Wesson Model 1 was a breechloader using metallic cartridges.[344] When reloading an empty firing chamber, the user now only had to insert one item, not three. Smith & Wesson invented a special cartridge for the revolver: the .22 Short Rimfire.[345] It is still in use today. "The S&W factory in Springfield, Massachusetts, couldn't keep up with the demand—the new revolver and its unique cartridge were such a hit with the American public that they flew off store shelves nationwide."[346]

Some repeating arms were made as turret and chain guns, starting at latest with New Yorker John Cochran's 1837 horizontal turret gun, which was made as a pistol and long gun.[347] Cochran's gun used a manually turned cylinder, and while he stated on his patent that "I generally form nine chambers in the cylinder," varieties of his gun include five- and seven-shot pistols.[348] Other horizonal turret guns include a five-shot invented by Edmund Graham in 1856,[349] and a ten-shot invented by Heinrich Genhart in 1857.[350]

"The best known, in America, of the vertical turret guns is the Porter."[351] Perry Porter's 1851 patent for his "self-loading repeating-rifles" display a magaz-

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341 This revolver, the Remington "Beals" third model, had a pin that was designed for removability, allowing the barrel to be quickly detached from the frame, a fresh cylinder inserted, and then the barrel to be re-attached. *See* CHARLES SCHIF, REMINGTON'S FIRST REVOLVERS: THE REMINGTON BEALS .31 CALIBER REVOLVERS 48, 106 (2007).

342 JOHN F. GRAF, STANDARD CATALOGUE OF CIVIL WAR FIREARMS 187–233 (2008) (20 models from Colt, plus 73 models from 36 other manufacturers).

343 Immersive Engineering, *supra* note 340.

344 The design had been patented in 1855 by Rollin White, who licensed it to Smith & Wesson. Improvement in Repeating Fire-Arms, U.S. Patent No. 12,648, (issued Apr. 3, 1855); *see also* SUPICA ET AL., *supra* note 62, at 43 (photo of Smith & Wesson Model 1).

345 *See, e.g.*, SUPICA ET AL., *supra* note 61, at 43 (text below photo of Smith & Wesson Model 1). Reloading was one round at a time. The cylinder would be rotated to a loading gate on the bottom or side of the frame. The gate would be opened, and one cartridge inserted. Then the user would rotate the cylinder so that the next chamber could be loaded. Improvement in Repeating Fire-Arms, U.S. Patent No. 12,648, (issued Apr. 3, 1855).

346 LOCKHART, *supra* note 232, at 257.

347 WINANT, FIREARMS CURIOSA, *supra* note 31, at 196.

348 U.S. Patent No. 188 (issued Apr. 28, 1837); WINANT, FIREARMS CURIOSA, *supra* note 31, at 195–96 (image of 7-shot pistol).

349 U.S. Patent No. 15,734 (issued Sept. 16, 1856); WINANT, FIREARMS CURIOSA, *supra* note 31, at 197–98 (image of Graham rifle).

350 U.S. Patent No. 16,477 (issued Jan. 27, 1857); WINANT, FIREARMS CURIOSA, *supra* note 31, at 197–98 (image of Genhart pistol).

351 WINANT, FIREARMS CURIOSA, *supra* note 31, at 199.

ine "constructed to contain thirty rounds."[352] An 1853 newspaper reported, "[w]e were shown [to]day a very ingenious instructed rifle, invented by Col. P.W. Porter. . . ." which was "capable of holding an indefinite number of charges, by the aid of which it may be practicable to make sixty discharges a minute."[353] Porter made three variations of his firearm, and seemingly most Porter guns were made as nine-shot pistols or rifles.[354] Due largely to the risk of chain fire, however, the guns did not achieve commercial success. Wendell Wright's 1854 eight-shot vertical turret gun was also commercial unsuccessful.[355]

In 1866, Henry Josselyn patented his twenty-shot chain pistol.[356] "An almost identical system of endless chain and sprocket wheel was used in an earlier British invention, patented by Thomas Treeby" in 1855.[357]

"The best known of the endless chain guns is a French product, the Guycot. The gun is usually referred to as the 'forty shot belt pistol,'" but also made were "pistols in twenty-five-shot and thirty-two-shot, and rifles in eighty-shot and 100-shot."[358] "[T]he most frequently found of the European turret pistols" was the ten-shot Noel pistol from around 1860.[359] Also notable was Joseph Enouy's forty-two-shot "Ferris Wheel" pistol.[360] But these firearms never came close to challenging conventional revolvers or pepperboxes for popularity.

Pin-fire revolvers were developed in France in 1836 "but did not really catch on until the 1850s."[361] Some pinfires were produced with twenty-one-round capacities, but "[d]espite some usage in the American Civil War," pinfires were "much more popular in Europe than in the United States."[362]

Some multi-shot arms were combination weapons. For example, Robert Lawton of Rhode Island patented a saber and pistol combination weapon in 1837, in which "the cylinder revolved around the shank of the blade."[363] Robert Colvin of Lancaster, Pennsylvania, patented a combination of a sword and revolver in 1862 and a combination of a bayonet and revolver in 1864.[364] In 1863, James Campbell of New York City patented "a sixteen-barrel pepperbox turning on the

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[352] U.S. Patent No. 8,210 (issued July 8, 1851).

[353] *A New Gun Patent*, THE ATHENS POST (Tenn.), Feb. 25, 1853, at 1 (reprinted from N.Y. Post).

[354] WINANT, FIREARMS CURIOSA, *supra* note 31, at 199–200 (images of one Porter revolver and two Porter rifles).

[355] U.S. Patent No. 11,917 (issued Nov. 7, 1854); WINANT, FIREARMS CURIOSA, *supra* note 31, at 201–03 (image of a Wright revolver).

[356] U.S. Patent No. 52,248 (issued Jan. 23, 1866); WINANT, FIREARMS CURIOSA, *supra* note 31, at 204–05 (image of Josselyn pistol).

[357] WINANT, FIREARMS CURIOSA, *supra* note 31, at 204–05 (images of Treeby rifle).

[358] WINANT, FIREARMS CURIOSA, *supra* note 31, at 206–07 (images of 25-shot Guycot pistol and 100-shot Guycot rifle).

[359] WINANT, FIREARMS CURIOSA, *supra* note 31, at 202–03 (image of Noel pistol).

[360] WINANT, FIREARMS CURIOSA, *supra* note 31, at 207–08 (image of Ferris Wheel pistol).

[361] SUPICA ET AL., *supra* note 62, at 49.

[362] SUPICA ET AL., *supra* note 62, at 49; *see also id.* at 48 (photo of 21-shot Belgian pinfire revolver); WINANT, FIREARMS CURIOSA, *supra* note 31, at 67–70.

[363] WINANT, FIREARMS CURIOSA, *supra* note 31, at 40.

[364] The sword and revolver weapon was "probably produced and marketed commercially," while the bayonet and revolver "probably was never put in production." *Id.* at 34, 36–37.

shaft of a lance."[365] "[T]his could have been a fearsome weapon, capable of very rapid fire if it functioned as planned."[366] Knife-revolvers, saber-revolvers, squeezer-revolvers,[367] knuckleduster-revolvers,[368] pocket-book-revolvers,[369] and cane guns[370] were all offered as repeating arms in the nineteenth century.

Two-barrel revolvers garnered moderate popularity. William Billinghurst, one of the nineteenth century's most famous gunsmiths, made a two-barrel combination weapon with a shotgun and seven-shot rifle, which used a manually turned cylinder for the rifle.[371] "It has been thought the Billinghurst gun gave [Jean Alexandre Francois] Le Mat the idea for the latter's revolver."[372]

Le Mat's two-barrel revolvers were considered "[t]he most unusual—and since the War the most famous" of all Confederate revolvers.[373] Le Mat's 1856 patent displayed an eight-shot revolving cylinder that fired through a rifled upper barrel plus a smooth lower shot-barrel.[374] Many varieties emerged, including pin-fire revolvers with ten-shot cylinders in addition to the shot cartridge.[375] During the Civil War, the Confederate War Department and Navy Department ordered around 7,000 LeMats. (While the inventor had a space in his name ("Le Mat"), his firearms are most often referred to without the space ("LeMat")).[376] Although the Navy Department's contract was nullified after several LeMats proved defecti-

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365 *Id.* at 39–40.

366 *Id.* at 40.

367 "A squeezer pistol is shaped unconventionally so it may be gripped in the palm when being fired." WINANT, FIREARMS CURIOSA, *supra* note 31, at 84. "The best known of the squeezers is the 'Protector Revolver'." *Id.* at 78, patented in 1883, U.S. Patent No. 273,664 (issued Mar. 6, 1883). As an 1892 advertisement shows, it was produced as a 7-shot, .32 caliber revolver. WINANT, FIREARMS CURIOSA, *supra* note 31, at 79. *See also id.* at 79 (images of three protectors).

368 "A knuckleduster pistol is shaped unconventionally so it may be comfortably gripped in the fist for use as a punching or pounding weapon." WINANT, FIREARMS CURIOSA, *supra* note 31, at 84. "The best known knuckleduster pistols are the short pepperboxes stamped 'My Friend' . . . ." *Id.* My Friend was patented by James Reid of New York in 1865. U.S. Patent No. 51,752 (issued Dec. 26, 1865). "They were made in 7-shot, .22 caliber; 5-shot, .32 caliber; and 5-shot, .41 caliber." WINANT, FIREARMS CURIOSA, *supra* note 31, at 84. *See also id.* at 87–88 (three images of Reid's My Friend revolvers); SUPICA ET AL., *supra* note 62, at 33 (photo of 6-shot European Deleaxhe Apache Knuckleduster).

369 The Frankenau Combination Pocket-Book and Revolver, patented in 1877, was made with a six-shot revolver that fires 5 mm, pin-fire cartridges. WINANT, FIREARMS CURIOSA, *supra* note 31, at 157; U.S. Patent No. 196,794 (issued Nov. 6, 1877); *see also* WINANT, FIREARMS CURIOSA, *supra* note 31, at 159 (image of the Frankenau pocket-book revolver).

370 A "rarely found" cane gun, patented by Marcelin Daigle of Louisiana in 1877 contained a 20-round tubular magazine for .22 cartridges in the shaft. WINANT, FIREARMS CURIOSA, *supra* note 31, at 144; FLAYDERMAN, *supra* note 234, at 476. *See also id.* at 145 (image of Daigle cane gun).

371 WINANT, FIREARMS CURIOSA, *supra* note 31, at 54–56.

372 *Id.* at 56.

373 CLAUD E. FULLER & RICHARD D. STEUART, FIREARMS OF THE CONFEDERACY 254 (Quarterman Publications, Inc. 1977) (1944). Le Mat was a physician in New Orleans before the war, and left for Paris in 1861, where he made arms for the Confederate government. *Id.*

374 U.S. Patent No. 15,925 (issued Oct. 21, 1856).

375 WINANT, FIREARMS CURIOSA, *supra* note 31, at 60–61 (images of three LeMats with 9-shot cylinders plus the additional barrel for the shot cartridge); SUPICA ET AL., *supra* note 62, at 45 (photo of LeMat 10-shot revolver).

376 FULLER & STEUART, *supra* note 373, at 254.

ve,[377] many were nevertheless used during the war,[378] including by "such famous Southern leaders as General Beauregard and General Stuart."[379] The Confederate "Field Manual for the Use of Officers on Ordnance Duty" provided the official arms of the Confederate States and described the LeMat as follows:

> Grape-shot pistol—This pistol is manufactured by M. Le Mat of Paris. It has a cylinder which revolves, containing nine chambers, a rifled barrel and a smooth-bored barrel. The latter receives a charge of eleven buckshot, and is fired by a slight change in the hammer. Some are in our service.[380]

"Le Mat revolvers were also made in long guns. They have shoulder stocks and long barrels and are bigger and heavier in every way, but otherwise there are no decided changes in construction."[381] After the war, Le Mat patented a breechloading version of his revolver for use with center-fire metallic cartridges.[382]

John Walch's twelve-shot revolvers were also used during the Civil War. The Walch Navy Revolver used two hammers and superposed rounds to fire twelve shots from six chambers. Walch later offered a five-chambered ten-shot revolver, which he produced in greater quantities than earlier models.[383]

Walch had a professional relationship with John Lindsay, and some arms had a mix of Walch and Lindsay parts.[384] Lindsay had success with his "Double Shooting Fire Arms," which fired two superposed rounds from one barrel, either one-at-a-time or simultaneously.[385] These were made as both pistols and muskets.[386] "[W]ell over a thousand each of pistols and muskets were manufactured," and the Army purchased over 1,000 of the muskets.[387]

By the time Walch patented his invention in 1859,[388] several others had accomplished controlled fire of superposed rounds. Johnson Marsh's 1836 "Double Shot Gun" allowed controlled fire of two superposed rounds by using two ham-

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377 *Id.* at 255–58.

378 *Id.* at 259.

379 WINANT, FIREARMS CURIOSA, *supra* note 31, at 58.

380 BERKELEY R. LEWIS, SMALL ARMS AND AMMUNITION IN THE UNITED STATES SERVICE 66 (Smithsonian Institution Press 1968) (1956). While it was common for LeMats to contain nine shots of .42 caliber in the cylinder and a .60 caliber shot-cartridge, the LeMats sold to the Confederate Navy apparently used .35 caliber for the cylinder and a shot-barrel around .50 caliber. FULLER & STEUART, *supra* note 373, at 254, 258.

381 WINANT, FIREARMS CURIOSA, *supra* note 31, at 60.

382 U.S. Patent No. 97,780 (issued Dec. 14, 1869).

383 WINANT, FIREARMS CURIOSA, *supra* note at 31; *see also id.* at 190–91 (images of five ten- and twelve-shot Walch revolvers).

384 *See* WINANT, FIREARMS CURIOSA, *supra* note 31, at 182, 184. When Lindsay's patent was initially rejected for conflicting with Walch's, Lindsay's patent attorney argued that Walch's revolvers were made under Lindsay's immediate care and inspection. *Id.* at 187.

385 *See* WINANT, FIREARMS CURIOSA, *supra* note 31, at 184, 186. "Lindsay disapproved of firing both shots at once, but he affirmed that such firing could be done safely in either the pistol or the long gun." *Id.* at 187.

386 WINANT, FIREARMS CURIOSA, *supra* note 31, at 185 (images of four Lindsay pistols).

387 *Id.* at 182, 186.

388 U.S. Patent No. 22,905 (issued Feb. 8, 1859).

mers.[389] Daniel Neal's 1855 pistol used an elongated hammer and a false hammer.[390] And Frederick Beerstecher's 1855 pistol used a two-part head of the hammer that allowed it to fire one superposed round at a time.[391]

Another approach to increasing firing capacity was to add a second barrel. Aaron Vaughan of Pennsylvania patented a double-barrel revolver with a fourteen-round capacity in 1862.[392] It utilized "two hammers actuated in succession by a single trigger . . . ."[393] The next year, H. D. Ward of Massachusetts patented an 8-shot revolver with two barrels that, like Vaughan's revolver, used two hammers and one trigger.[394] Ward's was different, however, in that the user had the option of firing two shots simultaneously—"one through each barrel."[395] Another two-barrel revolver, this one patented by Albert Christ of Ohio in 1866, used superposed barrels to fire its eighteen-shot cylinder.[396] The "Osgood Duplex," patented in 1880 by Freeman Hood of Connecticut, used a cylinder to fire eight cartridges through the "main" barrel while an "auxiliary" barrel fired a cartridge "of larger size."[397]

Some firearms were made with several barrels.[398] William Marston started making three-barrel pistols in 1857.[399] Five years later, J. Jarre patented his harmonica pistol, which began with one barrel and a horizontally sliding row of chambers,[400] and were later made with a horizontally sliding row of barrels[401]—some had ten barrels.[402] "Most pepperboxes have four, five, or six barrels," and while they "rarely [had] more than eight," one was made with twenty-four barrels.[403]

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389 U.S. Patent No. 9,839 (issued July 1, 1836).

390 U.S. Patent No. 12,440 (issued Feb. 27, 1855); WINANT, FIREARMS CURIOSA, *supra* note 31, at 181 (image of Neal pistol).

391 U.S. Patent No. 13,592 (issued Sept. 25, 1855); WINANT, FIREARMS CURIOSA, *supra* note 31, at 181 (image of Beerstecher pistol).

392 U.S. Patent No. 35,404 (issued May 27, 1862).

393 '404 Patent col.1 l. 20-21.; WINANT, FIREARMS CURIOSA, *supra* note 31, at 63 (image of a Vaughan revolver).

394 U.S. Patent No. 39,850 (issued Sept. 8, 1863).

395 '850 Patent col.1 l. 14.

396 U.S. Patent No. 57,864 (issued Sept. 11, 1866); WINANT, FIREARMS CURIOSA, *supra* note 31, at 64 (image of a Christ revolver).

397 U.S. Patent No. 235,240 (issued Dec. 7, 1880); WINANT, FIREARMS CURIOSA, *supra* note 31, at 68 (image of an Osgood Duplex that fired eight .22 cartridges through the main barrel and a .32 cartridge through the auxiliary barrel).

398 *See, e.g.*, SUPICA ET AL., *supra* note 62, at 33 (photo of 4-barrel European pistol made around 1810-1830).

399 U.S. Patent No. 17,386 (issued May 26, 1857); WINANT, FIREARMS CURIOSA, *supra* note 31, at 241, 243 (image of an 1864 Marson pistol).

400 U.S. Patent No. 35,685 (issued June 24, 1862); *see* SUPICA ET AL., *supra* note 62, at 33 (photo of 10-shot Jarre harmonic pistol with sliding row of chambers).

401 U.S. Patent No. 137,927 (issued Apr. 15, 1873).

402 WINANT, FIREARMS CURIOSA, *supra* note 31, at 245 (images of 6-barrel and 10-barrel harmonica pistols).

403 WINANT, FIREARMS CURIOSA, *supra* note 31, at 246, 249–250 (image of a 24-barrel pepperbox); *see also* SUPICA ET AL., *supra* note 62, at 33 (photo of 18-shot pepperbox handgun).

Rather than adding barrels, some revolvers added cylinders. In 1862, C. Edward Sneider patented a revolver with two seven-shot cylinders for rim-fire cartridges.[404] In 1865, George Gardiner patented an eleven-shot revolver using two percussion cap cylinders—the front cylinder held five shots while the rear cylinder held six.[405] Charles Linberg and William Phillips of Missouri invented a revolver in 1870 with two six-shot cylinders that could be "shifted on the spindle" for alternative use.[406] William Philip of New York patented a metallic cartridge revolver in 1783 with three cylinders that could hold seventeen total cartridges—the front cylinder "has seven chambers, and the others six," but "[t]he front and middle cylinders each have one chamber . . . reserved for serving as a portion of the barrel to the cylinder" behind them.[407] A chamber of the front cylinder of New Yorker William Orr's 1874 two-cylinder revolver similarly functioned as part of the barrel, leaving the user with eleven shots.[408]

While repeating handguns were widely available before the Civil War, repeating long guns were not. As with most advances in technologies, the early stages saw inventions that advanced the state of knowledge but did not win commercial success. In the 1830s, the Bennett and Haviland Rifle used a chain-drive system with twelve rectangular chambers—each loaded with powder and ball—to fire twelve rounds consecutively.[409] Alexander Hall's rifle with a fifteen-round rotating cylinder (like a revolver) was introduced in the 1850s.[410] The Kesling gun, invented in 1856, was a Roman-candle-style rifle that superposed perforated bullets on top of a solid bullet in a magazine—the solid bullet ended the Roman-candle firing and could then be fired at the user's discretion. Kesling's patent explained that the magazine could "contain any suitable number of charges," and displayed one with twelve charges.[411]

An 1855 alliance between Daniel Wesson (later, of Smith & Wesson) and Oliver Winchester led to a series of famous lever-action repeating rifles. First came the thirty-shot Volcanic Rifle, which an 1859 advertisement boasted could be fired thirty times within a minute.[412] But like the previous repeating rifles, it did not sell well.[413]

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404 U.S. Patent No. 34,703 (issued Mar. 18, 1862).

405 U.S. Patent No. 47,712 (issued May 16, 1865); WINANT, FIREARMS CURIOSA, *supra* note 31, at 73 (image of a Gardner revolver).

406 U.S. Patent No. 109,914 col.1 ll. 24-25 (issued Dec. 6, 1870); WINANT, FIREARMS CURIOSA, *supra* note 31, at 73 (image of a Linberg & Phillips revolver).

407 U.S. Patent No. 142,175 col.1 ll. 32-35 (issued Aug. 26, 1873); WINANT, FIREARMS CURIOSA, *supra* note 31, at 1 (image of a Philip revolver).

408 U.S. Patent No. 148,742 (issued Mar. 17, 1874); WINANT, FIREARMS CURIOSA, *supra* note 31, at 77 (image of an Orr revolver).

409 FLAYDERMAN, *supra* note 234, at 711; *see* SUPICA ET AL., *supra* note 62, at 30 (photo of Bennett and Haviland rifle).

410 FLAYDERMAN, *supra* note 234, at 713.

411 U.S. Patent No. 15,041 col.1, para. 7 (issued June 3, 1856).

412 HAROLD F. WILLIAMSON, WINCHESTER: THE GUN THAT WON THE WEST 25–27 (1952); *see* SUPICA ET AL., *supra* note 62, at 32 (photo of Volcanic carbine).

413 "In total, fewer than 10,000 Volcanics were produced . . . ." SUPICA ET AL., *supra* note 62, at 32.

Then came the sixteen-shot Henry Rifle in 1861, a much-improved version of the Volcanic. Tested at the Washington Navy Yard in 1862:

> 187 shots were fired in three minutes and thirty-six seconds (not counting reloading time), and one full fifteen-shot magazine was fired in only 10.8 seconds . . . hits were made from as far away as 348 feet, at an 18-inch-square target. . . . "It is manifest from the above experiment that this gun may be fired with great rapidity . . . ."[414]

"Advertisements claimed a penetration of eight inches at one hundred yards, five inches at four hundred yards, and power to kill at a thousand yards."[415]

"[F]ueled by the Civil War market, the first Henrys were in the field by mid-1862."[416] Indeed, the most famous testimonial for the Henry came from Captain James M. Wilson of the 12th Kentucky Cavalry, who used a Henry Rifle to kill seven of his Confederate neighbors who broke into his home and ambushed his family. Wilson praised the rifle's sixteen-round capacity: "When attacked alone by seven guerillas I found it [the Henry rifle] to be particularly useful not only in regard to its fatal precision, but also in the number of shots held in reserve for immediate action in case of an overwhelming force."[417] Soon after, Wilson's entire command was armed with Henry rifles.[418]

About 14,000 Henrys were produced, by the Henry factory operating as fast as it could.[419] Building a rifle that complicated took extra time. Over 8,000 were purchased by Union soldiers for personal use. The War Department bought about 1,700.

Deployed in far larger numbers during the war—over 100,000—was the seven-shot Spencer repeating rifle.[420] The internal magazine was located in the rifle's buttstock and was fast to reload with patented tubes that poured in seven fresh rounds of ammunition.[421] The most common use of Spencers was by cavalrymen, who had always been first in line for repeating firearms. President Lincoln, a gun enthusiast, test fired a Spencer on the White House lawn and was impressed. A Spencer could fire twenty aimed shots per minute.[422]

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414 R.L. WILSON, WINCHESTER: AN AMERICAN LEGEND 11–12 (1991).

415 PETERSON, TREASURY OF THE GUN, *supra* note 47, at 240.

416 WILSON, *supra* note 414, at 11.

417 H.W.S. CLEVELAND, HINTS TO RIFLEMEN 181 (1864).

418 Andrew L. Bresnan, *The Henry Repeating Rifle*, RAREWINCHESTERS (Aug. 17, 2007), https://www.rarewinchesters.com/articles/art_hen_02.shtml [https://perma.cc/7MGN-D44A].

419 GRAF, *supra* note 342, at 101.

420 *Id.* at 171–72 (2008).

421 *See Blakeslee Cartridge Box*, SMITHSONIAN INST., https://civilwar.si.edu/weapons_blakeslee.html [https://perma.cc/PMF8-MBF6] (last visited Apr.17, 2024). *See also* U.S. Patent No. 45-,469 (issued Dec. 20, 1864).

422 LOCKHART, *supra* note 232, at 259–60. During the war, the Spencer Repeating Rifle Company, of Boston, made 144,500 rifles and carbines (short rifles), of which 107,372 were sold to the US government. FLAYDERMAN, *supra* note 234, at 633. Some of these were subcontracted to the Burnside Rifle Company, in Providence, Rhode Island. *Id.* When the war ended, Union soldiers were allowed to buy their firearms. A Spencer cost a ten-dollar deduction in monthly pay. ADJUT-

The Union's repeating rifles were supplied by private businesses operating at maximal capacity. If the government's own factories had been able to produce repeaters like the Henry or Spencer for the entire infantry, the war would have been much shorter. But the federal factories did not have the capacity for mass production of repeaters. They were struggling just to produce the necessarily large quantities of the 1840s state-of-the-art infantry rifle: the single-shot muzzleloading rifled musket. It was not until two years into the war when all the infantry was supplied with that arm. As for the Confederacy, none of its armories had the capability of producing anything as complex as a Spencer or Henry.[423]

After the Confederacy surrendered at Appomattox, the defeated Confederate officers were allowed to take their handguns home.[424] As with the Union forces, some of the confederates' arms had been brought to service by individual soldiers, and some had been supplied by their army's ordnance departments. The Union soldiers of course took home the guns that they had bought; as for the arms that had been issued by the government, Union soldiers were allowed to buy them for a six-to-ten dollar deduction from their monthly pay.[425]

Shortly after the Civil War, the Henry evolved into the eighteen-shot Winchester Model 1866, which was touted as having a capacity of "eighteen charges, which can be fired in nine seconds."[426] Another advertisement contained pictures of Model 1866 rifles underneath the heading, "Two shots a second."[427] "[T]he Model 1866 was widely used in opening the West and, in company with the Model 1873, is the most deserving of Winchesters to claim the legend 'The Gun That Won the West.'"[428] Over 170,000 Model 1866s were produced, many

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ANT-GENERAL'S OFFICE, WAR DEPARTMENT, GENERAL ORDER NO. 101, RETENTION OF ARMS BY SOLDIERS (1865).

[423] LOCKHART, *supra* note 232, at 260–62. "The limitations of the factory economy, and not some kind of stodgy, conservative resistance to new technology, were what would delay the large-scale use of repeating rifles in combat." *Id.* at 262. Adding to the problem was the obduracy of the head of the Union's Ordnance Department, who insisted on sticking with muzzleloaders. He "conducted a one-man mutiny of disobedience and delay against President Lincoln. He refused to approve production orders, threw gun inventors out of his office, and repeatedly slow-tracked Lincoln's orders." CHRIS KYLE & WILLIAM DOYLE, AMERICAN GUN: A HISTORY OF THE U.S. IN TEN FIREARMS 41 (2013).

[424] Joe Servis, *The Surrender Meeting*, NAT'L PARK SERV.: STORIES, https://www.nps.gov/apco/learn/historyculture/the-surrender-meeting.htm [https://perma.cc/8YG8-UAW9] (June 14, 2022).

[425] Craig L. Barry, *Personalized Muskets–The Unfinished Fight*, CIVIL WAR NEWS, https://www.historicalpublicationsllc.com/civilwarnews/personalized-muskets---the-unfinished-fight/article_18c48174-3838-11ed-8c58-db38a1118e2b.html [https://perma.cc/78M2-T3V8] (Jan. 25, 2024) ("Muskets of all types, with or without accoutrements, cost $6. Spencer carbines, with or without accoutrements cost $10, while all other carbines and revolvers cost $8.").

[426] LOUIS A. GARAVAGLIA & CHARLES G. WORMAN, FIREARMS OF THE AMERICAN WEST 1866-1894, at 128 (1985). The Winchester 1866 was made in a variety of calibers. Only the smallest caliber could hold 18 rounds. *Id.*

[427] PETERSON, TREASURY OF THE GUN, *supra* note 47, at 234–35.

[428] Elmar du Plessis, *The Gun That Won the West–The Story of the Winchester Rifle*, NAT'L MUSEUM PUBL'NS (Nov. 30, 2016) https://nationalmuseumpublications.co.za/the-gun-that-won-the-west-the-story-of-the-winchester-rifle/ [https://perma.cc/B4RK-EYHB] ("Over a half million Model 1873 rifles had been produced by 1900, making it Winchester's most popular rifle. It was certainly one of the most recognisable rifles of America's frontier period, with the likes of But-

of them sold to foreign militaries who recognized the firearm as a game-changer.[429] Then came the Winchester Model 1873, whose magazine ranged from six to twenty-five.[430] Over 720,000 Model 1873s were produced by 1919.[431]

Separate from the Winchester and Henry patents was the 1873 Evans Repeating Rifle. With an innovative rotary helical magazine, it held thirty-four rounds. The Evans had some commercial success—about 12,000 made—although far from the level of the Winchesters.[432] All of the Winchesters and Henrys are still made today.[433]

The Henry rifle had appeared during the Civil War, and its improved version, the 1866 Winchester, during Reconstruction, in the same year that Congress sent the Fourteenth Amendment to the States for ratification. During Reconstruction, no government in the United States attempted to prohibit the possession of any particular type of firearm. Rather, the major gun control controversy of the time was efforts to prevent the freedmen in the former Confederate states from having firearms at all, or only having them with a special license.[434] These restrictions were rebuffed by the Second Freedmen's Bureau Act, the Civil Rights Act, and the Fourteenth Amendment.[435]

The final quarter of the nineteenth century saw more iconic Winchesters, namely the Model 1886 and then the Model 1892, which was made legendary by Annie Oakley and later by John Wayne.[436] These arms had a capacity of fifteen rounds.[437] Over a million were produced from 1892 to 1941.[438]

The first commercially successful repeating long guns—the Henrys and Winchesters—had been lever actions. After firing one round, the user moves a lever down and then up to eject the empty metal case and reload a fresh cartridge into the firing chamber. Next came pump-action rifles and shotguns. To eject and reload a pump-action long gun, the user pulls and then pushes the sliding

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ch Cassidy and Billy the Kid preferring it to any other rifle. It's no wonder, therefore, that it gained a reputation as 'The Gun that Won the West.').

[429] Nancy McClure, *Treasures from Our West: Embellished Winchester Model 1866*, BUFFALO BILL CTR. WEST (May 18, 2014), https://centerofthewest.org/2014/05/18/treasures-winchester-model-1866/ [https://perma.cc/P8QV-TL99].

[430] ARTHUR PIRKLE, WINCHESTER LEVER ACTION REPEATING RIFLES: THE MODELS OF 1866, 1873 & 1876, at 107 (2010).

[431] FLAYDERMAN, *supra* note 234, at 306–09.

[432] DWIGHT B. DEMERITT JR., MAINE MADE GUNS AND THEIR MAKERS 293–95 (1973); FLAYDERMAN, *supra* note 234, at 694.

[433] The Henry is made by Henry Repeating Arms in Wisconsin. The Winchesters are made by Uberti, an Italian company that specializes in reproductions of historic guns. The modern Henrys and Ubertis are built for modern ammunition and calibers. Elwood Shelton, *1860 Henry Rifle Past and Present*, GUNDIGEST (July 31, 2018), https://gundigest.com/rifles/1860-henry-rifle-past-and-present [https://perma.cc/JZ6Q-VQ3L].

[434] McDonald v. City of Chicago, 561 U.S. 742, 771 (2010).

[435] *Id.* at 773–75.

[436] *Model 1892 Lever-Action Rifles*, WINCHESTER REPEATING ARMS, https://www.winchesterguns.com/products/rifles/model-1892/model-1892-intro.html [https://perma.cc/N9KK-FW8Q] (last visited Mar. 19, 2024).

[437] *Winchester Model 1892*, MIL. FACTORY, https://www.militaryfactory.com/smallarms/detail.php?smallarms_id=527 [https://perma.cc/KSS2-S2XW] (last visited Mar. 19, 2024).

[438] FLAYDERMAN, *supra* note 234, at 307–12.

fore-end of the gun, located underneath the barrel. The most famous pump-action rifle of the nineteenth century was the Colt Lightning, introduced in 1884. It could fire fifteen rounds.[439]

In bolt-action guns, discussed below, the user typically moves the bolt's handle in four short movements: up, back, forward, down. For semiautomatic rifles, no manual steps are needed to eject the empty shell and reload the next cartridge. The semiautomatic can be fired as fast as the user can press the trigger. Each press of the trigger fires one new shot. The Girardoni rifle of the Founding Era had a similar capability, although its internal mechanics were not the same as a semiautomatic.[440]

Meanwhile, revolvers kept getting better. The double-action revolver allows the user to shoot as fast as he or she can press the trigger. In the earlier, single-action revolvers, the user first had to cock the hammer with his or her thumb.[441] The first double-action revolver was invented in England in 1851, but it was expensive and did not make much impact in America.[442] Double-action revolvers in America took off with the 1877 introduction of three models by Colt.

The other improvement was fast reloading. As described above, in the early revolvers the five or six chambers in a cylinder had to be reloaded one chamber at a time. For the Colt Navy revolver and the Remington Beals revolver, quickly removing an empty cylinder and replacing it with a preloaded one was easy.[443]

Other revolver improvements allowed the user to access the entire back side of the cylinder at once. The first top-break revolver was the 1870 Smith & Wesson Model 3. Releasing a hinge made the cylinder and barrel fall forward, so that all chambers were exposed for reloading. Just as fast to reload, and sturdier, was the 1889 Colt Navy with its swing-out cylinder.[444] Virtually all modern revolvers are swing-out. The user presses a knob that releases the cylinder to swing out from the revolver (usually to the left of the frame), so that all six chambers are exposed at once.[445]

In the early revolvers, the user had to rotate the cylinder before adding each round. With a top-break or the swing-out, the user could quickly drop in one round after another.[446]

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[439] *Id.* at 122. Pump-action guns are also called slide action.

[440] For the Girardoni, the user had to tip the rifle slightly to roll a new bullet into place. *See, e.g.*, Mike Markowitz, *The Girandoni Air Rifle: A Weapon Ahead of its Time?*, DEF. MEDIA NETWORK (May 14, 2013), https://www.defensemedianetwork.com/stories/the-girandoni-air-rifle/ [https://perma.cc/62AK-UJAX].

[441] The most common American pepperboxes, by Ethan Allen, had been double action. *See supra* note 329.

[442] *Revolver: Double Action Revolver*, FIREARMS HIST., TECH. & DEV. (July 1, 2010), http://firearmshistory.blogspot.com/2010/07/revolver-double-action-revolver.html [https://perma.cc/L2ZU-9YWV] (last visited Mar. 19, 2024).

[443] *See supra* note 340.

[444] *See, e.g.*, Jim Supica, *A Brief History of Firearms*, NAT'L RIFLE ASS'N MUSEUM, https://www.nramuseum.org/gun-info-research/a-brief-history-of-firearms.aspx [https://perma.cc/L4Z8-AZSQ] (last visited Apr. 11, 2024).

[445] *See, e.g.*, *id.*

[446] *See, e.g.*, *id.*

With a simple accessory, users could drop in all six rounds at once. The first speedloader for a revolver was patented in 1879.[447] A revolver speedloader holds all six (or five) fresh cartridges in precise position so that they can be dropped into an empty cylinder simultaneously.[448] With practice, the speedloader is a fast reload, although not as fast as swapping detachable magazines.

As described above, rifles with tubular magazines—such as twenty-two-shot Girardoni or the seven-shot Spencer—had their own speedloaders; the rifle speedloaders were precisely sized tubes to pour in a new load of ammunition.

As for detachable box magazines, the first one was invented in 1862,[449] but they did not catch on until the advent of semiautomatic firearms, beginning in the last fifteen years of the nineteenth century.

The first functional semiautomatic firearm was the Mannlicher Model 85 rifle, invented in 1885.[450] Mannlicher introduced new models in 1891, 1893, and 1895.[451] Semiautomatic handguns before the turn of the century included the Mauser C96,[452] Bergmann Simplex,[453] Borchardt M1894,[454] Borchardt C-93,[455] Fabrique Nationale M1899,[456] Mannlicher M1896 and M1897,[457] Luger M1898 and M1899,[458] Roth-Theodorovic M1895, M1897, and M1898,[459] and the Schwarzlose M1898.[460] The ones that became major commercial successes were the Mauser and the Luger, both of which would sell millions in the following decades to militaries and civilians. The Luger used a detachable magazine; the original Mauser's internal magazine was reloaded with stripper clips.[461]

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447 Garry James, *Rifleman Q&A: What Was the First Speedloader*, AM. RIFLEMAN (Oct. 11, 2020), https://www.americanrifleman.org/content/rifleman-q-a-what-was-the-first-speedloader/ [https://perma.cc/9ZBX-G9VY].

448 *Id.*

449 The 1862 model was the ten-round Jarre harmonica pistol. WINANT, FIREARMS CURIOSA, *supra* note 31, at 244–45. As the name implied, the magazine stuck out horizontally from the side of the firing chamber, making the handgun awkward to carry. SUPICA ET AL., *supra* note 62, at 33.

450 JOHN WALTER, RIFLES OF THE WORLD 568 (3d ed. 2006).

451 *Id.* at 568–69.

452 DOUGHERTY, *supra* note 55, at 84.

453 *Id.* at 85.

454 *Springfield Armory Museum – Collection Record*, REDISCOV.COM, http://ww2.rediscov.com/spring/VFPCGI.exe?IDCFile=/spring/DETAILS.IDC,SPECIFIC=9707,DATABASE=objects [https://perma.cc/8YYZ-XXNE] (last visited Mar. 19, 2024).

455 Leonardo Antaris, *In the Beginning: Semi-Automatic Pistols of the 19th Century*, AM. RIFLEMAN (Jan. 4, 2018), https://www.americanrifleman.org/content/in-the-beginning-semi-automatic-pistols-of-the-19th-century/ [https://perma.cc/EE73-5NJ2]; *see also* SUPICA ET AL., *supra* note 62, at 86 (photo of Borchardt C-93).

456 Antaris, *supra* note 455.

457 *Id.*

458 *Id.*

459 *Id.*

460 *Id.*

461 *Id.*

American-made semi-automatic handguns, rifles, and shotguns were just around the corner, to be introduced in the early years of the twentieth century.[462]

E. Continuing Advances in Firearms Were Well Known to the Founders

While the Founders could not foresee all the specific advances that would take place in the nineteenth century, they were well aware that firearms were getting better and better.

Tremendous improvements in firearms had always been part of the American experience. The first European settlers in America had mainly owned matchlocks. When the trigger is pressed, a smoldering hemp cord is lowered to the firing pan; the powder in the pan then ignites the main gunpowder charge in the barrel.[463]

As described previously, the first firearm more reliable than the matchlock was the wheel lock, invented by Leonardo da Vinci.[464] In a wheel lock, the powder in the firing pan is ignited when a serrated wheel strikes a piece of iron pyrite.[465] The wheel lock was the first firearm that could be kept loaded and ready for use in a sudden emergency. Although matchlock pistols had existed, the wheel lock made pistols far more practical and common.[466] The wheel lock was the "preferred firearm for cavalry" in the sixteenth and seventeenth centuries.[467] The proliferation of wheel locks in Europe in the sixteenth century coincided with the homicide rate falling by half.[468]

However, wheel locks cost much more than a matchlock. Moreover, their moving parts were far more complicated than the matchlocks'. Under conditions of hard use in North America, wheel locks were too delicate and too difficult to repair. The path of technological advancement often involves expensive inventions eventually leading to products that are affordable to average consumers and are even better than the original invention. That has been the story of firearms in America.

The gun that was even better than the wheel lock, but simpler and less expensive, was the flintlock. The earliest versions of flintlocks had appeared in the mid-sixteenth century. But not until the end of the seventeenth century did most European armies replace their matchlocks with flintlocks. Americans, individually, made the transition much sooner.[469]

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[462] Many of the first American semiautomatics were invented by John Moses Browning, the greatest of all American firearms inventors. The semiautomatics of the twenty-first century are refinements of the work of Browning, Borchardt, Mauser, and the other great inventors of their time. *See, e.g.*, NATHAN GORENSTEIN, THE GUNS OF JOHN MOSES BROWNING: THE REMARKABLE STORY OF THE INVENTOR WHOSE FIREARMS CHANGED THE WORLD (2021).

[463] *See* text at note 163.

[464] *See* text at notes 43, 49.

[465] *See* text at note 49.

[466] *See* LOCKHART, *supra* note 232, at 80.

[467] *Id.*

[468] *See* Carlisle E. Moody, *Firearms and the Decline of Violence in Europe: 1200-2010*, 9 REV. EUR. STUD. 53 (2017).

[469] *See* LOCKHART, *supra* note 232, at 106.

Indian warfare in the thick woods of the Atlantic seaboard was based on ambush, quick raids, and fast individual decision-making in combat—the opposite of the more orderly battles and sieges of European warfare. In America, the flintlock became a necessity.[470]

Unlike matchlocks, flintlocks can be kept always ready.[471] There is no smoldering hemp cord to give away the location of the user. Flintlocks are more reliable than matchlocks—all the more so in adverse weather, although still far from impervious to rain and moisture. Flintlocks are also simpler and faster to reload than matchlocks.[472]

Initially, the flintlock could not shoot further or more accurately than a matchlock.[473] But it could shoot much more rapidly. A matchlock took more than a minute to reload once.[474] In experienced hands, a flintlock could be fired and reloaded five times in a minute, although under the stress of combat, three times a minute was a more typical rate.[475] Compared to a matchlock, a flintlock was more likely to ignite the gunpowder charge instantaneously, rather than with a delay of some seconds.[476] "The flintlock gave infantry the ability to generate an overwhelmingly higher level of firepower."[477]

The Theoretical Lethality Index (TLI), which will be discussed further in the next section, is a measure of a weapon's effectiveness in military combat. The TLI of a seventeenth century musket is nineteen and the TLI of an eighteenth-century flintlock is forty-three.[478] So the transition of firearm type in the American colonies more than doubled the TLI. There is no reason to believe that the American Founders were ignorant of how much better their own firearms were compared to those of the early colonists.

As described in Part II.E, Founders who had served in the Continental Congress knew of Joseph Belton's sixteen-shot firearm.[479] Likewise, the twenty-two-shot Girardoni rifle famously carried by Lewis & Clark was no secret, and it

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[470] David B. Kopel, *The Founders Were Well Aware of Continuing Advances in Arms Technology*, THE VOLOKH CONSPIRACY (May 26, 2023, 1:08 PM), https://reason.com/volokh/2023/05/26/the-founders-were-well-aware-of-continuing-advances-in-arms-technology/ [https://perma.cc/CEZ6-8LUX].

[471] With the caveat that gunpowder is hygroscopic, and too much water could ruin the gunpowder. Hence the practice of storing a firearm on the mantel above the fireplace. *Id.*

[472] JOHNSON ET AL., *supra* note 17, at 2189–91; GREENER, *supra* note 30, at 66–67; CHARLES C. CARLTON, THIS SEAT OF MARS: WAR AND THE BRITISH ISLES 1485–1746, at 171–73 (2011).

[473] *See* LOCKHART, *supra* note 232, at 105.

[474] *See id.* at 107.

[475] *See id.* at 107–08.

[476] *See id.* at 104.

[477] *Id.* at 107.

[478] TREVOR N. DUPUY, THE EVOLUTION OF WEAPONS AND WARFARE 92 (1984).

[479] Delegates to the 1777 Continental Congress included the two Charles Carrolls from Maryland, future Supreme Court Chief Justice Samuel Chase, John Adams, Samuel Adams, Francis Dana, Elbridge Gerry, John Hancock, John Witherspoon (President of Princeton, the great American college for free thought), Benjamin Harrison (father and grandfather of two Presidents), Francis Lightfoot Lee, and Richard Henry Lee (hero of the *1776* musical). *See* text at notes 227–29.

had been invented in 1779. As of 1785, South Carolina gunsmith James Ransier of Charleston, South Carolina, was advertising four-shot repeaters for sale.[480]

The Founding generation was especially aware of one of the most common firearms of their time, the Pennsylvania-Kentucky rifle. The rifle was invented by German and Swiss immigrants in the early eighteenth century. It was created initially for the needs of frontiersmen who might spend months on a hunting expedition in the dense American woods. "What Americans demanded of their gunsmiths seemed impossible": a rifle that weighed ten pounds or less, for which a month of ammunition would weigh one to three pounds, "with proportionately small quantities of powder, be easy to load," and "with such velocity and flat trajectories that one fixed rear sight would serve as well at fifty yards as at three hundred, the necessary but slight difference in elevation being supplied by the shooter's experience."[481] By around 1735, "the impossible had taken shape" with the creation of the iconic Pennsylvania-Kentucky rifle.[482]

As for the most common American firearm, the smoothbore (nonrifled) flintlock musket, there had also been great advances. To a casual observer, a basic flintlock musket of 1790 looks very similar to flintlock musket of 1690. However, improvements in small parts, many of them internal, had made the best flintlocks far superior to their ancestors. For example, thanks to English gunsmith Henry Nock's 1787 patented flintlock breech, "the gun shot so hard and so fast that the very possibility of such performance had hitherto not even been imaginable."[483]

The Founders were well aware that what had been impossible or unimaginable to one generation could become commonplace in the next. With the federal armories advanced research and development program that began in the Madison administration, the government did its best to make the impossible possible.

F. Perspective

In the early nineteenth century, the finest maker of flintlock shotguns was Old Joe Manton of London. A "strong, plain gun" from Manton cost hundreds of dollars. By 1910, a modern shotgun, "incomparably superior, especially in fit, balance, and artistic appearance" to Manton's cost about ten dollars.[484]

Military historian Trevor Dupuy created a "Theoretical Lethality Index" (TLI) to compare the effectiveness of battlefield weapons from ancient times through the twentieth century.[485] While the TLI was never intended to describe weapon utility in civilian defense situations, such as against home invaders, it is a usable rough estimate for community defense situations, such as militia use. According to Dupuy, the TLI of an eighteenth-century flintlock (the common

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[480] James Lambert Ransier, Advertisement, *At No. 165.5 King Street*, COLUMBIAN HERALD, OR THE PATRIOTIC COURIER OF NORTH-AMERICA (Charleston, S.C.), Oct. 26, 1785.

[481] HELD, *supra* note 21, at 143 (emphasis omitted).

[482] *Id.* The gun is also called the American Long Rifle.

[483] *Id.* at 137.

[484] CHARLES ASKINS, THE AMERICAN SHOTGUN 21–22 (1910). Ten dollars in 1913 is approximately equal to $250 today. Three hundred dollars in 1913 would be over $7,000 today.

[485] DUPUY, *supra* note 478.

service arm of the American Revolution) was forty-three.[486] The TLI of the standard service arm 112 years after the Second Amendment was ratified—the 1903 Springfield bolt-action magazine-fed rifle—is 495.[487] Dupuy did not calculate a TLI for late twentieth century firearms. Using Dupuy's formula, Kopel calculated the TLI for two modern firearms: an AR semiautomatic rifle is 640, and a 9mm semiautomatic handgun is 295.[488]

Again, the TLI has nothing to do with personal defense. An AR rifle is not always twice as good as a 9mm pistol for defense against a rapist or home invader. The modern rifle might be better or worse than the modern handgun, depending on other circumstances.

For militia utility, the eleven-fold advance from the single-shot flintlock to the magazine-fed bolt-action rifle of 1903 is enormous. The Founding generation did not precisely predict the Springfield bolt action or its eleven-fold improvement over the long guns of the Founding period. The Founders did do all they could to make that improvement take place.

As firearms historian Robert Held wrote in 1957, "the history of firearms" came to an end in the late nineteenth century.[489] Although manufacturing quality

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[486] *Id.*

[487] *Id.* The previous US military standard rifle was the 1892 bolt-action Krag–Jørgensen. Its underperformance in the 1898 Spanish-American War led the War Department to start looking for something better. *See* LOCKHART, *supra* note 232, at 279–80.

The British had adopted the bolt-action magazine-fed Lee-Metford rifle in 1888, and the Germans, the Mauser Gewehr 98 in 1898. The 1903 Springfield was essentially a modified Mauser, for which the US government had to pay damages to settle a patent suit. The Springfield 1903 stayed in service through the Vietnam War, although it lost is role as the standard rifle during World War II to the semiautomatic M1 Garand. A huge number of twentieth and twenty-first century American hunting rifles are variants of the Springfield; many use the Springfield's famous .30-'06 cartridge. *See e.g.*, John Enright, *Lee-Enfield Rifle—Workhorse of the British Empire*, AM. RIFLEMAN (July 1, 2016), https://www.americanrifleman.org/content/lee-enfield-rifle-workhorse-of-the-british-empire/#:~:text=adopted%20by%20the%20British%20Government,by%20American%20James%20Parris%20Lee. [https://perma.cc/CRL8-SRQ2]; Blaine Taylor, *The Mauser 98: The Best Bolt-Action Rifle Ever Made?*, WARFARE HIST. NETWORK, https://warfarehistorynetwork.com/article/mauser-98-the-best-bolt-action-rifle-ever-made/ [https://perma.cc/3KMS-JGEB] (last visited Apr. 10, 2024); Christopher Miskimon, *The 1903 Springfield Rifle's Storied Military History*, WARFARE HIST. NETWORK, https://warfarehistorynetwork.com/article/the-1903-springfield-rifles-stories-military-history/ [https://perma.cc/KMY9-D9WJ] (last visited Apr. 10, 2024).

[488] David B. Kopel, *The Theoretical Lethality Index is Useful for Military History but Not for Gun Control Policy*, REASON.COM/VOLOKH CONSPIRACY (Nov. 1, 2022, 1:23 PM), https://reason.com/volokh/2022/11/01/the-theoretical-lethality-index-is-useful-for-military-history-but-not-for-gun-control-policy/ [https://perma.cc/RX4H-9P8S].

A modern mid-power handgun, such as a nine millimeter, is far superior to a flintlock long gun of the late 1700s in reliability and rate of fire. But handguns have much shorter barrels than long guns. As a result, handguns, even the best modern ones, have less range than rifles. While the difference usually does not matter for personal defense, longer range is often very important in military combat, such as militia use. Hence the modern handgun's rating far below modern rifles in the combat-oriented TLI. *Id.*

[489] HELD, *supra* note 21, at 186 ("Although the age of firearms today thrives with ten thousand species in the fullest heat of summer, the *history* of firearms ended between seventy and eighty years ago. There has been nothing new since, and almost certainly nothing will come hereafter."). According to Held, any modern bolt action is "essentially" an updated version of the Mauser bolt actions of the 1890s or the Mannlicher bolt actions of the 1880s. "All lever-action rifles are at

has always been improving, design refinements continue, and ergonomics are the better than ever, in the twentieth century there were no major innovations in firearms. For the average citizen, the nineteenth century brought in the revolver action, the lever action, the pump action, and the semiautomatic action. Those are still the types of firearms that are most common today.[490] The firearms you can own today are better manufactured and more affordable versions of types that were introduced before 1900.

The big exception is for optics, thanks to lasers (now broadly affordable), high-power scopes, and handheld computers integrated with scopes, for long range hunting.

During the nineteenth century, bans on particular types of firearms were rare. As will be described in the next Part, there were four state statutes that aimed at particular firearms. Three of them covered handguns, old and new; one of them aimed at repeating rifles.

IV. FIREARMS BANS IN THE NINETEENTH CENTURY

This Part describes bans on particular types of firearms in the nineteenth century. The discussion also notes some Bowie knife legislation that was enacted along with some of the handgun laws. Bowie knives will be discussed in much more detail in Part V.

A. Georgia Ban on Handguns, Bowie Knives, and Other Arms

Between 1791 and the beginning of the Civil War in 1861, there was one law enacted against acquiring particular types of firearms. An 1837 Georgia statute made it illegal for anyone "to sell, or to offer to sell, or to keep or to have about their persons, or elsewhere" any:

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heart Henrys of the early 1860s," and all semiautomatics "descend from" the models of the 1880s. *Id.* at 185.

[490] Also, still common today are firearms that were typical in the eighteenth century and before: single-shot and double-barrel (two-shot) guns.

The automatic firearm—what is commonly called a machine gun—was invented by Hiram Maxim in 1884. During the nineteenth century, it had strong sales to militaries, except in the United States. There, the military was mainly a "frontier constabulary." Unlike France, Germany, and other European states, the United States was not engaged in an arms race with nearby rivals that might invade. Maxim contacted American firearms manufacturers with offers to license his machine gun system for their models. He was universally rebuffed, sometimes with colorful language. The first and only machine gun marketed to American consumers was the Thompson submachinegun, starting in 1920. In the consumer market, it was a failure. The gun was popular with criminals, especially bootleggers, and had some sales to law enforcement. The National Firearms Act of 1934 followed the lead of several state laws starting in the mid-1920s and imposed a stiff tax and registration system on machine guns. *See* JOHN ELLIS, THE SOCIAL HISTORY OF THE MACHINE GUN (1986).

The Thompson finally found a constructive role in World War II, where it was widely issued to American and British special forces, such as paratroopers. Arnold Blumberg, *The Thompson Gun's Curious History, from World War I to World War II*, WARFARE HIST. NETWORK, https://warfarehistorynetwork.com/thompson-guns-curious-history-from-world-war-i-to-world-war-ii/ [https://perma.cc/H4N7-E2R9] (last visited Mar. 20, 2024).

> Bowie or any other kinds of knives, manufactured and sold for the purpose of wearing or carrying the same as arms of offence or defence; pistols, dirks,[491] sword-canes, spears, &c., shall also be contemplated in this act, save such pistols as are known and used as horseman's pistols, &c.[492]

Horse pistols were the only type of handgun not banned in Georgia. These were large handguns, usually sold in a pair, along with a double holster that was meant to be draped over a saddle. They were too large for practical carry by a person who was walking.

At the time, there was no right to arms in the Georgia Constitution. In 1846, the Georgia Supreme Court held the statute unconstitutional.[493] The court explained that the Second Amendment stated an inherent right, and nothing in the Georgia Constitution had ever authorized the state government to violate the right.[494] For all the weapons, including handguns, the ban on concealed carry was upheld, while the sales ban, possession ban, and open carry ban were held unconstitutional.[495] The Supreme Court's 2008 *District of Columbia v. Heller* extolled *Nunn* because the "opinion perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause."[496] *Nunn* was a leader among the many antebellum state court decisions holding that a right enumerated in the Bill of Rights was protected against state infringement.[497]

B. Tennessee Ban on Many Handguns

After the end of Reconstruction, the white supremacist legislature of Tennessee in 1879 banned the sale "of belt or pocket pistols, or revolvers, or any other kind of pistol, except army or navy pistols"—that is, large handguns of the sort carried by military officers, artillerymen, cavalrymen, etc.[498] These big and well-made guns were already possessed in quantity by many former Confederate officers. The big handguns were more expensive than smaller pistols.

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[491] Dirks are a fighting knife originally created in Scotland. HAROLD L. PETERSON, DAGGERS & FIGHTING KNIVES OF THE WESTERN WORLD 58–59 (1968) [hereinafter PETERSON, DAGGERS & FIGHTING KNIVES].

[492] Act of Dec. 25, 1837, § 1, 1837 Ga. Laws 90, 90. Although section 1 of the Act was prohibitory, section 4 contained an exception allowing open carry of some of the aforesaid arms, not including handguns: "*Provided, also,* that no person or persons, shall be found guilty of violating the before recited act, who shall openly wear, externally, Bowie Knives, Dirks, Tooth Picks, Spears, and which shall be exposed plainly to view . . . ." The same section also allowed vendors to sell inventory they already owned, through the next year. *Id.* at 90–91, § 4.

[493] Nunn v. State, 1 Ga. 243 (1846).

[494] *Id.* at 250–51.

[495] *Id.* at 251.

[496] 554 U.S. 570, 612 (2008).

[497] *See* Jason Mazzone, *The Bill of Rights in Early State Courts*, 92 MINN. L. REV. 1, 34 (2007); AKHIL REED AMAR, THE BILL OF RIGHTS 145–56 (1998) (discussing "the Barron contrarians").

[498] Act of Mar. 27, 1879, ch. 186, § 1, 1879 Tenn. Pub. Acts 231, 231.

Because officers tended to come from the upper strata of society, the effect of the 1879 Tennessee law was to make new handguns unaffordable to poor people of all races. The vast majority of the former slaves were poor, and so were many whites. While some Jim Crow-era laws had a focused racial impact, the Tennessee statute was one of many Jim Crow laws that disadvantaged black people and poor whites, both of whom were viewed with suspicion by the ruling classes.

The ban on sales of small handguns was upheld under the Tennessee Constitution because it would help reduce the concealed carrying of handguns.[499]

C. Arkansas Ban on Many Handguns, and Bowie Knives

Arkansas followed suit with a similar law in 1881. That law also forbade the sale of Bowie knives, dirks (another type of knife), sword-canes (a sword concealed in a walking stick), and metal knuckles.[500] In a prosecution for the sale of a pocket pistol, the Arkansas Supreme Court rejected a constitutional defense. The statute was "leveled at the pernicious habit of wearing such dangerous or deadly weapons as are easily concealed about the person. It does not abridge the constitutional right of citizens to keep and bear arms for the common defense; for it in no wise restrains the use or sale of such arms as are useful in warfare."[501]

The 1868 Arkansas Constitution's right to arms, still in effect, states, "[t]he citizens of this State shall have the right to keep and bear arms for their common defense."[502] Similarly, the right to arms provision of the Tennessee Constitution, as adopted in 1870 and still in effect, states, "the citizens of this State have a right to keep and to bear arms for their common defense; [B]ut the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime."[503]

In both states, the "common defense" language was interpreted by the courts as protecting an individual right of everyone, but only for militia-type arms. Such arms included the general types of handguns used in the US military. When Congress was drafting the future Second Amendment, there was a proposal in the Senate to add similar "common defence" language. The Senate rejected the proposal.[504]

Whatever the merits of the state courts' interpretations of the state constitutions, the Tennessee and Arkansas statutes are unconstitutional under the Second Amendment. The Supreme Court in *Heller* repudiated the notion that the Second Amendment is for only military-type arms. Dick Heller's nine-shot .22 caliber revolver was certainly not a military-type handgun.[505]

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[499] State v. Burgoyne, 75 Tenn. 173 (Tenn. 1881).

[500] Act of Apr. 1, 1881, No. 96, § 3, 1881 Ark. Acts 191, 192.

[501] Dabbs v. State, 39 Ark. 353, 357 (1885).

[502] ARK. CONST. of 1868, art. I, § 5 (retained in 1874 Ark. Const.).

[503] TENN. CONST. of 1870, art. I, § 26.

[504] S. Journal, 1st Cong., 1st Sess. 76–77 (Aug. 10, 1789).

[505] Dick Heller's particular handgun, a single action Buntline revolver manufactured by High Standard, is identified at Plaintiffs' Motion for Summary Judgment, Exhibit A, Parker v. District of Columbia, 311 F. Supp. 2d 103 (D.D.C. 2004), *rev'd* Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007), https://web.archive.org/web/20111117110734/http://www.gurapossessky.co

D. *Florida Licensing Law for Repeating Rifles and Handguns*

The closest historic analogue to twenty-first century bans on semiautomatic rifles is an 1893 Florida statute that required owners of Winchesters and other repeating rifles to apply for a license from the board of county commissioners.[506] In 1901, the law was extended to also include handguns.[507] As amended, "Whoever shall carry around with, or have in his manual possession, in any county in this State, any pistol, Winchester rifle, or other repeating rifle, without having a license from the county commissioners of the respective counties of this State," should be fined up to $100 or imprisoned up to thirty days.[508]

The county commissioners could issue a two-year license only if the applicant posted a one-hundred-dollar bond.[509] The commissioners were required to record "the maker of the firearm so licensed to be carried, and the caliber and number of the same."[510] The bond of $100 was exorbitant. It was equivalent to over $3,400 today.[511]

A 1909 case involved Giocomo Russo's petition for a writ of mandamus against county commissioners who had refused his application for a handgun carry license.[512] Based on his name, Russo may have been an Italian immigrant. At the time, Italians were sometimes considered to be in a separate racial category. When Russo applied, the county commissioners said that they only issued licenses to applicants whom they knew personally, and they did not think the applicant needed to carry a handgun.[513] Russo argued that the licensing statute was unconstitutional.[514]

The Florida Supreme Court denied Russo's petition for a writ of mandamus.[515] According to the court, there were two possibilities: (i) if the statute is constitutional, then mandamus to the county commissioners would be incorrect because they acted within their legal discretion; and (ii) if the statute is unconstitutional, then mandamus would be improper because a writ of mandamus cannot

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m/news/parker/documents/SJExhibitA.pdf. [https://perma.cc/JN4F-Y6E9] (last visited Apr. 10, 2024).

[506] Act of June 2, 1893, ch. 4147, § 1, 1893 Fla. Laws 71, 71. Additionally, dealers of repeating rifles were required to pay a licensing tax of ten dollars, and sales to minors were prohibited. Act of June 2, 1893, ch. 4115, § (9)14, 1893 Fla. Laws 3, 13; *see also* Act of June 1, 1895, ch. 4322, § (9)14, 1895 Fla. Laws 3, 14 (restating 1893 law requiring licensing tax and forbidding sales to minors).

[507] Act of May 9, 1901, ch. 4928, 1901 Fla. Laws 57, 57.

[508] 4 THE COMPILED GENERAL LAWS OF FLORIDA, 1927, at 3459–60 (Atlanta, The Harrison Company 1928) (published at 5th div., pt. 1, tit. 2, ch. 3, art. 6, § 7202).

[509] *Id.* at 3460, § 7203

[510] *Id.*

[511] 2022= 879.4. 1893= 27. 1901= 25. Avg. = 26. *Consumer Price Index 1800,* Fed. Reserve Bank of Minneapolis, https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator/consumer-price-index-1800-. [https://perma.cc/NV49-TEEK] (last visited Mar. 9, 2024).

[512] State v. Parker, 57 Fla. 170 (1909).

[513] *Id.* at 171–72.

[514] *See id.* at 172–73.

[515] *Id.* at 173.

order an official to carry out an unconstitutional statute.[516] Either way, Russo was not entitled to a writ of mandamus.[517] Pursuant to the doctrine of constitutional avoidance, the court declined to opine on the statute's constitutionality.[518]

Decades later, a case arose as to whether a handgun in an automobile glove-box fit within the statutory language "on his person or in his manual possession."[519] By five to two, the Florida Supreme Court held that it did not; no license was necessary to carry a handgun or repeating rifle in an automobile.[520] A four-justice majority granted the defendant's petition for habeas corpus because of the rule of lenity: in cases of ambiguity, criminal statutes should be construed narrowly.[521] Automobile travelers "should be recognized and accorded the full rights of free and independent American citizens," said the majority.[522]

Justice Rivers H. Buford concurred with the majority.[523] His opinion went straight to the core problem with the statute.

Born in 1878, Buford had worked from ages ten to twenty-one in Florida logging and lumber camps. In 1899, at the suggestion of a federal judge who owned a logging camp, Buford began the study of law. He was admitted to the Florida bar the next year. In 1901, he was elected to the Florida House of Representatives. Later, he was appointed county prosecuting attorney, elected state's attorney for the ninth district, and elected state attorney general. He was appointed to the Florida Supreme Court in 1925.[524] As of 1923, "[h]is principal diversion [was] hunting."[525]

The Florida Constitution of 1885 had provided: "The right of the people to bear arms in defence of themselves and the lawful authority of the State, shall not be infringed, but the Legislature may prescribe the manner in which they may be borne."[526]

Concurring, Justice Buford wrote that the statute should be held to violate the Florida Constitution and the Second Amendment:

> I concur in the judgment discharging the relator because I think that Section 5100, R.G.S., § 7202, C.G.L., is unconstitutional because it offends against the Second Amendment to the Constitution of the United States and Section 20 of the Declaration of Rights of the Constitution of Florida.

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516 *Id.*

517 *Id.*

518 State v. Parker, 57 Fla. 170, 172–73 (1909).

519 Watson v. Stone, 148 Fla. 516, 518 (1941).

520 *Id.* at 522–23.

521 *Id.* at 517–23.

522 *Id.* at 522–23.

523 *Id.* at 523–24.

524 3 HISTORY OF FLORIDA: PAST AND PRESENT, HISTORICAL AND BIOGRAPHICAL 155–56 (Chicago & New York, The Lewis Publishing Co. 1923); *Justice Rivers Henderson Buford*, FLA. S. CT., https://supremecourt.flcourts.gov/Justices/Former-Justices/Justice-Rivers-Henderson-Buford [https://perma.cc/T2PH-DCFF] (last visited Mar. 21, 2024) [hereinafter HISTORY OF FLORIDA].

525 3 HISTORY OF FLORIDA, *supra* note 524, at 155–56.

526 FLA. CONST. of 1885, art. I, § 20.

> Proceedings in habeas corpus will lie for the discharge of one who is held in custody under a charge based on an unconstitutional statute.
>
> The statute does not attempt to prescribe the manner in which arms may be borne but definitely infringes on the right of the citizen to bear arms as guaranteed to him under Section 20 of the Declaration of Rights of the Florida Constitution.[527]

He explained the history of the exorbitant licensing laws of 1893 and 1901:

> I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied. We have no statistics available, but it is a safe guess to assume that more than 80% of the white men living in the rural sections of Florida have violated this statute. It is also a safe guess to say that not more than 5% of the men in Florida who own pistols and repeating rifles have ever applied to the Board of County Commissioners for a permit to have the same in their possession and there had never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested.[528]

Justice Buford had described some of the changed societal conditions underlying the 1893 and 1901 enactments. There may have been additional factors involved. Repeating rifles had been around for decades.[529] By the 1880s, manufacturing improvements had made such rifles affordable even for some poor people. Black Americans were using such rifles to drive off lynch mobs, such as in famous 1892 incidents in Paducah, Kentucky and Jacksonville, Florida.[530]

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527 Watson v. Stone, 148 Fla. 516, 523–24 (1941).

528 *Id.* at 524.

529 See text at notes 412–30.

530 In Jacksonville,

> [W]hen a white man, having been killed by a negro, and threats of lynching the prisoner from the Duval County Jail being made, a large concourse, or mob of negroes, assembled around the jail and defied and denied the sheriff of the county ingress to the building. This mob, refusing to disburse upon the reading of the riot act by the sheriff, he called for assistance from the militia to aid him in enforcing the laws.

In sum, the nineteenth century history of firearms bans is not helpful for justifying prohibitions today on semiautomatic firearms. The only pre-1900 statutory precedent for such a law is from Florida in 1893, and it is dubious. Before that, there were three prior sales prohibitions that covered many or most handguns. One of these was held to violate the Second Amendment, and the other two are plainly unconstitutional under *Heller*. Accordingly, renewed attention is being given to precedents involving Bowie knives, which we will examine next.

V. BOWIE KNIVES

Starting in 1837, many states enacted legislation about Bowie knives. Defending Maryland's ban on many modern rifles, state Attorney General Brian Frosh argued that nineteenth century laws about Bowie knives provide a historical analogy to justify the present ban.[531] Prohibitory laws for adults, however, were exceptional. As with firearms, sales bans or bans on all manner of carrying existed but were rare.

Section A explains the definition and history of Bowie knives and of a related knife, the Arkansas toothpick. Part B is a state-by-state survey of all Bowie knife legislation in the United States before 1900.

Among the 221 state or territorial statutes with the words "Bowie knife" or "Bowie knives," only five were just about Bowie knives (along with their close relative, the Arkansas toothpick). Almost always, Bowie knives were regulated the same as other knives that were well-suited for fighting against humans and animals—namely "dirks" or "daggers." That same regulatory category frequently also included "sword-canes." About ninety-eight percent of statutes on "Bowie knives" treated them the same as various other blade arms. Bowie knives did not set any precedent for a uniquely high level of control. They were regulated the same as a butcher's knife.

Bowie knives and many other knives were often regulated like handguns. Both types of arms are concealable, effective for defense, and easy to misuse for offense.

For Bowie knives, handguns, and other arms, a few states prohibited sales. The very large majority, however, respected the right to keep and bear arms, including Bowie knives. These states allowed open carry while some of them forbade concealed carry. In the nineteenth century, legislatures tended to prefer that people carry openly; today, legislatures tend to favor concealed carry. Based on history and precedent, legislatures may regulate the mode of carry, as the Supreme Court affirmed in *Bruen*.[532]

REPORT OF THE ADJUTANT-GENERAL FOR THE BIENNIAL PERIOD ENDING DECEMBER 31, 1892, at 18, (1893); NICHOLAS J. JOHNSON, NEGROES AND THE GUN: THE BLACK TRADITION OF ARMS 110–12 (2014).

[531] Supplemental Brief of Appellees at 26–43, Bianchi v. Frosh, 858 Fed. Appx. 645 (4th Cir. 2021) (No. 21-1255).

[532] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 5 (2022) ("The historical evidence from antebellum America does demonstrate that *the manner* of public carry was subject to reasonable regulation . . . . States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly.") (emphasis added).

Besides regulating the mode of carry, many states restricted sales to minors. They also enacted special laws against misuse of arms.

Of the 221 state or territorial statutes cited in this Article, 115 come from just 5 states: Mississippi, Alabama, Georgia, Virginia, and North Carolina. This is partly because these were the only states whose personal property tax statutes specifically included "Bowie knife" in their lists of taxable arms, along with other knives, such as "dirks."[533]

Before delving into the Bowie knife laws, here is a glossary of the arms types that often appear in the same statutes as Bowie knives:

Bowie knife. This was the marketing and newspaper term for old or new models of knives suitable for fighting, hunting, and utility. There was no common feature that distinguished a "Bowie knife" from older knives. For example, a "Bowie knife" could have a blade sharpened on only one edge, or on two edges. It could be straight or curved. It might or might not have a handguard. There was no particular length.[534]

Arkansas toothpick. A loose term for some Bowie knives popular in Arkansas.[535]

Dagger. A straight knife with two cutting edges and a handguard.

Dirk. Small stabbing weapons, with either one or two sharpened edges.[536] Originally, a Scottish fighting knife with one cutting edge.[537] Many nineteenth century laws forbade concealed carry of "dirks" and/or "daggers." The statutory formula of "bowie knife + (dirk and/or dagger)" covered many knives well-suited for defense or offense. This category does not include pocket knives.

Sword-cane. A sword concealed in a walking stick. Necessarily with a slender blade.

Slungshot. The original slungshot was a nautical tool, a rope looped on both ends, with a lead weight or other small, dense item at one end.[538] It helps sailors accurately cast mooring lines and other ropes. A slungshot rope that is shortened to forearm length and spun rapidly is an effective blunt force weapon.[539] As will be detailed in Part VI.B.1, many slungshots were made of leather instead of rope, intended for use as weapons, and very easily concealed.

Colt. Similar to a slungshot.[540]

Knucks, knuckles. Linked rings or a bar, often made of metal, with finger holes. They make the fist a more potent weapon. Laws about knuckles are also detailed in part VI.

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533 *Infra* notes 565–67 (Mississippi); 582, 588 (Alabama); 621–27 (Georgia); 654 (Virginia); 672 (North Carolina).

534 *Id.*

535 *Infra* notes 551–54.

536 "Dirks in America were small stabbing weapons, usually small daggers but sometimes single edged." Email from Mark Zalesky, Publisher of *Knife Magazine*, to David B. Kopel (Nov. 19, 2022, 6:57 AM) (on file with author).

537 PETERSON, DAGGERS AND FIGHTING KNIVES OF THE WESTERN WORLD, *supra* note 491, at 60.

538 *See infra* notes 1075–92.

539 *See infra* notes 1086–92.

540 1 SHORTER OXFORD ENGLISH DICTIONARY 444, 456 (6th ed. 2007) ("A short piece of weighted rope used as a weapon").

Revolver. A handgun in which the ammunition is held in a rotating cylinder.

Pistol. Often a generic term for handguns. Sometimes used to indicate non-revolvers, as in a law covering "pistols or revolvers."

A. The History of Bowie Knives and Arkansas Toothpicks

1. What is a Bowie knife?

The term "Bowie knife" originated after frontiersman Col. Jim Bowie used one at a famous "Sandbar Fight" on the lower Mississippi River near Natchez, Mississippi, on September 19, 1827.

The knife had been made by Rezin Bowie, Jim's brother. According to Rezin, the knife was intended for bear hunting. He stated, "[t]he length of the knife was nine and a quarter inches, its width one and a half inches, single-edged, and blade not curved."[541] Nothing about the knife was novel.

The initial and subsequent media coverage of the Sandbar Fight was often highly inaccurate.[542] As "Bowie knife" entered the American vocabulary, manufacturers began labeling all sorts of large knives as "Bowie knives." Some of these were straight (like Rezin's) and other had curved blades. Rezin's knife was single-edged, but some "Bowie knives" were double-edged. Rezin's knife did not have a clip point, but some so-called "Bowie knives" did. Likewise, some had crossguards (to protect the user's hand), and others did not. "Bowie knife" was more a sloppy marketing term than a description of a particular type of knife—just as some people today say "Coke" to mean many kinds of carbonated beverages. (The difference is that true "Coke" products, manufactured by the Coca-Cola Company, do exist; there never was a true "Bowie knife," other than the one used at the Sandbar Fight.) Manufacturers slapped the "Bowie knife" label on a wide variety of large knives that were well-suited for hunting and self-defense. In words of knife historian Norm Flayderman, "there is no one specific knife that can be exactingly described as a Bowie knife."[543]

From the beginning, laws about "Bowie knives" have been plagued by vagueness. For example, a Tennessee statute against concealed carry applied to "any Bowie knife or knives, or Arkansas tooth picks, or any knife or weapon that shall in form, shape or size resemble a Bowie knife or any Arkansas tooth pick . . . ."[544]

When Stephen Hayes was prosecuted for concealed carry, the witnesses disagreed about whether his knife was a Bowie knife.[545] One said it was too small and slim to be a Bowie knife and should properly be called a "Mexican pirate-

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[541] Letter from R.P. Bowie to the Editor of PLANTER'S ADVOCATE (Aug. 24, 1838), *in* 1 CAPT. MARRYAT, A DIARY IN AMERICA: WITH REMARKS ON ITS INSTITUTIONS 290, 291 (1839).

[542] *See* 1 CAPT. MARRYAT, A DIARY IN AMERICA: WITH REMARKS ON ITS INSTITUTIONS 289–91 (1839).

[543] NORM FLAYDERMAN, THE BOWIE KNIFE: UNSHEATHING AN AMERICAN LEGEND 490 (2004).

[544] Act of Jan. 27, 1838, ch. 137, §§ 1–2, 1837–1838 Tenn. Pub. Acts 200, 200–01 (1838).

[545] Haynes v. State, 24 Tenn. 120 (1844).

knife."[546] The jury found Haynes innocent of wearing a Bowie knife but guilty on a second charge "of wearing a knife in shape or size resembling a bowie-knife."[547] Note the disjunctive "form, shape or size." On appeal, the Tennessee Supreme Court agreed that the legislature could not declare "war against the name of the knife."[548] A strict application of the letter of the law could result in injustices, "for a small pocket-knife, which is innocuous, may be made to resemble in form and shape a bowie-knife or Arkansas tooth-pick."[549] The court affirmed the conviction, held that the statute must be construed "within the spirit and meaning of the law," and relied on the judge and jury to make the decision as a matter of fact.[550]

2. What is an Arkansas toothpick?

As for "Arkansas Toothpick," Flayderman says that it was mainly another marketing term for "Bowie knife."[551] But he notes that some Mississippi tax receipts and other writings expressly distinguish an "Arkansas Toothpick" from a "Bowie knife."[552]

Mark Zalesky, publisher of *Knife Magazine*, explains:

> The idea of the "Arkansas toothpick" being a large dagger seems to stem from [Raymond Thorp's 1948 book *Bowie Knife*] [t]he *Iron Mistress* novel and movie in 1951/52[;] and the subsequent interest in Bowie, Crockett, the Alamo etc. during the 1950s and early

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546 *Id.* at 121.

547 *Id.*

548 *Id.* at 122.

549 *Id.*

550 Haynes v. State, 24 Tenn. at 122–23.

Similarly, a North Carolina law prohibited carrying "concealed about his person any pistol, bowie knife, dirk, dagger, slung-shot, loaded cane, brass, iron or metallic knuckles, or razor, or other deadly weapon of like kind." Defendant argued that his butcher's knife was not encompassed by the statute. He argued that the statute applied to weapons "used only for purposes offensive and defensive." The North Carolina Supreme Court disagreed, for such an interpretation would allow concealed carry of "deadly weapons of a very fatal type; as for example, a butcher's knife, a shoe knife, a carving knife, a hammer, a hatchet, and the like." Defendant had argued that a broad interpretation would:

> embrace small and large pocket knives, and like useful practical things that men constantly carry in their pockets and about their persons, and are more or less deadly instruments in their character. The answer to this is, that these things are not ordinarily carried and used as deadly weapons, but for practical purposes, and the ordinary pocket knife cannot be reckoned as per se a deadly weapon; but it would be indictable to so carry them for such unlawful purpose if deadly in their type and nature. If one should carry a pocket knife, deadly in its character, as a weapon of assault and defense, he would be indictable, just as he would be if he carried a dirk or dagger.

State v. Erwin, 91 N.C. 545, 546–48 (1884).

551 FLAYDERMAN, *supra* note 543, at 265–74.

552 *Id.*

> 1960s. You are dealing with a definition that has changed over the years.[553]

But as of 1840, "[m]ost evidence supports the idea that 'Arkansas toothpick' was originally a 'frontier brag' of sorts, . . . a casual nickname for any variety of bowie knife but particularly types that were popular in Arkansas."[554]

3. The crime in the Arkansas legislature

The sandbar fight had taken place in 1827. Jim Bowie died on March 6, 1836, as one of the defenders of the Alamo. In 1840, he would become the namesake of Bowie County, the northeastern most in Texas. According to Zalesky, "we first see the term 'Bowie knife' beginning to come into use in 1835 and by mid-1836 it was everywhere. It is clear that such knives existed before the term for them became popular."[555]

The first legislation about Bowie knives, from Mississippi and Alabama in mid-1837, may have been a response to a continuing problem of criminal misuse. Legislative attention to the topic was surely intensified by an infamous crime in late 1837, which may have helped lead to the enactment of several laws in succeeding weeks. Historian Clayton Cramer explains:

> Two members of the Arkansas House of Representatives turned from insults to Bowie knives during debate as to which state official should authorize payment of bounties on wolves. Speaker of the House John Wilson was president of the Real Estate Bank. Representative J.J. Anthony sarcastically suggested that instead of having judges sign the wolf bounty warrants, some really important official should do so, such as the president of the Real Estate Bank.
>
> Speaker Wilson took offense and immediately confronted Anthony, at which point both men drew concealed Bowie knives. Anthony struck the first blows, and nearly severed Wilson's arm. Anthony then threw down his knife (or threw it at Wilson), then threw a chair at Wilson. In response, Wilson buried his Bowie knife to the hilt in Anthony's chest (or abdomen, depending on the account), killing him. "Anthony fell, exclaiming, 'I'm a dead man,' and immediately expired."[556] "The Speaker himself fell to the floor, weak from loss of blood. But on hands and knees he crawled to his dead opponent, withdrew his Bowie, wiped it clean on Anthony's coat, replaced it in its sheath, and fainted."[557] While Wilson was

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[553] Email from Mark Zalesky, *supra* note 536.

[554] *Id.*

[555] *Id.*

[556] E-mail from Clayton Cramer to David B. Kopel (Aug. 22, 2022, 9:08 AM) (on file with author) (quoting WILLIAM F. POPE, EARLY DAYS IN ARKANSAS 225 (Dunbar H. Pope ed., 1895); William Ogden Niles, *The Murder in Arkansas*, NILES' NAT'L REG., June 23, 1838, at 258).

[557] RAYMOND W. THORP, BOWIE KNIFE 4 (1991) (Univ. of N.M. Press 1948).

expelled from the House, he was acquitted at trial, causing "the most intense indignation through the entire State."[558]

B. *Survey of Bowie Knife Statutes*

Section B surveys every Bowie knife statute enacted by any American state or territory in the nineteenth century. Jurisdictions are discussed chronologically, by date of first enactment.

In the footnotes, a cite to an enacted statute also includes a string cite of re-enactments of the same statute, such as part of a recodification of the criminal code.

Mississippi (1837)

The first "Bowie knife" law was enacted by Mississippi on May 13, 1837. The statute punished three types of misuse of certain arms: "any rifle, shot gun, sword cane, pistol, dirk, dirk knife, bowie knife, or any other deadly weapon."[559]

It was forbidden to use such arms in a fight in a city, town, or other public place.[560] It became illegal to "exhibit the same in a rude, angry, and threatening manner, not in necessary self defence."[561] Finally, if one of the arms were used in a duel and caused a death, the duelist would be liable for the debts owed by the deceased.[562] All these provisions would later be enacted by some other states.

Another Bowie knife law was also signed on May 13 by Governor Charles Lynch. The state legislature's incorporation of the town of Sharon empowered the local government to pass laws "whereby . . . the retailing and vending of ardent spirits, gambling, and every species of vice and immorality may be suppressed, together with the total inhibition of the odious and savage practice of wearing dirks, bowie knives, or pistols."[563] Similar language appeared in the incorporation of towns in 1839 and 1840.[564]

Starting in 1841, the state annual property tax included "one dollar on each and every Bowie Knife."[565] The tax was cut to fifty cents in 1850.[566] But then raised back to a dollar, and extended to each "Arkansas tooth-pick, sword cane,

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558 E-mail from Clayton Cramer to David B. Kopel (Aug. 22, 2022, 9:08 EDT) (on file with author) (quoting and citing POPE, *supra* note 556, at 225–26; THORP, *supra* note 557, at 4 n.1; *General Assembly*, ARK. STATE GAZETTE, Dec. 12, 1837, at 2 (expulsion two days later); Grieve & Orme, *The Trial of John Wilson . . .*, S. RECORDER (Milledgeville, Ga.), Mar. 6, 1838, at 3; Niles, *supra* note 556, at 258).

559 Act of May 13, 1837, § 5, 1837 Miss. Laws 288, 289-90.

560 *Id.*

561 *Id.* at 292, §9.

562 *Id.* at 290–91, §8.

563 Act of May 13, 1837, § 5, 1837 Miss. Laws 293, 294.

564 Act of Feb. 15, 1839, ch. 168, § 5, 1839 Miss. Laws 384, 385; Act of Feb. 18, 1840, ch. 111, § 5, 1840 Miss. Laws 179, 180-81.

565 Act of Feb. 6, 1841, ch. 1, § 1, 1841 Miss. Laws 51, 52; Act of Feb. 24, 1844, ch. 1, § 1, 1844 Miss. Laws 57, 58.

566 Act of Mar. 9, 1850, ch. 1, § 1, 1850 Miss. Laws 43, 43.

duelling or pocket pistol."[567] In the next legislature, pocket pistols were removed from the tax.[568]

When the Civil War came, the legislature prohibited "any Sheriff or Tax-Collector to collect from any tax payer the tax heretofore or hereafter assessed upon any bowie-knife, sword cane, or dirk-knife, and that hereafter the owner of any bowie-knife, sword-cane or dirk-knife shall not be required to give in to the tax assessor either of the aforesaid articles as taxable property."[569] That was a change from before, when tax collectors were allowed to confiscate arms from people who could not pay the property tax.[570]

After the Confederacy surrendered, the legislature was still controlled by confederates, and an arms licensing law for the former slaves was enacted.

> [N]o freeman, free negro or mulatto, not in the military service of the United States Government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition, dirk or bowie knife, and on conviction thereof, in the county court, shall be punished by fine, not exceeding ten dollars, and pay the costs of such proceedings, and all such arms or ammunition shall be forfeited to the informer, and it shall be the duty of every civil and military officer to arrest any freedman, free negro or mulatto found with any such arms or ammunition, and cause him or her to be committed for trial in default of bail.[571]

As detailed in Justice Alito's opinion and Justice Thomas's concurrence in *McDonald v. Chicago*, laws such as Mississippi's prompted Congress to pass the Second Freedmen's Bureau Bill, the Civil Rights Act, and the Fourteenth Amendment, all with the express intent of protecting the Second Amendment rights of the freedmen.[572]

After the war, the Auditor of Public Accounts had to "furnish each clerk of the board of supervisors" with a list of taxable property owned by each person. This included "pistols, dirks, bowie-knives, sword-canes, watches, jewelry, and gold and silver plate."[573]

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567 Act of Mar. 2, 1854, ch. 1, § 1, 1854 Miss. Laws 49, 49–50.

568 Act of Feb. 2, 1857, ch. 1, § 3, art. 10, 1856–1857 Miss. Laws 33, 36 ("[E]ach bowie knife, dirk knife, or sword cane . . . .") (1857).

569 Act of Dec. 19, 1861, ch. 125, 1861–1862 Miss. Laws 134, 134 (1861).

570 Alabama's system of confiscating arms for unpaid taxes and then selling them at public auction is described *infra* at notes 599–01.

571 Act of Nov. 29, 1865, ch. 23, § 1, 1865 Miss. Laws 165, 165.

572 McDonald v. City of Chicago, 561 U.S. 742 (2010).

573 Act of May 13, 1871, ch. 33, art 3, § 1, 1871 Miss. Laws 816, 819–20; Act of Apr. 15, 1876, ch. 104, §§ 7, 13, 1876 Miss. Laws 129, 131-32, 134; Act of Mar. 5, 1878, ch. 3, §§ 8, 12, 1878 Miss. Laws 23, 27–29; Act of Mar. 5, 1880, ch. 6, §§ 7, 14, 1880 Miss. Laws 19, 21, 24–25; Act of Apr. 2, 1892, ch. 74, §§ 8, 18, 1892 Miss. Laws 60, 193–94, 198; Act of Feb. 10, 1894, ch. 32, 1894 Miss. Laws 27, 27–28; Act of May 18, 1897, ch. 10, 1897 Miss. Laws 10, 10.

Concealed carry was outlawed for "any bowie knife, pistol, brass knuckles, slung shot or other deadly weapon of like kind or description."[574] There was an exception for persons "threatened with, or having good and sufficient reason to apprehend an attack."[575] Also excepted were travelers, but not "a tramp."[576] Sales to minors or to intoxicated persons were outlawed.[577] A father who permitted a son under sixteen to carry concealed was criminally liable.[578] Students at "any university, college, or school" could not carry concealed.[579]

The forbidden items for concealed carry were expanded in 1896: "any bowie knife, dirk knife, butcher knife, pistol, brass or metalic knuckles, sling shot, sword or other deadly weapon of like kind or description."[580] Two years later, the legislature corrected the spelling of "metallic," and provided that the jury "may return a verdict that there shall be no imprisonment," in which case the judge would impose a fine.[581]

Alabama (1837)

The legislature imposed a $100 per knife tax on the sale, transfer, or import of any "Bowie-Knives or Arkansaw Tooth-picks," or "any knife or weapon that shall in form, shape or size, resemble" them. [582] The $100 tax was equivalent to about $2,600 dollars today.[583]

Additionally, if any person carrying one "shall cut or stab another with such knife, by reason of which he dies, it shall be adjudged murder, and the offender shall suffer the same as if the killing had been by malice aforethought."[584]

Then in 1839 Alabama outlawed concealed carry of "any species of fire arms, or any bowie knife, Arkansaw tooth-pick, or any other knife of the like kind, dirk, or any other deadly weapon."[585] An 1856 statute prohibited giving a male minor a handgun or bowie knife.[586]

According to the US Supreme Court's analysis of the historical record, concealed carry bans are constitutionally unproblematic, as long as open carry is

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574 Act of Feb. 28, 1878, ch. 46, § 1, 1878 Miss. Laws 175, 175.

575 *Id.*

576 *Id.*

577 *Id.* § 2.

578 *Id.* at 176, § 3.

579 *Id.* § 4.

580 Act of Mar. 11, 1896, ch. 104, § 1, 1896 Miss. Laws 109, 109-10.

581 Act of Feb. 11, 1898, ch. 68, § 1, 1898 Miss. Laws 86, 86.

582 Act of June 30, 1837, No. 11, § 1, *reprinted in* ACTS PASSED AT THE CALLED SESSION OF THE GENERAL ASSEMBLY OF THE STATE OF ALABAMA 7 (Tuscaloosa, Ferguson & Eaton 1837).

583 *Consumer Price Index 1800*, *supra* note 511 (2022 = 884.6. 1837 = 34).

584 Act of June 30, 1837, No. 11, § 1, *reprinted in* ACTS PASSED AT THE CALLED SESSION OF THE GENERAL ASSEMBLY OF THE STATE OF ALABAMA 7 (Tuscaloosa, Ferguson & Eaton 1837).

585 Act of Feb. 1, 1839, No. 77, § 1, *reprinted in* ACTS PASSED AT THE ANNUAL SESSION OF THE GENERAL ASSEMBLY OF THE STATE OF ALABAMA 67–68 (Tuscaloosa, Hale & Eaton 1838).

586 Act of Feb. 2, 1856, No. 26, *reprinted in* ACTS OF THE FIFTH BIENNIAL SESSION OF THE GENERAL ASSEMBLY OF ALABAMA, HELD IN THE CITY OF MONTGOMERY, COMMENCING ON THE SECOND MONDAY IN NOVEMBER, 1855, at 17 (Montgomery, Bates & Lucas 1856).

allowed. Or vice versa. The American legal tradition of the right to arms allows the legislature to regulate the mode of carry.[587]

The exorbitant one-hundred-dollar transfer tax was replaced with something less abnormal. The annual state taxes on personal property included two dollars on "every bowie knife or revolving pistol."[588] Even that amount was hefty for a poor person. As the defense counsel in an 1859 Texas case had pointed out, a person who could not afford a firearm could buy a common butcher knife (which fell within the expansive definition of "Bowie knife") for no more than fifty cents.[589] As described next, the cost of manufacturing a high-quality Bowie knife was a little less than three dollars, which approximately implies a retail price around six dollars. Whether a knife cost fifty cents or six dollars, an annual two-dollar tax likely had an effect in discouraging ownership, as the tax was so high in relation to the knife's value. The cumulative annual taxes on the knife would far exceed the knife's cost.

The legislature having aggressively taxed Bowie knives, there were not enough of them in Alabama when the Civil War began in 1861. The legislature belatedly recognized that the militia was under-armed. In military crisis, the legislature appropriated funds for the state armory at Mobile to manufacture Bowie knives:

> Whereas there is a threatened invasion of our State by those endeavoring to subjugate us; and whereas there is a great scarcity of arms, and the public safety requires weapons to be placed in the hands of our military, therefore. . .
>
> . . . [S]ix thousand dollars . . . is hereby appropriated . . . to purchase one thousand Bowie-knife shaped pikes [similar to a spear], and one thousand Bowie knives for the use of the 48th regiment Alabama militia.[590]

The Governor was authorized to draw further on the treasury, as he saw appropriate, "to cause arms of a similar, with such improvements as he may direct, to be manufactured for any other regiment or battalion of militia, or other troops."[591]

If Alabama legislatures starting in 1837 had not suppressed the people's acquisition of militia-type knives, then the 1861 wartime legislature might not have been forced to divert scarce funds to manufacture Bowie knives for the militia. The men and youth of Alabama militia could have just armed themselves in the ordinary course of affairs, buying large knives for themselves for all legitimate uses.

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[587] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 59 (2022).

[588] Act of Feb. 10, 1852, No. 1, 1851 Ala. Laws 3, 3 (1852).

[589] Cockrum v. State, 24 Tex. 394, 395–96 (1859) ("A common butcher-knife, which costs not more than half a dollar, comes within the description given of a bowie-knife or dagger, being very frequently worn on the person. To prohibit such a weapon, is substantially to take away the right of bearing arms, from him who has not money enough to buy a gun or a pistol.").

[590] Act of Nov. 27, 1861, No. 222, § 1, 1861 Ala. Laws 214, 214–15.

[591] *Id.* at 215, § 6.

The legislature had appropriated $6,000 to buy 2,000 Bowie knives and pikes. This works out to a three-dollar manufacturing cost per knife or pike.

A little later, a wartime tax of five percent on net profits was imposed on many businesses, including "establishments for manufacturing or repairing shoes, harness, hats, carrigos [horse-drawn carriages], wagons, guns, pistols, pikes, bowie knives."[592]

After Reconstruction ended, an 1881 concealed carry ban applied to "a bowie knife, or any other knife, or instrument of like kind or description, or a pistol, or fire arms of any other kind or description, or any air gun."[593] "[E]vidence, that the defendant has good reason to apprehend an attack, may be admitted in the mitigation of the punishment, or in justification of the offense."[594]

Throughout the nineteenth century, and all over the United States, grand and petit juries often refused to enforce concealed carry laws against defendants who had been acting peaceably. The statute attempted to address the problem: "grand juries . . . shall have no discretion as to finding indictments for a violation of this, act . . . if the evidence justifies it, it shall be their duty to find and present the indictment."[595] To make the law extra tough, "the fines under this act shall be collected in money only" (rather than allowing payment by surrender of produce, livestock, personal chattels, etc.).[596]

Shortly after the end of the Civil War, the unreconstructed white supremacist legislature had enacted a harsh property tax, designed to disarm poor people of any color. It was two dollars on "all pistols or revolvers" possessed by "private persons not regular dealers holding them for sale."[597] For "all bowie-knives, or knives of the like description," the tax was three dollars.[598] If the tax were not paid, the county assessor could seize the arms.[599] To recover the arms, the owner had to pay the tax plus a fifty-percent penalty.[600] After ten days, the assessor could sell the arms at auction.[601]

Later, the arms seizure provisions were removed, and the tax reduced to levels for other common household goods. "All dirks and bowie knives, sword canes, pistols, on their value, three-fourths of one percent; and fowling pieces and guns, on their value, at the rate of seventy-five cents on the one hundred dollars."[602]

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[592] Act of Dec. 9, 1862, No. 1, § 4, 1862 Ala. Laws 3, 8.

[593] Act of Feb. 19, 1881, No. 44, § 1, 1880–1881 Ala. Laws 38, 38 (1881).

[594] *Id.*

[595] *Id.* § 2.

[596] *Id.* at 39, § 4.

[597] Act of Feb. 22, 1866, No. 1, § 2(11), 1865–1866 Ala. Laws 3, 7 (1866); Act of Feb. 19, 1867, No. 260, § 2(10), 1866–1867 Ala. Laws 259, 263 (1867).

[598] Act of Feb. 22, 1866, No. 1, § 2(11), 1865–1866 Ala. Laws 3, 7 (1866); Act of Feb. 19, 1867, No. 260, § 2(10), 1866–1867 Ala. Laws 259, 263 (1867).

[599] Act of Feb. 22, 1866, No. 1, § 2(11), 1865–1866 Ala. Laws 3, 7 (1866); Act of Feb. 19, 1867, No. 260, § 2(10), 1866–1867 Ala. Laws 259, 263 (1867).

[600] Act of Feb. 22, 1866, No. 1, § 2(11), 1865–1866 Ala. Laws 3, 7 (1866); Act of Feb. 19, 1867, No. 260, § 2(10), 1866–1867 Ala. Laws 259, 263 (1867).

[601] Act of Feb. 22, 1866, No. 1, § 2(11), 1865–1866 Ala. Laws 3, 7 (1866); Act of Feb. 19, 1867, No. 260, § 2(10), 1866–1867 Ala. Laws 259, 263 (1867).

[602] Act of Mar. 19, 1875, § 5(14), 1874–1875 Ala. Laws 3, 6 (1875).

State law provided that county assessors could require a person to disclose under oath the taxable property they owned by disclosing the value of their household and kitchen furniture, taxable library, jewelry, silverware, plate, pianos and other musical instruments, paintings, clocks, watches, gold chains, pistols, guns, dirks and bowie-knives.[603] The tax rate was .75% of the value.[604]

The tax was cut in 1883 to fifty-five cents per hundred dollars of value.[605] Then raised to sixty cents for inter alia, "all dirks and bowie knives, swords, canes, pistols and guns; all cattle, horses, mules, studs, jacks and jennets and race horses; all hogs, sheep and goats."[606]

Separately, the legislature imposed occupational taxes. At the time, state sales taxes were rarer than they are today, and the occupational tax levels sometimes approximated the amount that a vendor might have collected in sales taxes. "For dealers in pistols, bowie knives and dirk knives, whether the principal stock in trade or not, twenty-five dollars."[607] Finally, in 1899, the license for pistol, bowie, and dirk sellers become one-hundred dollars.[608] Separately, there was a $5 tax for wholesale dealers in pistol and rifle cartridges, raised to $10 for dealers in towns of 20,000 or more.[609] The wholesale license also authorized retail sales.[610]

State legislative revisions to municipal charters gave a municipality the power "to license dealers in pistols, bowie-knives and dirk-knives."[611]

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603 Act of Feb. 8, 1877, No. 2, § 2(6), 1876–1877 Ala. Laws 3, 4 (1877); *see also* Act of Mar. 6, 1876, No. 1, § 4(5), 1875–1876 Ala. Laws 43, 46 (1876).

604 Act of Mar. 6, 1876, No. 1, § 4(5), 1875–1876 Ala. Laws 43, 46 (1876); Act of Feb. 8, 1877, No. 1, 1876–1877 Ala. Laws 3, 3 (1877).

605 For "silverware, ornaments and articles of taste, pianos and other musical instruments, paintings, clocks, gold Furniture, and silver watches, and gold safety chains; all wagons or other vehicles; all mechanical tools and farming implements; all dirks and bowie knives, swords, canes, pistols and guns; all cattle, horses, mules, studs, jacks and jennets, and race horses; all hogs, sheep and goats." Act of Feb. 23, 1883, No. 61, § 5(5), 1882–1883 Ala. Laws 67, 69–71 (1883).

606 Act of Dec. 12, 1884, No. 1, § 5(5), 1884–1885 Ala. Laws 3, 5–6 (1884).

607 Act of Mar. 19, 1875, § 102(27), 1874–1875 Ala. Laws 3, 41 (1875). *See also* Act of Mar. 6, 1876, No. 1, § 7(15), 1875–1876 Ala. Laws 43, 82 (1876) ($50); Act of Dec. 11, 1886, No. 4, § 5(17), 1886–1887 Ala. Laws 31, 36 (1886) ($300, adding "pistol cartridges"); Act of Dec. 13, 1892, No. 95, 1892–1893 Ala. Laws 183, 183 (1892) ($300, "provided that any cartridges whether called rifle or pistol cartridges or by any other name that can be used in a pistol shall be deemed pistol cartridges within the meaning of this section").

608 Act of Feb. 23, 1899, No. 903, § 16(66), 1898–1899 Ala. Laws 164, 190 (1899).

609 *Id.* § 16(67).

610 *Id.*

611 Act of Feb. 13, 1879, No. 314, § 14, 1878–1879 Ala. Laws 434, 436–38 (1879) (Uniontown); Act of Feb. 16, 1885, No. 314, § 17(9), 1884–85 Ala. Laws 543, 552 (1885) (Uniontown) (adding dealer in "brass knuckles"; "the sums charged for such licenses" may "not exceed the sums established by the revenue laws of the State. . . ."); Act of Feb. 7, 1885, No. 197, § 1(84), 1884–1885 Ala. Laws 322, 322–23 (1885) (Tuscaloosa) ("to license and regulate pistols or Shooting galleries, the game of quoits, and all kind and description of games of chance played in a public place; . . . and dealers in pistols, bowie-knives and shotguns or fire arms, and knives of like kind or description") (unusually broad, not repeated for other charters); Act of Feb. 28, 1889, No. 550, § 17(9), 1888–1889 Ala. Laws 957, 965–66 (1889) (Faunsdale); Act of Feb. 16, 1891, No. 357, 1890–1891 Ala. Laws 763, 764 (1891) (Uniontown); Act of Feb. 18, 1891, No. 573, § 16(29), 1890–1891 Ala. Laws 1304, 1317 (1891) (Decatur) (to license dealers in "pistols, or pistol cartridges, bowie knives, dirk knives, whether principal stock in trade or not, $100.00"); Act of Feb. 7, 1893, No. 140, § 21(77),

Georgia (1837)

As discussed supra, the legislature in 1837 forbade the sale, possession, or carry of Bowie and similar knives, pistols (except horseman's pistols), dirks, sword-canes, and spears.[612]

The Georgia Supreme Court held all of the law to violate the Second Amendment, except a section outlawing concealed carry.[613]

After the November 1860 election of Abraham Lincoln, with a secession crisis in progress, the Georgia legislature forbade "any person other than the owner" to give "any slave or free person of color, any gun, pistol, bowie knife, slung shot, sword cane, or other weapon used for the purpose of offence or defence."[614] The Act was not to be construed to prevent "owners or overseers from furnishing a slave with a gun for the purpose of killing birds, &c., about the plantation of such owner or overseer."[615]

An 1870 statute forbade open or concealed carry of "any dirk, bowie-knife, pistol or revolver, or any kind of deadly weapon" at "any court of justice, or any election ground or precinct, or any other public gathering," except for militia musters.[616]

The old 1837 statute against concealed carry was updated in 1883 to eliminate the exception for a "horsemen's pistol."[617] Thus, concealed carry remained illegal with "any pistol, dirk, sword in a cane, spear, Bowie-knife, or any other kind of knives manufactured and sold for the purpose of offense and defense."[618] Any "kind of metal knucks" was added in 1898.[619]

Furnishing "any minor" with "any pistol, dirk, bowie knife or sword cane" was outlawed in 1876.[620]

1892–1893 Ala. Laws 272, 292 (1893) (Demopolis) (same as Decatur); Act of Feb. 18, 1895, No. 345, § 33, 1894–1895 Ala. Laws 593, 616 (1895) (Columbia) (same); Act of Feb. 18, 1895, No. 521, §1(99), 1894–1895 Ala. Laws 1079, 1080–81 (1895) (Tuscaloosa) (to license and collect an annual tax on "gun shops or gun repair shops" and "dealers in pistols or pistol cartridges or bowie knives or dirk knives"); Act of Dec. 5, 1896, No. 62, 1896–1897 Ala. Laws 70, 71 (1896) (Uniontown) ("to license . . . dealers in pistols, bowie knives, dirk knives or brass knuckles"); Act of Feb. 20, 1899, No. 549, § 20, 1898–1899 Ala. Laws 1033, 1046 (1899) (Fayette) (maximum dealer license fee shall not exceed "[p]istols, pistol cartridges, bowie knives, dirk knives, whether principal stock in trade or not, $50.00"); Act of Feb. 18, 1899, No. 566, § 3(9), 1898–1899 Ala. Laws 1098, 1102, 1105 (1899) (Uniontown) (same as previous Uniontown charter); Act of Feb. 23, 1899, No. 704, § 3, 1898–1899 Ala. Laws 1454, 1456–62 (1899) (Uniontown) (same).

[612] Act of Dec. 25, 1837, *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA PASSED IN MILLEDGEVILLE AT THE AN ANNUAL SESSION IN NOVEMBER AND DECEMBER, 1837, at 90–91 (Milledgeville, P. L. Robinson 1838).

[613] Nunn v. State, 1 Ga. 243 (1846).

[614] Act of Dec. 19, 1860, No. 64, 1860 Ga. Laws 56, 56–57.

[615] *Id.*

[616] Act of Oct. 18, 1870, No. 285, §1, 1870 Ga. Laws 421, 421; Act of Oct. 14, 1879, No. 266, 1878–1879 Ga. Laws 64, 64 (1879) (creating law enforcement officer exception).

[617] Act of Aug. 17, 1883, No. 93, 1882–1883 Ga. Laws 48, 48–49 (1883).

[618] *Id.*

[619] Act of Dec. 20, 1898, No. 106, 1898 Ga. Laws 60, 60.

[620] Act of Feb. 17, 1876, No. 128, 1876 Ga. Laws 112, 112.

A twenty-five dollar occupational tax was enacted in 1882 for "all dealers in pistols, revolvers, dirk or Bowie knives."[621] The tax was later raised to one-hundred dollars, adding dealers of "pistol or revolver cartridges."[622] Then the tax was reduced to twenty-five dollars,[623] but raised back to one-hundred dollars in 1890.[624] In 1892, "metal knucks" were added, and the ammunition expanded to "shooting cartridges."[625] The tax was cut to twenty-five dollars in 1894.[626]

The state property tax statute required taxpayers to disclose all sorts of personal and business property, by asking the value of their "guns, pistols, bowie-knives and such articles?"[627] The same question was included in the municipal charter for the town of Jesup,[628] and in the new charter for Cedartown.[629]

South Carolina (1838)

The legislature received a "petition of sundry citizens of York, praying the passage of a law to prevent the wearing of Bowie Knives, and to exempt managers of elections from militia duty." A member "presented the presentment of the Grand Jury of Union District…in relation to carrying Bowie knives, and retailing spirituous liquors." The knife and liquor issues were referred to the Judiciary Committee.[630]

The legislature did not enact any law with the words "bowie knife" in 1838, or in the nineteenth century.

Tennessee (1838)

Like Georgia, Tennessee enacted Bowie knife legislation just a few weeks after the nationally infamous December crime on the floor of the Arkansas House of Representatives.

In January 1838, the Tennessee legislature statute forbade sale or transfer of "any Bowie knife or knives, or Arkansas tooth picks, or any knife or weapon

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[621] Act of Dec. 9, 1882, No. 18, § 2(18), 1882–1883 Ga. Laws 34, 37 (1882).

[622] Act of Dec. 22, 1884, No. 52, § 2(18), 1884–1885 Ga. Laws 20, 23 (1884); Act of Dec. 22, 1886, § 2(18), 1886 Ga. Laws 14, 17.

[623] Act of Dec. 26, 1888, No. 123, § 2(17), 1888 Ga. Laws 19, 22.

[624] Act of Dec. 26, 1890, No. 131, § 2(16), 1890–1891 Ga. Laws 35, 38 (1890).

[625] Act of Dec. 23, 1892, No. 133, § 2(16), 1892 Ga. Laws 22, 25.

[626] Act of Dec. 18, 1894, No. 151, § 2(16), 1894 Ga. Laws 18, 21; Act of Dec. 24, 1896, No. 132, § 2(16), 1896 Ga. Laws 21, 25; Act of Dec. 22, 1898, No. 150, § 2(16), 1898 Ga. Laws 21, 25 (changing ammunition to "shooting cartridges, pistol or rifle cartridges").

[627] Act of Oct. 20, 1885, No. 457, § 1, 1884–1885 Ga. Laws 28, 30 (1885); Act of Dec. 27, 1886, No. 101, § 1, 1886 Ga. Laws 24, 26, 28; Act of Dec. 26, 1888, No. 103, § 46(30), 1888 Ga. Laws 245, 261; Act of Nov. 11, 1889, No. 640, § 36(30), 1889 Ga. Laws 980, 993.

[628] Act of Dec. 26, 1888, No. 103, § 46(30), 1888 Ga. Laws 245, 261.

[629] Act of Nov. 11, 1889, No. 640, § 36(30), 1889 Ga. Laws 980, 993.

[630] JOURNAL OF THE PROCEEDINGS OF THE SENATE AND HOUSE OF REPRESENTATIVES OF THE GENERAL ASSEMBLY OF SOUTH-CAROLINA, AT ITS REGULAR SESSION OF 1838; COMMENCING NOVEMBER 26, AND ENDING DECEMBER 19, at 31, 42 (Columbia, A.H. Pemberton 1839).

that shall in form, shape or size resemble a Bowie knife or any Arkansas tooth pick."[631]

Further, if a person "shall maliciously draw or attempt to draw" such a concealed knife "for the purpose of sticking, cutting, awing, or intimidating any other person," the person would be guilty of a felony.[632] Whether the carrying was open or concealed, if a person in "sudden rencounter, shall cut or stab another person with such knife or weapon, whether death ensues or not, such person so stabbing or cutting shall be guilty of a felony."[633] Civil officers who arrested and prosecuted a defendant under the Act would receive a fifty-dollar bonus per case; the Attorney General would receive twenty dollars for the same, to be paid by the defendant.[634]

The concealed carry ban was upheld against a state constitutional challenge.[635] The court said that the right to arms was an individual right to keep militia-type arms, and a Bowie knife would be of no use to a militia.[636]

In *Day v. State*, the 1838 law against drawing a Bowie knife was applied against a victim who had drawn in immediate self-defense.[637] Upholding the conviction the Tennessee Supreme Court noted that laws against selling and carrying Bowie knives were "generally disregarded in our cities and towns."[638] Likewise, a post-Reconstruction statute allowed carrying only of Army-or-Navy-type pistols.[639] When a person's "life had been threatened within the previous hour by a dangerous and violent man, who was in the wrong," the victim carried a concealed pistol that was not an Army-or-Navy type.[640] The court in that case upheld the conviction, citing *Day v. State*.[641]

The 1856 legislature forbade selling, loaning, or giving any minor "a pistol, bowie-knife, dirk, or Arkansas tooth-pick, or hunter's knife."[642] The Act

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631 Act of Jan. 27, 1838, ch. 138, § 1, *reprinted in* ACTS PASSED AT THE FIRST SESSION OF THE TWENTY-SECOND GENERAL ASSEMBLY OF THE STATE OF TENNESSEE: 1837–8, 200–01 (Nashville, S. Nye & Co. 1838).

632 *Id.*

633 *Id.*

634 *Id.*

635 Aymette v. State, 21 Tenn. (2 Hum.) 154 (1840).

636 *Id.* at 158 ("These weapons would be useless in war. They could not be employed advantageously in the common defence of the citizens. The right to keep and bear them is not, therefore, secured by the [C]onstitution.").

637 Day v. State, 37 Tenn. (5 Sneed) 496 (1857). "It seems that during an altercation between the defendant and Bacon, at the house of the latter, the defendant was ordered by Bacon to leave the house, which he did, Bacon following him to the door, with a large bottle in his hand. While Bacon was standing upon the door-step, the defendant approached him and, laying his left hand upon Bacon's shoulder, told him not to rush upon him, at the same time drawing a large knife from beneath his vest, which he held in his right hand behind him, but made no effort to use. *Id.* at 496–97.

638 *Id.* at 499.

639 *See supra* note 498.

640 Coffee v. State, 72 Tenn. 245, 246 (1880).

641 *Id.*

642 Act of Feb. 26, 1856, ch. 81, § 2, 1855–1856 Tenn. Pub. Acts 92, 92 (1856).

"shall not be construed so as to prevent the sale, loan, or gift, to any minor of a gun for hunting."[643]

In October 1861, after Tennessee had seceded from the Union, all the laws against importing, selling, or carrying "pistols, Bowie knives, or other weapons" were suspended for the duration of the war.[644]

In 1869, the legislature forbade carrying any "pistol, dirk, bowie-knife, Arkansas tooth-pick," any weapon resembling a bowie knife or Arkansas toothpick, "or other deadly or dangerous weapon" while "attending any election" or at "any fair, race course, or public assembly of the people."[645]

Virginia (1838)

A few weeks after the Arkansas legislative crime, Virginia made it illegal to "habitually or generally" carry concealed "any pistol, dirk, bowie knife, or any other weapon of the like kind."[646] If a habitual concealed carrier were prosecuted for murder or felony, and the weapon had been removed from concealment within a half hour of the infliction of the wound, the court had to formally note the fact.[647] Even if the defendant were acquitted or discharged, he could be prosecuted within a year for the unlawful carry.[648] Or alternatively, in the original prosecution, a jury that acquitted for the alleged violent felony still had to consider whether the defendant was a habitual carrier, drew within the half-hour period, and if so, convict the defendant of the concealed carry misdemeanor.[649]

The law was simplified in 1847 to simply provide a fine for habitual concealed carry by "[a]ny free person," with "one moiety of the recovery to the person who shall voluntarily cause a prosecution for the same."[650]

An 1882 statute forbade concealed carry, even if not habitual, of "any pistol, dirk, bowie-knife, razor, slung-shot, or any weapon of the like kind."[651]

Whether or not concealed, carrying "any gun, pistol, bowie-knife, dagger or other dangerous weapon, to any place of public worship" during a religious

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643 *Id.*

644 Act of Oct. 30, 1861, ch. 23, 1861–1862 Tenn. Pub. Acts 16, 16–17 (1861).

645 Act of Dec. 1, 1869, ch. 22, § 2, 1869–1870 Tenn. Pub. Acts 23, 23–24 (1869).

646 Act of Feb. 1, 1838, ch. 101, § 1, *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, PASSED AT THE SESSION OF 1838, at 76–77 (Richmond, Thomas Ritchie 1838).

647 *Id.* at 76–77, § 2.

648 *Id.*

649 *Id.*

650 Act of Mar. 14, 1848, ch. 120, tit. 2, ch. 7, § 8, 1847–1848 Va. Acts 93, 110 (1848); Act of Oct. 29, 1870, ch. 348, 1869–1870 Va. Acts 510, 510 (1870).

651 Act of Mar. 6, 1882, ch. 219, 1881–1882 Va. Acts 233, 233 (1882); Act of Feb. 22, 1884, ch. 148, 1883–1884 Va. Acts 180, 180 (1884); Act of Mar. 4, 1896, ch. 745, 1895–1896 Va. Acts 826, 826 (1896) (allowing "the hustings judge of any husting court" to issue one-year concealed carry permits).

meeting was forbidden in 1869.[652] So was carrying "any weapon on Sunday, at any place other than his own premises, except for good and sufficient cause."[653]

After the Civil War, the state property tax law included in the list of taxable items of personal property: "[t]he aggregate value of all rifles, muskets, and other fire-arms, bowie-knives, dirks, and all weapons of a similar kind."[654] There was an exception for arms issued by the state "to members of volunteer companies."[655]

The legislature in 1890 forbade selling "to minors under sixteen years of age" any "cigarettes or tobacco in any form, or pistols, dirks, or bowie-knives."[656]

Florida (1838)

Two months after the Arkansas homicide, the Florida legislature supplemented an 1835 statute against concealed carry in general. The new statute provided that any person who wants to "vend dirks, pocket pistols, sword canes, or bowie knives" must pay an annual $200 tax.[657] Any individual who wanted to carry one openly must pay a ten-dollar tax.[658] The county treasurer must give the individual a receipt showing that the open carry tax had been paid.[659]

After the Civil War, a new Black Code forbade "any negro, mulatto, or other person of color, to own, use or keep in his possession or under his control, any Bowie-knife, dirk, sword, fire-arms or ammunition of any kind, unless he first obtain a license to do so from the Judge of Probate of the county."[660] The applicant needed "the recommendation of two respectable citizens of the county, certifying to the peaceful and orderly character of the applicant."[661] A person who informed about a violation could keep the arms.[662] Violators of the statute "shall be sentenc-

[652] Act of Feb. 23, 1875, ch. 124, § 1, 1874–1875 Va. Acts 102, 102 (1875); Act of Mar. 14, 1878, ch. 311, ch. 7, §21 1877–1878 Va. Acts 279, 305 (1878).

[653] Act of Feb. 23, 1875, ch. 124, § 1, 1874–1875 Va. Acts 102, 102 (1875); Act of Mar. 14, 1878, ch. 311, ch. 7, §21 1877–1878 Va. Acts 279, 305 (1878).

[654] Act of Mar. 31, 1875, ch. 239, §5(18), 1874–1875 Va. Acts 281, 282–83 (1875); Act of Mar. 27, 1876, ch. 162, § 6(18), 1875–1876 Va. Acts 162, 164 (1876); Act of Apr. 22, 1882, ch. 119, § 6(18), 1881–1882 Va. Acts 497, 499 (1882); Act of Mar. 15, 1884, ch. 450, § 6(18), 1883–1884 Va. Acts 561, 563 (1884); Act of Jan. 16, 1890, ch. 19, 1889–1890 Va. Acts 18, 19 (1890); Act of Mar. 6, 1890, ch. 244, § 6(18), 1889–1890 Va. Acts 197, 198-200 (1890); Act of Mar. 8, 1894, ch. 797, § 1(18), 1893–1894 Va. Acts 930, 931 (1894).

[655] Act of Mar. 31, 1875, ch. 239, §5(18), 1874–1875 Va. Acts 281, 282–83 (1875); Act of Mar. 27, 1876, ch. 162, § 6(18), 1875–1876 Va. Acts 162, 164 (1876); Act of Apr. 22, 1882, ch. 119, § 6(18), 1881–1882 Va. Acts 497, 499 (1882); Act of Mar. 15, 1884, ch. 450, § 6(18), 1883–1884 Va. Acts 561, 563 (1884); Act of Jan. 16, 1890, ch. 19, 1889–1890 Va. Acts 18, 19 (1890); Act of Mar. 6, 1890, ch. 244, § 6(18), 1889–1890 Va. Acts 197, 198-200 (1890); Act of Mar. 8, 1894, ch. 797, § 1(18), 1893–1894 Va. Acts 930, 931 (1894).

[656] Act of Feb. 28, 1890, ch. 152, 1889–1890 Va. Acts 118, 118 (1890); Act of Feb. 23, 1894, ch. 366, 1893–1894 Va. Acts 425, 425–26 (1894).

[657] Act of Feb. 10, 1838, No. 24, 1838 Fla. Laws 36, 36.

[658] *Id.*

[659] *Id.*

[660] Act of Jan. 15, 1866, ch. 1466, § 12, 1865 Fla. Laws 23, 25 (1866).

[661] *Id.*

[662] *Id.*

ed to stand in the pillory for one hour, or be whipped, not exceeding thirty-nine stripes, or both, at the discretion of the jury."[663]

There were no published Florida statutory compilations from 1840 until 1881. By then, the 1838 tax law ($200 annually for vendors; $10 for open carry)[664] had been replaced with a fifty-dollar occupational license tax for vendors.[665] The merchant license tax was raised to one-hundred dollars in 1889 for vendors of "pistols, bowie knives, or dirk knives."[666] Additionally, the "merchant, store-keeper, or other person" could not sell the items "to minors."[667] The tax was cut to ten dollars in 1893, but extended to cover sellers of "pistols, Springfield rifles [the standard US Army rifle], repeating rifles, bowie knives or dirk knives."[668]

North Carolina (1840)

In 1841, North Carolina prohibited "any free Negro, Mulatto, or free Person of Colour" to "wear or carry about his or her person, or keep in his or her house, any Shot-gun, Musket, Rifle, Pistol, Sword, Dagger or Bowie-knife, unless he or she shall have obtained a license therefor from the Court of Pleas and Quarter Sessions."[669] An 1847 statute forbade "any slave" to receive "any gun cotton, fire arms, swords, dirks or other side arms."[670] There were exceptions if a slave had a "written order" from an "owner or employer" allowing them to "sell, barter, or deliver . . . for owner or employer."[671]

The state property tax laws covered Bowie knives and other arms. The arms were tax-exempt if the owner did not use or carry them, but otherwise applied:

> on all pistols (except such as shall be used exclusively for mustering, and also those kept in shops and stores for sale) one dollar each; on all bowie knives, one dollar each; and dirks and sword canes, fifty cents each; (except such as shall be kept in shops and stores for Sale) Provided, however, that only such pistols, bowie knives, dirks,

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663 *Id.*

664 Act of Feb. 10, 1838, No. 24, 1838 Fla. Laws 36, 36.

665 Act of March 5, 1881, ch. 3219, §§ 11-12, *reprinted in* 1 DIGEST OF THE LAWS OF THE STATE OF FLORIDA, FROM THE YEAR ONE THOUSAND EIGHT HUNDRED AND TWENTY-TWO, TO THE ELEVENTH DAY OF MARCH, ONE THOUSAND EIGHT HUNDRED AND EIGHTY-ONE INCLUSIVE 873 (Tallahassee, Floridian Book & Job Off. 1881) (published at ch. 174, § 24(14)).

666 Act of June 3, 1889, No. 1, § 1(13), 1889 Fla. Laws 1, 6; Act of June 10, 1891, ch. 4010, § 9(13), 1891 Fla. Laws 1, 9.

667 Act of June 3, 1889, No. 1, § 1(13), 1889 Fla. Laws 1, 6; Act of June 10, 1891, No. 1, § 9(13), 1891 Fla. Laws 1, 9.

668 Act of June 2, 1893, ch. 4115, § 9(14), 1893 Fla. Laws 3, 13; Act of June 1, 1895, ch. 4322, § 9(14), 1895 Fla. Laws 3, 14.

669 Act of Jan. 11, 1841, ch. 30, 1840–1841 N.C. Sess. Laws 61, 61-62 (1841).

670 Act of Jan. 18, 1847, ch. 42, 1846–1847 N.C. Sess. Laws 107, 107 (1847).

671 *Id.*

> and sword canes, as are used, worn or carried about the person of the owner. . . .[672]

In the arms licensing law for free people of color, the Black Code continued to treat Bowie knives like firearms. "If any free negro shall wear or carry about his person, or keep in his house, any shot-gun, musket, rifle, pistol, sword, dagger, or bowie-knife," he shall be guilty of a misdemeanor, unless he had been issued a one-year license from the court of pleas and quarter-sessions.[673] When the Civil War drew near, the legislature repealed the licensing law, and forbade "any free negro" to "wear or carry about his person or keep in his house any shot gun, musket, rifle, pistol, sword, sword cane, dagger, bowie knife, powder or shot."[674]

An 1877 private act banned concealed carry in Alleghany County under terms similar to what would be enacted statewide in 1879.[675] The statewide statute outlawed concealed carry of "any pistol, bowie knife, dirk, dagger, slungshot, loaded cane, brass, iron or metallic knuckles or other deadly weapon of like kind," "except when upon his own premises."[676]

An 1893 statute made it illegal to "in any way dispose of to a minor any pistol or pistol cartridge, brass knucks, bowie-knife, dirk, loaded cane, or slingshot."[677] A loaded cane had a hollowed section filled with lead.[678] It is a powerful impact weapon.[679]

As the legislature revised municipal charters, it specified what sorts of arms-related taxes the municipality could impose. There was much variation, and sometimes the legislature set maxima.[680]

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[672] Act of Jan. 23, 1851, ch. 121, § 5, 1850–1851 N.C. Sess. Laws 241, 243–44 (1851). *See also* Act of Feb. 2, 1857, ch. 34, § 23(4) , 1856–1857 N.C. Sess. Laws 28, 34 (1857) (raising the tax on dirks and sword canes to 65 cents); Act of Mar. 12, 1866, ch. 21, § 11, 1866 N.C. Sess. Laws 30, 33–34 (one dollar on "every dirk bowie-knife, pistol, sword-cane, dirk-cane and rifle cane (except for arms used for mustering and police duty) used or worn about the person of any one during the year"; tax did not "apply to arms used or worn previous to the ratification of this act").

[673] REVISED CODE OF NORTH CAROLINA, ENACTED BY THE GENERAL ASSEMBLY AT THE SESSION OF 1874: TOGETHER WITH OTHER ACTS OF A PUBLIC AND GENERAL NATURE, PASSED AT THE SAME SESSION 577 (Boston, Little, Brown & Co. 1855) (published at ch. 107, § 66).

[674] Act of Feb. 23, 1861, ch. 34, 1860–1861 N.C. Sess. Laws 68, 68 (1861).

[675] Act of Feb. 16, 1877, ch. 104, § 1, 1876–1877 N.C. Sess. Laws 162, 162–163 (1877).

[676] Act of Mar. 5, 1879, ch. 127, 1879 N.C. Sess. Laws 231, 231.

[677] Act of Mar. 6, 1893, ch. 514, 1893 N.C. Sess. Laws 468, 468–69.

[678] *See infra* Part VI.C.2.

[679] *Id.*

[680] In chronological order: Wilmington: to tax "every pistol gallery . . . on all pistols, dirks, bowie-knives or sword-canes, if worn about the person at any time during the year." Act of Feb. 20, 1861, ch. 180, § 1, 1860–1861 N.C. Sess. Laws 218, 220 (1861). Charlotte: fifty dollars on "every pistol, bowie-knife, dirk, sword-cane, or other deadly weapons worn upon the person, except a pocket knife, without special permission of the board of aldermen." Act of Mar. 10, 1866, ch. 7, § 19(6), 1866–1867 N.C. Sess. Laws 53, 63 (1866). Salisbury: "on all pistols, except when part of stock in trade, a tax not exceeding one dollar; on all dirks, bowie-knives and sword canes, if worn about the person at any time during the year, a tax not exceeding ten dollars." Act of Apr. 12, 1869, ch. 123, § 18, 1868–1869 N.C. Sess. Laws 192, 201-02 (1869). Lincolnton: five dollars for worn weapons. Act of Mar. 3, 1871, ch. 32, § 13, 1870–1871 N.C. Sess. Laws 67, 73 (1871). Lumberton: can tax "pistols, dirks, bowie knives or sword canes" as seen fit. Act of Dec. 13, 1873, ch. 7, § 3, 1873–1874 N.C. Sess. Laws 277, 278-79 (1873); Act of Mar. 6, 1883, ch. 89, § 45, 1883 N.C.

Washington Territory (1854)

Similar to 1837 Mississippi, the Washington Territory provided a criminal penalty for, "[e]very person who shall, in a rude, angry, or threatening manner, in a crowd of two or more persons, exhibit any pistol, bowie knife, or other dangerous weapon . . ."[681]

California (1855)

California adopted a more elaborate version of the 1837 Mississippi law about duels; if a person killed another in a duel with "a rifle, shot-gun, pistol, bowie-knife, dirk, small-sword, back-sword or other dangerous weapon," the duelist would have to pay the decedent's debts.[682] The duelist would also be liable to the decedent's family for liquidated damages.[683]

Louisiana (1855)

Sess. Laws 791, 807-08 (Lumberton recharter). Asheville: anyone "selling pistols, bowie knives, dirks, slung shot, brass knuckles or other like deadly weapons, in addition to all other taxes, a license tax not exceeding fifty dollars." Act of Mar. 8, 1883, ch. 111, § 36(9), 1883 N.C. Sess. Laws 853, 871-72. Waynesville: like Ashville, but forty dollars. Act of Mar. 11, 1885, ch. 127, § 14(12), 1885 N.C. Sess. Laws 1088, 1096-97. Reidsville: twenty-five-dollar tax on "every pistol, bowie-knife, dirk, sword-cane, or other deadly weapon, except carried by officers in the discharge of their duties." Act of Mar. 1, 1887, ch. 58, § 22(50), 1887 N.C. Sess. Laws 878, 885. Rockingham: to tax pistols, dirks, bowie knives, or sword canes. Act of Mar. 7, 1887, ch. 101, § 45, 1887 N.C. Sess. Laws 978, 987-88. Hickory: fifty dollars on sellers; "sling-shots" replaces "slung shot." Act of Mar. 11, 1889, ch. 238, § 36(8), 1889 N.C. Sess. Laws 946, 956. Marion: twenty-five dollars on every "pistol, bowie-knife, dirk, sword-cane or other deadly weapon, except carried by officers in discharge of their duties." Act of Mar. 11, 1889, ch. 183, § 27(40), 1889 N.C. Sess. Laws 828, 836. Mount Airy: ten dollars on open carry of "a pistol, bowie-knife, dirk, sword-cane or other deadly weapon, except guns, shot-guns, and rifles for shooting game." Act of Mar. 3, 1897, ch. 90, 1897 N.C. Sess. Laws 154, 154. Wadesborough: "on all pistols, dirks, bowie-knives, or sword-canes." Act of Feb. 3, 1891, ch. 26, § 45, 1891 N.C. Sess. Laws 695, 705-06. Columbus: same. Act of Feb. 25, 1891, ch. 101, § 48, 1891 N.C. Sess. Laws 891, 902. Buncombe: same. Act of Mar. 9, 1891, ch. 327, § 44, 1891 N.C. Sess. Laws 1413, 1423. Asheville: $500 on vendors selling "pistols, bowie-knives, dirks, slung-shots, brass or metallic knuckles, or other deadly weapons of like character." Act of Mar. 13, 1895, ch. 352, § 55(8), 1895 N.C. Sess. Laws 588, 611. Morven: "on all pistols, dirks, bowie knives, or sword canes." Act of Mar. 1, 1897, ch. 71, § 44, 1897 N.C. Sess. Laws 104, 115–16. Lilesville: same. Act of Mar. 9, 1897, ch. 130, § 44, 1897 N.C. Sess. Laws 226, 236-37. M-ount Airy: $75 on "every vendor or dealer in pistols and other deadly weapons." Act of Mar. 3, 1897, ch. 90, 1897 N.C. Sess. Laws 154, 154. Salisbury: same $500 as Asheville. Act of Mar. 6, 1899, ch. 186, § 54(8), 1899 N.C. Sess. Laws 483, 501–03. Monroe: same, but one-hundred dollars. Act of Mar. 6, 1899, ch. 352, § 25(14), 1899 N.C. Sess. Laws 958, 967–68. Manly: tax "on all pistols, dirks, bowie knives or sword canes." Act of Mar. 6, 1899, ch. 260, § 44, 1899 N.C. Sess. Laws 755, 766.

[681] Act of Apr. 28, 1854, ch. 2, § 30, 1854 Wash. Sess. Laws 73, 80; Act of Jan. 31 1860, ch. 2, § 30, 1859 Wash. Sess. Laws 106, 109 (1859); Act of Jan. 28, 1863, ch. 2, § 30, 1862 Wash. Sess. Laws 279, 284 (1863); Act of Dec. 2, 1869, ch. 2, § 32, 1869 Wash. Sess. Laws 200, 203–04; Act of Nov. 10, 1873, ch. 2, § 34, 1873 Wash. Sess. Laws 182, 186.

[682] Act of Apr. 27, 1855, ch. 127, 1855 Cal. Stat. 152, 152–53.

[683] *Id.*

The legislature banned concealed carry of "pistols, bowie knife, dirk, or any other dangerous weapon."[684]

During Reconstruction, when election violence was a major problem, the legislature forbade carry of "any gun, pistol, bowie knife or other dangerous weapon, concealed or unconcealed weapon" within a half-mile of a polling place when the polls were open, or within a half-mile of a voter registration site on registration days.[685]

Giving "any person under the age of twenty-one" a "pistol, dirk, bowie-knife or any other dangerous weapon, which may be carried concealed" was forbidden.[686]

New Hampshire (1856)

Like all of the Northeast, New Hampshire in mid-century had no interest in Bowie knife laws. But Bowie knives did appear in a legislative resolution that considered Bowie knives and revolvers to be effective for legitimate defense.

On May 19, 1856, Senator Charles Sumner (R-Mass.) delivered one of the most famous speeches in the history of the Senate, "The Crime Against Kansas."[687] Among the crimes he described, pro-slavery settlers in the Kansas Territory were trying to make Kansas a slave territory by attacking and disarming anti-slavery settlers in violation of the Second Amendment. Sumner turned his fire on South Carolina Democrat Andrew Butler:

> Next comes the *Remedy of Folly* . . . from the senator from South Carolina, who . . . thus far stands alone in its support . . . . This proposition, nakedly expressed, is that the people of Kansas should be deprived of their arms.
>
> . . . .
>
> Really, sir, has it come to this? The rifle has ever been the companion of the pioneer, and, under God, his tutelary protector against the red man and the beast of the forest. Never was this efficient weapon more needed in just self-defence than now in Kansas, and at least one article in our National Constitution must be blotted out, before the complete right to it can in any way be impeached. And yet, such is the madness of the hour, that, in defiance of the solemn guaranty, embodied in the Amendments of the Constitution, that "the right of the people to keep and bear arms shall not be infringed," the people of Kansas have been arraigned for keeping and bearing them, and the senator from South Carolina has had the face to say openly, on this floor, that they should be disarmed—of course, that the fanatics of Slavery,

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[684] Act of Mar. 14, 1855, No. 120, § 115, 1855 La. Acts 130, 148; Act of July 13, 1898, No. 112, 1898 La. Acts. 158, 159 (same).

[685] Act of Mar. 16, 1870, No. 100, § 73, 1870 La. Acts 145, 159–60; Act of Nov. 20, 1872, No. 98, § 59, 1873 La. Acts. 15, 27 (1872).

[686] Act of July 1, 1890, No. 46, 1890 La. Acts 39, 39.

[687] SPEECH OF HON. CHARLES SUMNER, IN THE SENATE OF THE UNITED STATES, 19TH AND 20TH, MAY, 1856, at 9 (Boston, John P. Jewett & Co. 1856).

> his allies and constituents, may meet no impediment. Sir, the senator is venerable . . . but neither his years, nor his position, past or present, can give respectability to the demand he has made, or save him from indignant condemnation, when, to compass the wretched purposes of a wretched cause, he thus proposes to trample on one of the plainest provisions of constitutional liberty.[688]

That wasn't even close to the worst that Sumner said about Brooks that day. Most notably, he compared Butler to Don Quixote:

> The senator from South Carolina has read many books of chivalry, and believes himself a chivalrous knight, with sentiments of honor and courage. Of course he has chosen a mistress to whom he has made his vows, and who, though ugly to others, is always lovely to him; though polluted in the sight of the world, is chaste in his sight;—I mean the harlot Slavery.[689]

Three days later, Butler's nephew, Representative Preston Brooks (D-S.C.) snuck up behind Sumner while he was working at his desk on the Senate floor and assaulted him with a cane.[690] He nearly killed Sumner, who was not able to resume his Senate duties for two and a half years.[691] The assault was widely applauded in the South.[692] The attack symbolized a broader problem: in the slave states, the law and the mobs suppressed any criticism of slavery, lest it inspire slave revolt.[693] Even in free states, abolitionist speakers were attacked by mobs.[694]

In response, on July 12, the New Hampshire legislature passed a resolution "in relation to the late acts of violence and bloodshed by the Slave Power in the Territory of Kansas, and at the National Capital."[695] As one section of the resolution observed, it was becoming difficult for people to speak out against slavery unless they were armed for self-defense:

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688 *Id.* at 64–65.

689 *Id.* at 9.

690 *See* Gregg M. McCormick, *Personal Conflict, Sectional Reaction: The Role of Free Speech in the Caning of Charles Sumner*, 85 TEX. L. REV. 1519, 1526–27 (2007).

691 *Id.*

692 *Id.* at 1529.

693 *Id.* at 1520 ("Prior to the Sumner-Brooks affair, the suppression of abolitionist mailings, the Congressional Gag Rule, the murder of Reverend Lovejoy, and suppression of antislavery speech in the Kansas Territory served as concrete examples of slavery's threat to Northern rights.").

694 *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 846 (2010) (Thomas, J., concurring) ("Mob violence in many Northern cities presented dangers as well."); Michael Kent Curtis, *The Fraying Fabric of Freedom: Crisis and Criminal Law in Struggles for Democracy and Freedom of Expression*, 44 TEX. TECH. L. REV. 89, 102 (2011) ("In the North, mobs disrupted abolitionist meetings and destroyed the presses of anti-slavery newspapers.").

695 Act of July 12, 1856, ch. 1870, § 6, 1856 N.H. Laws 1781, 1781–82.

> Resolved, That the recent unmanly and murderous assaults which have disgraced the national capital, are but the single outbursts of that fierce spirit of determined domination which has revealed itself so fully on a larger field, and which manifests itself at every point of contact between freedom and slavery, and which, if it shall not be promptly met and subdued, will render any free expression of opinion, any independence of personal action by prominent men of the free States in relation to the great national issue now pending, imprudent and perilous, unless it shall be understood that it is to be backed up by the bowie-knife and the revolver.[696]

Despised as Bowie knives and revolvers were by some slave-state legislatures, New Hampshire recognized that the First Amendment is backed up by the Second Amendment, as a last resort.

Texas (1856)

Bowie knives were omnipresent in Texas. On April 21, 1836, the Texans had won their independence from Mexico at the Battle of San Jacinto. Outnumbered, they had routed the Mexican army in part thanks to their deadly Bowie knives.[697]

Many Texans carried Bowie knives. Texans were described as "desperate whittlers of sticks," who would start whittling whenever a conversation began.[698] But the Texans were not carrying Bowie knives because they were whittling addicts. As a visiting British diplomat reported, murder and crime were rampant, and "the Perpetrators escape with the greatest impunity."[699] "It is considered unsafe to walk through the Streets of the principal Towns without being armed. The Bowie Knife is the weapon most in vogue."[700]

After a decade as an independent republic, Texas joined the United States on December 29, 1845. An 1856 statute provided that if a person used a "bowie knife" or "dagger" in manslaughter, the offense "shall nevertheless be deemed murder, and punished accordingly." A "bowie knife" or "dagger" were defined as "any knife intended to be worn upon the person, which is capable of inflicting death, and not commonly known as a pocket knife."[701]

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[696] *Id.*

[697] *See* CHARLES EDWARDS LESTER, SAM HOUSTON AND HIS REPUBLIC 97 (1846).

[698] *See* JOSEPH WILLIAM SCHMITZ, TEXAS CULTURE: IN THE DAYS OF THE REPUBLIC 1836–1846, at 22 (1960); N. DORAN MAILLARD, HISTORY OF THE REPUBLIC OF TEXAS: FROM THE DISCOVERY OF THE COUNTRY TO THE PRESENT TIME 213 (1842).

[699] Letter from Francis Sheridan to Joseph Garraway (July 12, 1840), *in* 15 TEX. HIST. ASS'N 221 (1912);

[700] *Id.*; *see* SCHMITZ, *supra* note 698, at 65.

[701] TEX. PENAL CODE arts. 610–11 (1856), *in* 1 A DIGEST OF THE GENERAL STATUTE LAWS OF THE STATE OF TEXAS: TO WHICH ARE SUBJOINED THE REPEALED LAWS OF THE REPUBLIC AND STATE OF TEXAS 534 (Austin, John Marshall & Co.1859). *See also id.* at 520 (art. 493 doubling penalty for assault with intent to murder, if perpetrated with "a bowie knife, or dagger"); Act of

The Texas Supreme Court upheld the law in *Cockrum v. State*.[702] Under the Second Amendment and the Texas Constitution's right to arms, "[t]he right to carry a bowie-knife for lawful defense is secured, and must be admitted."[703] However, extra punishment for a crime with a Bowie knife did not violate the right to arms.[704]

In the chaotic years after the Civil War, the legislature prohibited carrying "any gun, pistol, bowie-knife or other dangerous weapon, concealed or unconcealed," within a half mile of a polling place while the polls are open.[705]

Then came one of the most repressive anti-carry laws enacted by an American state in the nineteenth century. It did not apply to long guns, but it did apply to "any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of knife manufactured or sold for the purposes of offense or defense."[706] Both open and concealed carry were forbidden.[707] The exceptions were "immediate and pressing" self-defense, or in a person's home or business, or travelers with arms in their baggage.[708] Another section of the bill banned all firearms, plus the arms previously listed, from many places, including churches, all public assemblies, and even "a ball room, social party, or social gathering."[709] The Act did not apply in any county proclaimed by the Governor "as a frontier county, and liable to incursions of hostile Indians."[710]

The Texas Supreme Court upheld the handgun carry ban in 1872.[711] According to the court, the statutory exceptions to the carry ban (travelers, or in response to a specific threat, or in militia service) sufficiently allowed the exercise of the right to bear arms.

The court stated that the Texas right to arms protected only arms that "are used for purposes of war," such as "musket and bayonet . . . the sabre, holster

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Nov. 6, 1871, ch. 26, § 1, 1871 Tex. Gen. Laws 19, 19 (doubling penalty for perpetrator "in disguise").

[702] 24 Tex. 394 (1859).

[703] *Id.* at 402.

[704] *Id.* at 403. "Such admonitory regulation of the abuse must not be carried too far. It certainly has a limit. For if the legislature were to affix a punishment to the abuse of this right, so great, as in its nature, it must deter the citizen from its lawful exercise, that would be tantamount to a prohibition of the right." *Id.*

[705] Act of Aug. 15, 1870, ch. 78, § 55, 1870 Tex. Gen. Laws 128, 139.

[706] Act of Apr. 12, 1871, ch. 34, § 1, 1871 Tex. Gen. Laws 25, 25; Act of Feb. 24, 1887, ch. 9, 1887 Tex. Gen. Laws 6, 7; Act of Jan. 30, 1889, ch. 37, 1889 Tex. Gen. Laws 33, 33; Act of Aug. 19, 1897, ch. 25, 1897 Tex. Gen. Laws 24, 24.

[707] Act of Apr. 12, 1871, ch. 34, § 3, 1871 Tex. Gen. Laws 25, 25–26; Act of Feb. 24, 1887, ch. 9, 1887 Tex. Gen. Laws 6, 6–7; Act of Jan. 30, 1889, ch. 37, 1889 Tex. Gen. Laws 33, 33; Act of Aug. 19, 1897, ch. 25, 1897 Tex. Gen. Laws 24, 24.

[708] Act of Apr. 12, 1871, ch. 34, § 1, 1871 Tex. Gen. Laws 25, 26; Act of Feb. 24, 1887, ch. 9, 1887 Tex. Gen. Laws 6, 7. *See* Act of Jan. 30, 1889, ch. 37, 1889 Tex. Gen. Laws 33, 33. *See* Act of Aug. 19, 1897, ch. 25, 1897 Tex. Gen. Laws 24, 24.

[709] Act of Apr. 12, 1871, ch. 34, § 3 1871 Tex. Gen. Laws 25, 25–26; Act of Feb. 24, 1887, ch. 9, 1887 Tex. Gen. Laws 6, 7; Act of Jan. 30, 1889, ch. 37, 1889 Tex. Gen. Laws 33, 33.; Act of Aug. 19, 1897, ch. 25, 1897 Tex. Gen. Laws 24, 24.

[710] Act of Apr. 12, 1871, ch. 34, § 4 1871 Tex. Gen. Laws 25, 26; Act of Feb. 24, 1887, ch. 9, 1887 Tex. Gen. Laws 6, 7; Act of Jan. 30, 1889, ch. 37, 1889 Tex. Gen. Laws 33, 33; Act of Aug. 19, 1897, ch. 25, 1897 Tex. Gen. Laws 24, 24.

[711] English v. State, 35 Tex. 473 (1871).

pistols and carbine . . . the field piece, siege gun, and mortar, with side arms [military handguns]."[712] In contrast, the Constitution did not cover arms "employed in quarrels and broils, and fights between maddened individuals," such as "dirks, daggers, slungshots, swordcanes, brass-knuckles and bowie knives."[713]

In 1889, written consent of a parent, guardian, "or someone standing in lieu thereof" was required to give or sell to a minor a pistol, "bowie knife or any other knife manufactured or sold for the purpose of offense or defense," and various other weapons.[714] The statute did not apply to long guns.[715]

New Mexico (1859)

The territory's first Bowie knife law outlawed giving "to any slave any sword, dirk, bowie-knife, gun, pistol or other fire arms, or any other kind of deadly weapon of offence, or any ammunition of any kind suitable for fire arms."[716] Slavery in New Mexico was usually in the form of peonage.[717] The Comanche and Ute Indians, among others, brought captives from other tribes to the territory and sold them to buyers of all races.[718]

Concealed and open carry were prohibited in 1860. The scope was expansive:

> any class of pistols whatever, bowie knife (cuchillo de cinto), Arkansas toothpick, Spanish dagger, slung-shot, or any other deadly weapon, of whatever class or description they may be, no matter by what name they may be known or called . . . .[719]

New Mexico was part of a pattern: legislative enthusiasm for Bowie knife laws was greatest where slavery was lawful. After slavery was outlawed by the Thirteenth Amendment in December of 1865, the most oppressive Bowie-knife and gun controls were enacted in areas where slavery had been abolished by federal action rather than by choice of the legislature before the Civil War.

An 1887 statute forbade almost all carry of Bowie knives and other arms.[720] It applied to defined "deadly weapons":

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[712] *Id.* at 476.

[713] *Id.* at 474. The Texas court was plainly wrong that Bowie knives are not used in warfare. *See* text at 697.

[714] Act of Aug. 19, 1897, ch. 155, 1897 Tex. Gen. Laws 221, 221–22.

[715] *Id.*

[716] Act of Feb. 3, 1859, ch. 26, § 7, 1858–1859 N.M. Laws 64, 68 (1859).

[717] *See* RESÉNDEZ, *supra* note 338.

[718] *See id.*

[719] Act of Feb. 2, 1860, § 1, 1859–1860 N.M. Laws 94 (1860).

Territorial statues were published bilingually. The arms list in Spanish: "ninguna pistola de cualesquiera clase que sea, ni bowie knife (cachillo de cinto), [*s.i.c.* cuchillo, lit., belt knife] Arkansas toothpick, daga española, huracana, ó cualesquiera otra arma mortifera de cualesquiera clase ó descripcion."

[720] Act of Feb. 18, 1887, ch. 30, § 1, 1886 N.M. Laws 55, 55 (1887).

> all kinds and classes of pistols, whether the same be a revolver, repeater, derringer, or any kind or class of pistol or gun; any and all kinds of daggers, bowie knives, poniards [small, thin daggers], butcher knives, dirk knives, and all such weapons with which dangerous cuts can be given, or with which dangerous thrusts can be inflicted, including sword canes, and any kind of sharp pointed canes: as also slung shots, bludgeons or any other deadly weapons with which dangerous wounds can be inflicted . . . .[721]

A person carrying a deadly weapon was not allowed to "insult or assault another."[722] Nor to unlawfully "draw, flourish, or discharge" a firearm, "except in the lawful defense of himself, his family or his property."[723]

The law forbade carrying "either concealed or otherwise, on or about the settlements of this territory."[724] The statute defined a "settlement" as anyplace within 300 yards of any inhabited house.[725] The exceptions to the carry ban were:

> in his or her residence, or on his or her landed estate, and in the lawful defense of his or her person, family, or property, the same being then and there threatened with danger . . . .[726]

Travelers could ride armed through a settlement.[727] If they stopped, they had to disarm within fifteen minutes, and not resume until the eve of departure.[728] Hotels, boarding houses, saloons, and similar establishments had to post bilingual copies of the Act.[729]

Law enforcement officers could carry weapons "when the same may be necessary, but it shall be for the court or the jury to decide whether such carrying of weapons was necessary or not, and for an improper carrying or using deadly weapons by an officer, he shall be punished as other persons are punished."[730]

Ohio (1859)

Without limiting open carry, the legislature prohibited concealed carry of "a pistol, bowie knife, dirk, or any other dangerous weapon."[731] The jury must acquit if it were proven that the defendant was "engaged in pursuit of any lawful business, calling, or employment, and the circumstances in which he was placed at

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721 *Id.* at 57, § 8.
722 *Id.* at 56, § 5.
723 *Id.* at 56, § 4.
724 *Id.* at 55, § 1.
725 *Id.* at 56, § 4.
726 *Id.* at 55, § 1.
727 *Id.* at 57, § 9.
728 *Id.*
729 *Id.* at 57, § 11.
730 *Id.* at 57, § 10.
731 Act of Mar. 18, 1859, § 1, 1859 Ohio Laws 56, 56.

the time aforesaid were such as to justify a prudent man in carrying the weapon or weapons aforesaid for the defense of his person, property, or family."[732]

Kentucky (1860)

"If any person, other than the parent or guardian, shall sell, give, or loan, any pistol, dirk, bowie-knife, brass-knucks, slung-shot, colt [similar to a slungshot], cane-gun, or other deadly weapon which is carried concealed, to any minor, or slave, or free negro, he shall be fined fifty dollars."[733]

In 1886, an occupational license tax was enacted. It was twenty-five dollars to "sell pistols," and fifty dollars to "sell bowie-knives, dirks, brass-knucks or slung-shots."[734]

Indiana (1859)

Except for travelers, no concealed carry of "any dirk, pistol, bowie-knife, dagger, sword in cane, or any other dangerous or deadly weapon."[735] Open carry of such weapons was unlawful, if "with the intent or avowed purpose of injuring his fellow man."[736]

It was forbidden in 1875 to give any person "under the age of twenty-one years, any pistol, dirk, or bowie-knife, slung-shot, knucks, or other deadly weapon that can be worn, or carried, concealed upon or about the person."[737] Or to give such person pistol ammunition.[738]

Nevada (1861)

If a person fought a duel with "a rifle, shot-gun, pistol, bowie-knife, dirk, small-sword, back-sword, or other dangerous weapon," and killed his opponent or anyone else, the killing was murder in the first degree.[739]

Idaho Territory (1864)

Like Nevada.[740]

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[732] *Id.* at 56–57, § 2.

[733] Act of Jan. 12, 1860, ch. 33, § 23, 1859–1860 Ky. Acts 241, 245 (1860).

[734] Act of May 17, 1886, ch. 1233, art. 5, § 2, 1885 Ky. Acts 140, 154 (1886); Act of November 11, 1892, ch. 103, art. 10, subdiv. 4, § 35, 1891–1892 Ky. Acts 277, 345–46 (1892); Act of June 9, 1893, ch. 217, § 35, 1891–1892 Ky. Acts 981, 1001 (1893).

[735] Act of Feb. 23, 1859, ch. 78, 1859 Ind. Acts 129, 129; Act of Apr. 14, 1881, ch. 37, § 82, 1881 Ind. Acts 174, 191.

[736] Act of Feb. 23, 1859, ch. 78, 1859 Ind. Acts 129, 129; Act of Apr. 14, 1881, ch. 37, § 82, 1881 Ind. Acts 174, 191.

[737] Act of Feb. 27, 1875, ch. 40, § 1, 1875 Ind. Acts 59, 59.

[738] *Id.*

[739] Act of Nov. 26, 1861, ch. 28, § 35, 1861 Nev. Stat. 56, 61.

[740] Act of Feb. 4, 1864, ch. 3, § 35, 1863 Idaho Sess. Laws 435, 441 (1864); Act of Dec. 21, 1864, ch. 3, § 35, 1864 Idaho Sess. Laws 298, 303–04.

Montana Territory (1865)

No concealed carry "within any city, town, or village" of "any pistol, bowie-knife, dagger, or other deadly weapon."[741] Duelists who kill using "a rifle, shot-gun, pistol, bowie-knife, dirk, small sword, back-sword, or other dangerous weapon" are guilty of murder.[742]

Colorado Territory (1868)

No concealed carry "within any city, town or village" of "any pistol, bowie-knife, dagger or other deadly weapon."[743]

Arizona Territory (1867)

Split from the New Mexico Territory in 1863, the new Arizona Territory did not copy New Mexico's 1859 comprehensive carry ban. Instead, the laws targeted misuse. Anyone "who shall in the presence of two or more persons, draw or exhibit" any "dirk, dirk knife, bowie knife, pistol, gun, or other deadly weapon . . . in a rude, angry or threatening manner, not in necessary self defence" was guilty of a crime.[744] So was anyone "who shall in any manner unlawfully use the same in any fight or quarrel."[745]

Carrying "maliciously or with design therewith, to intimidate or injure his fellow-man," was specifically forbidden for everyone "in the Counties of Apache and Graham, over the age of ten years."[746] The arms were "any dirk, dirk-knife, bowie-knife, pistol, rifle, shot-gun, or fire-arms of any kind."[747]

Reenacting the statute against drawing a gun in a threatening manner, the 1883 legislature added a proviso against persons "over the age of ten and under the age of seventeen years" carrying concealed or unconcealed "any dirk, dirk-knife, bowie-knife, slung-shot, brass-knuckles, or pistol" in any city, village, or town.[748] Concealed carry of those same arms in a city, village, or town was forbidden for everyone in 1887.[749] And then everywhere in 1891, for "any pistol

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741 Act of Jan. 11, 1865, § 1, 1864 Mont. Laws 355, 355 (1865).

742 Act of Feb. 21, 1879, ch. 4, § 23, 1879 Mont. Laws 41, 359; Act of Jan. 10, 1887, ch. 4, § 23, 1887 Mont. Laws 59, 505.

743 Act of Jan. 10, 1868, ch. 22, § 149, 1867 Colo. Sess. Laws 191, 229 (1868) (reenacted in 1876 as ch. 24, § 153, 1876 Colo. Sess. Laws 261, 304); Act of Feb. 1, 1881, 1881 Colo. Sess. Laws 74, 74; Act of Apr. 10, 1885, 1885 Colo. Sess. Laws 170, 170; Act of Apr. 10, 1891, § 1, 1891 Colo. Sess. Laws 129, 129 (expanding coverage to include "any pistol, revolver, derringer, bowie-knife, razor, dagger, sling-shot or other deadly weapon").

744 Act of Sept. 30, 1867, § 1, 1867 Ariz. Sess. Laws 21, 21; Act of Feb. 12, 1875, § 1, 1875 Ariz. Sess. Laws 101, 101.

745 Act of Sept. 30, 1867, § 1, 1867 Ariz. Sess. Laws 21, 21; Act of Feb. 12, 1875, § 1, 1875 Ariz. Sess. Laws 101, 101.

746 Act of Feb. 8, 1883, No. 19, § 1, 1883 Ariz. Sess. Laws 21, 21–22.

747 *Id.*

748 Act of Feb. 24, 1883, No. 36, § 3, 1883 Ariz. Sess. Laws 65, 66.

749 REVISED STATUTES OF ARIZONA 726 (Prescott, Prescott Courier Print 1887) (published at tit. 11, § 662).

or other firearm, dirk, dagger, slung-shot, sword cane, spear, brass knuckles, or other knuckles of metal, bowie knife or any kind of knife or weapon except a pocket-knife not manufactured and used for the purpose of offense and defense."[750]

In 1889, Arizona enacted an open carry ban in "any settlement, town, village or city," for any "pistol, dirk, dagger, slung shot, sword cane, spear, brass knuckles, bowie knife, or any other kind of a knife manufactured and sold for the purposes of offense or defense."[751] Arriving travelers could carry for the first half hour, or on the way out of town.[752] Hotels had to post notices about the no carry rule.[753] Carry was also forbidden at public events, and even at some private social gatherings.[754]

Illinois (1867)

The legislature's revision of the municipal charter of Bloomington allowed the town "[t]o regulate or prohibit" concealed carry of "any pistol, or colt, or slung-shot, or cross knuckles, or knuckles of brass, lead or other metal, or bowie-knife, dirk-knife, dirk or dagger or any other dangerous or deadly weapon."[755]

Only a "father, guardian or employer" or their agent could give a minor "any pistol, revolver, derringer, bowie knife, dirk or other deadly weapon of like character."[756]

Kansas (1868)

No carrying of "a pistol, bowie-knife, dirk or other deadly weapon" by any "person who is not engaged in any legitimate business, any person under the influence of intoxicating drink, and any person who has ever borne arms against the government of the United States."[757]

No furnishing of "any pistol, revolver or toy pistol, by which cartridges or caps may be exploded, or any dirk, bowie-knife, brass knuckles, slung shot, or other dangerous weapons to any minor, or to any person of notoriously unsound mind"[758] "Any minor who shall have in his possession any pistol, revolver or toy pistol, by which cartridges may be exploded, or any dirk, bowie-knife, brass knuckles, slung shot or other dangerous weapon, shall be deemed guilty of a misdemeanor."[759]

West Virginia (1868)

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750 Act of Mar. 6, 1891, No. 2, § 1, 1893 Ariz. Sess. Laws 3, 3 (1891) (as published by the Seventeenth Legislative Assembly of the Territory of Arizona in 1893).

751 Act of Mar. 18, 1889, No. 13, § 1, 1889 Ariz. Sess. Laws 16, 16.

752 *Id.* at 17, § 6.

753 *Id.* at 17, § 7.

754 *Id.* at 17, § 3.

755 Act of Mar. 7, 1867, ch. 6, § 1(38), 1867 Ill. Laws 639, 650.

756 Act of Apr. 16, 1881, § 2, 1881 Ill. Laws 71, 71.

757 Act of Feb. 26, 1867, ch. 31, § 282, 1868 Kan. Sess. Laws 317, 378 (1867).

758 Act of Mar. 5, 1883, ch. 105, 1883 Kan. Sess. Laws 159, 159.

759 *Id.*

An 1868 statute copied Virginia's law against "habitually" carrying a concealed "pistol, dirk, bowie knife, or weapon of the like kind."[760] Justices of the Peace had a duty to enforce the statute.[761]

Then in 1882, West Virginia adopted a law similar to the Texas carry ban of 1871.[762] Without restricting carry of long guns, it broadly outlawed carrying pistols, Bowie knives, and numerous other arms.[763] Among the exceptions were that the person had "good cause to believe and did believe that he was in danger of death or great bodily harm."[764] Additionally, there was a prohibition on selling or furnishing such arms to a person under twenty-one.[765]

In *State v. Workman*, West Virginia Supreme Court of Appeals upheld the statute, because the arms protected by the Second Amendment:

> must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets—arms to be used in defending the State and civil liberty—and not to pistols, bowie-knives, brass knuckles, billies, and such other weapons as are usually employed in brawls, street fights, duels, and affrays, and are only habitually carried by bullies, blackguards, and desperadoes, to the terror of the community and the injury of the state.[766]

Maryland (1870)

Any person who was arrested in Baltimore, brought to the station house, and found to be carrying "any pistol, dirk, bowie knife," various other weapons, "or any other deadly weapon whatsoever" would be fined five to twenty-five dollars.[767]

It became illegal in 1872 in Annapolis to carry concealed "any pistol, dirk-knife, bowie-knife, sling-shot, billy, razor, brass, iron, or other metal knuckles, or any other deadly weapon."[768]

A ban on carrying "with the intent or purpose of injuring any person," was enacted in 1886 for "any pistol, dirk-knife, bowie-knife, slung-shot, billy, sand-club, metal knuckles, razor or any other dangerous of deadly weapon of any kind whatsoever, (penknives excepted) . . . ."[769]

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[760] THE CODE OF WEST VIRGINIA COMPRISING LEGISLATION TO THE YEAR 1870, at 691, 692 (Wheeling, John Frew 1868) (published at ch. 148, § 7).

[761] Act of Dec. 27, 1873, ch. 226, § 168, 1872 W. Va. Acts 654, 709 (1873).

[762] Act of Mar. 24, 1882, ch. 135, § 1, 1882 W. Va. Acts 421, 421–23.

[763] *Id.* at 421, § 1.

[764] *Id.* at 422, § 1.

[765] *Id.* at 421, § 1.

[766] 14 S.E. 9, 11 (W. Va. 1891).

[767] Act of Apr. 8, 1870, ch. 473, § 1, 1870 Md. Laws 891, 892; Act of Mar. 30, 1874, ch. 178, § 1, 1874 Md. Laws 243, 243–44; Act of Apr. 8, 1884, ch. 187, § 1, 1884 Md. Laws 249, 249; Act of Apr. 8, 1890, ch. 534, § 1, 1890 Md. Laws 606, 606–07; Act of Mar. 24, 1898, ch. 123, § 761, 1898 Md. Laws 241, 533.

[768] Act of Feb. 26, 1872, ch. 42, § 1, 1872 Md. Laws 56, 56–57.

[769] Act of Apr. 7, 1886, ch. 375, § 1, 1886 Md. Laws 602, 602.

District of Columbia (1871)

The Legislative Assembly of the District of Columbia prohibited concealed carry of "any deadly or dangerous weapons, such as daggers, air-guns, pistols, bowie-knives, dirk-knives, or dirks, razors, razor-blades, sword-canes, slung-shots, or brass or other metal knuckles."[770]

In 1892, a similar D.C. statute was enacted by Congress with additional provisions.[771] It prohibited concealed carry of the same weapons as 1871, plus "blackjacks."[772] A concealed carry permit valid up to one month could be issued by any Judge of Police Court, with "proof to him of the necessity," and a bond.[773]

Open carry was lawful, except "with intent to unlawfully use."[774] The statute was not to be construed to prevent anyone "from keeping or carrying about his place of business, dwelling house, or premises" the listed arms, or from taking them to and from a repair place.[775]

Giving a deadly weapon to a minor was forbidden.[776] Vendors had to be licensed by Commissioners of the District of Columbia.[777] The license itself was "without fee," but the licensee could be required to post a bond.[778] Sellers had to keep a written list of purchasers, which was subject to police inspection.[779] Weekly sales reports to the police were required.[780]

Nebraska (1873)

No concealed carry of weapons "such as a pistol, bowie-knife, dirk, or any other dangerous weapon."[781] As in Ohio, there was a "prudent man" defense.[782]

A revised municipal charter for Lincoln made it unlawful in the city to carry "any concealed pistol, revolver, dirk, bowie knife, billy, sling-shot, metal knuckles, or other dangerous or deadly weapons of any kind."[783] The city's police

[770] Act of Aug. 10, 1871, § 1, *reprinted in* 1 THE COMPILED STATUTES IN FORCE IN THE DISTRICT OF COLUMBIA, INCLUDING THE ACTS OF THE SECOND SESSION OF THE FIFTIETH CONGRESS, 1887–89, at 178 (Washington, Gov't Prtg. Off. 1894) (published at ch. 16., § 119).

[771] Act of July 13, 1892, ch. 159, § 1, 27 Stat. 116, 116 (1892).

[772] *Id.* at 116, § 1.

[773] *Id.* at 116–17, § 2.

[774] *Id.* at 116, § 2.

[775] *Id.*

[776] *Id.* at 117, § 5.

[777] *Id.*

[778] *Id.*

[779] *Id.*

[780] *Id.*

[781] Act of Mar. 8, 1873, ch. 58, § 25, 1873 Neb. Laws 719, 724–725; Act of Feb. 25, 1875, § 3, 1875 Neb. Laws 1, 3; Act of Mar. 30, 1899, ch. 94, § 1, 1899 Neb. Laws 349, 349.

[782] Act of Mar. 4, 1873, ch. 58, § 25, 1873 Neb. Laws 719, 724–25; Act of Feb. 25, 1875, § 3, 1875 Neb. Laws 1, 3; Act of Mar. 30, 1899, ch. 94, § 1, 1899 Neb. Laws 349, 349; Act of Mar. 18, 1859, § 1, 1859 Ohio Laws 56, 56.

[783] Act of Aug. 26, 1895, art. 16, § 1, 1895 Neb. Laws 209, 209.

were authorized to arrest without a warrant a person found "in the act of carrying" concealed "and detain him."[784]

Missouri (1874)

Concealed carry was forbidden in many locations:

> any church or place where people have assembled for religious worship, or into any school-room, or into any place where people may be assembled for educational, literary or social purposes, or to any election precinct on any election day, or into any court-room during the sitting of court, or into any other public assemblage of persons met for other than militia drill or meetings, called under the militia law of this state, having concealed about his person any kind of fire-arms, bowie-knife, dirk, dagger, slung-shot, or other deadly weapon . . . .[785]

This was similar to the 1871 Texas statute, but unlike Texas, it applied only to concealed carry.

As in the 1837 Mississippi statue, which was a model for some later states, Missouri outlawed the exhibition of "any kind of firearms, bowie knife, dirk, dagger, slung shot or other deadly weapon, in a rude, angry or threatening manner, not in the necessary defence of his person, family or property."[786]

The exhibiting statute and the concealed carry statute were combined in 1885.[787] The new law also forbade carrying the listed weapons when intoxicated or under the influence.[788] Providing one of the arms to a minor "without the consent of the parent or guardian" was outlawed.[789]

Arkansas (1875)

Antebellum Arkansas had legislation against concealed carry, but not specifically about Bowie knives.

The 1874 election was the first in which the voting rights of former Arkansas confederates were fully restored.[790] They elected Democratic majorities and ended Reconstruction.[791] In 1875, the new state legislature banned the open or concealed carry of "any pistol of any kind whatever, or any dirk, butcher or

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[784] *Id.* at 210, § 3.

[785] Act of Mar. 26, 1874, § 1, 1874 Mo. Laws 43, 43; Act of Mar. 30, 1875, § 1, 1875 Mo. Laws 50, 50–51.

[786] Act of Apr. 17, 1877, § 1, 1877 Mo. Laws 240, 240.

[787] Act of Mar. 20, 1885, § 1, 1885 Mo. Laws 139, 140.

[788] *Id.* at 140.

[789] *Id.*

[790] *Civil War Through Reconstruction, 1861–1874*, THE ENCYCLOPEDIA OF ARK. HIST. & CULTURE, http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=388 [https://perma.cc/D3NG-66P2] (last visited Apr. 10, 2024).

[791] *Id.*

Bowie knife, or sword or spear in a cane, brass or metal knucks, or razor, as a weapon."[792]

The next year, the Arkansas Supreme Court heard a case of a man who had been convicted of carrying a pocket revolver. In *Fife v. State*,[793] the court approvingly quoted a then-recent Tennessee case about the types of arms covered in the state constitutional right.

> Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the State. Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we hold that the rifle, of all descriptions, the shot gun, the musket and repeater, are such arms, and that, under the [state] Constitution, the right to keep such arms cannot be infringed or forbidden by the Legislature.[794]

The Arkansas court continued: "[t]he learned judge might well have added to his list of war arms, the sword, though not such as are concealed in a cane."[795] The pocket pistol not being a war arm, the defendant's conviction was upheld.[796] Needless to say, *Fife*'s protection of "the rifle of all descriptions" makes it and the 1875 statute poor precedents for today's efforts to outlaw common rifles.

Two years later, the Arkansas court reversed a conviction for concealed carry of "a large army size pistol":

> [T]o prohibit the citizen from wearing or carrying a war arm . . . [was] an unwarranted restriction upon [the defendant's] constitutional right to keep and bear arms. If cowardly and dishonorable men sometimes shoot unarmed men with army pistols or guns, the evil must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional privilege.[797]

The legislature responded in 1881 with a new statute against the sale or disposition of "any dirk or bowie knife, or a sword or a spear in a cane, brass or metal knucks, razor, or any pistol of any kind whatever, except such pistols as are used in the army or navy."[798] As discussed, the 1881 Arkansas statute might have

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[792] Act of Feb. 16, 1875, § 1, 1874–1875 Ark. Acts 156, 156 (1875).

[793] 31 Ark. 455, 455–56 (1876).

[794] *Id.* at 460 (quoting Andrews v. State, 50 Tenn. 165, 179 (1871)).

[795] *Id.*

[796] *Id.* at 461.

[797] Wilson v. State, 33 Ark. 557, 560 (1878).

[798] Act of Apr. 1, 1881, No. 96, § 3, 1881 Ark. Acts 191, 192. The carry ban in section 1 was phrased slightly differently from the quoted sales ban in section 3. The section 1 carry ban applied to "or a sword, or a spear in a cane." The section 1 carry ban could, in isolation, be read as a banning all sword carry. Whereas section 3 is only about concealed swords—that is swords/spears in a cane.

been consistent with the *state* constitution, but it is contrary to modern Second Amendment doctrine.[799]

Wisconsin (1874)

Some municipal charters enacted or amended by the Wisconsin legislature included provisions authorizing localities to regulate or prohibit concealed carry of any pistol or colt, or slung shot, or cross knuckles, or knuckles of lead, brass or other metal, or bowie knife, dirk knife, or dirk or dagger, or any other dangerous or deadly weapon.[800]

Wyoming (1882)

As in other states, it was unlawful to "exhibit any kind of fire-arms, bowie-knife, dirk, dagger, slung-shot or other deadly weapon in a rude, angry or threatening manner not necessary to the defense of his person, family or property."[801]

Oklahoma Territory (1890)

Oklahoma had a confusing statute, although what matters for present purposes is that the law applied to "any pistol, revolver, bowie knife, dirk, dagger, slung-shot, sword cane, spear, metal knuckles, or any other kind of knife or

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The best reading of the statute as a whole is application to sword canes, and not to ordinary swords. A ban on sword sales or open carry would have directly defied the Arkansas Supreme Court's *Wilson* decision. Such defiance seems unlikely, since the legislature was adjusting the law (by allowing open carry of Army & Navy handguns) to comply with the Arkansas Supreme Court ruling.

[799] *See supra* notes 790–97 and accompanying text.

[800] Act of Mar. 10, 1874, ch. 184(4), § 3(61), 1874 Wis. Sess. Laws 311, 334 (Milwaukee); Act of Mar. 5, 1875, ch. 262(4), § 3(49), 1875 Wis. Sess. Laws 450, 471 (Green Bay); Act of Mar. 3, 1876, ch. 103(4), § 3(43), 1876 Wis. Sess. Laws 199, 218 (Platteville); Act of Mar. 11, 1876, ch. 313, tit. 4, § 3(59), 1876 Wis. Sess. Laws 715, 737 (Racine); Act of Mar. 7, 1877, ch. 162(5), § 3(49), 1877 Wis. Sess. Laws 346, 367 (New London); Act of Mar. 9, 1878, ch. 112, tit. 5, § 3(55),1878 Wis. Sess. Laws 98, 119–20 (Beaver Dam); Act of Mar. 13, 1882, ch. 92, § 29(47), 1882 Wis. Sess. Laws 292, 309 (Lancaster); Act of Mar. 18, 1882, ch. 169(4), § 3(48), 1882 Wis. Sess. Laws 503, 524 (Green Bay); Act of Mar. 30, 1883, ch. 183(6), § 3(56), 1883 Wis. Sess. Laws 687, 713 (Oshkosh); Act of Apr. 3, 1883, ch. 341, § 52(83), 1883 Wis. Sess. Laws 970, 990 (Sturgeon Bay); Act of Apr. 4, 1883, ch. 351, § 32(45), 1883 Wis. Sess. Laws 1016, 1034 (Nicolet); Act of Mar. 7, 1885, ch. 37(4), § 3(26), 1885 Wis. Sess. Laws 110, 126 (Kaukauna); Act of Mar. 27, 1885, ch. 159(5), § 3(44), 1885 Wis. Sess. Laws 733, 753 (Shawano); Act of Apr. 2, 1885, ch. 227(5), § 3(50), 1885 Wis. Sess. Laws 1085, 1109 (Whitewater); Act of Mar. 24, 1887, ch. 124, tit. 4, § 2(56), 1887 Wis. Sess. Laws 310, 336 (Sheboygan); Act of Apr. 11, 1887, ch. 409(4), § 36(53), 1887 Wis. Sess. Laws 1284, 1308 (Clintonville); Act of Mar. 29, 1887, ch. 162(4), § 3(36), 1887 Wis. Sess. Laws 728, 754 (La Crosse); Act of Apr. 11, 1887, ch. 409(4), § 36(53), 1887 Wis. Sess. Laws 1284, 1308 (Berlin); Act of Mar. 30, 1891, ch. 123(5), § 2(51), 1891 Wis. Sess. Laws 675, 699–700 (Menasha); Act of Mar. 11, 1891, ch. 23(6), § 3(28), 1891 Wis. Sess. Laws 43, 61 (Sparta); Act of Mar. 12, 1891, ch. 40, tit. 4, § 28(60), 1891 Wis. Sess. Laws 160, 186 (Racine).

[801] Act of Mar. 4, 1882, ch. 81, § 1, 1882 Wyo. Sess. Laws 174, 174.; Act of Jan. 31, 1884, ch. 67, § 1, 1884 Wyo. Sess. Laws 114, 114.

instrument manufactured or sold for the purpose of defense."[802] Section 1 forbade anyone to "carry concealed on or about his person, saddle, or saddle bags" the aforesaid arms, which do not include long guns.[803] Section 2 made it illegal "to carry upon or about his person any pistol, revolver, bowie knife, dirk knife, loaded cane, billy, metal knuckles, or any other offensive or defensive weapon."[804] Unlike section 1, section 2 applied to carry in general, not just concealed carry.[805] Whereas the residual term of section 1 was anything "manufactured or sold for the purpose of defense," the section 2 residual was "any other offensive or defensive weapon."[806] What the difference was is unclear. Section 3 banned sales of the aforesaid items to minors.[807] The statute affirmed the legality of carrying long guns for certain purposes, such as hunting or repair.[808]

Iowa (1887)

There was no state legislation on Bowie knives in the nineteenth century, notwithstanding California Attorney General's claim in a brief that "Iowa banned their possession, along with the possession of other 'dangerous or deadly weapon[s],' in 1887."[809]

Michigan (1891)

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[802] THE STATUTES OF OKLAHOMA 1890, at 495–96 (Guthrie, State Capital Prtg. Co. 1891) (published at ch. 25, art. 47, § 2). THE STATUTES OF OKLAHOMA, 1893, at 503–04 (Guthrie, State Capital Prtg. Co. 1893) (published at ch. 25, art. 45, § 2).

[803] STATUTES OF OKLAHOMA 1890, at 495–96 (published at ch. 25, art. 47, § 1); STATUTES OF OKLAHOMA, 1893, at 503–04 (published at ch. 25, art. 45, § 1).

[804] STATUTES OF OKLAHOMA 1890, at 495–96 (published at ch. 25, art. 47, § 2); STATUTES OF OKLAHOMA, 1893, at 503–04 (published at ch. 25, art. 45, § 2).

[805] *See* STATUTES OF OKLAHOMA 1890, at 495–96 (published at ch. 25, art. 47, § 2); STATUTES OF OKLAHOMA, 1893, at 503–04 (published at ch. 25, art. 45, § 2).

[806] STATUTES OF OKLAHOMA 1890, at 495–96 (published at ch. 25, art. 47, §§ 1–2); STATUTES OF OKLAHOMA, 1893, at 503–04 (published at ch. 25, art. 45, §§ 1–2).

[807] STATUTES OF OKLAHOMA 1890, at 495–96 (published at ch. 25, art. 47, § 3); STATUTES OF OKLAHOMA, 1893, at 503–04 (published at ch. 25, art. 45, § 3).

[808] *See* STATUTES OF OKLAHOMA 1890, at 495–96 (published at ch. 25, art. 47, § 5); STATUTES OF OKLAHOMA, 1893, at 503–04 (published at ch. 25, art. 45, § 5).

[809] Defendant's Supplemental Brief in Response to the Court's Order of September 26, 2022 at 41–42, Duncan v. Bonta, No. 17-cv-1017-BEN-JLB, 2023 U.S. Dist. LEXIS 169577 (S.D. Cal. Nov. 10, 2022). The brief's cite is Declaration of Robert Spitzer, p. 24, electronic page no. 163 of 230, available at https://michellawyers.com/wp-content/uploads/2022/11/2022-11-10-Dec-of-Robert-Spitzer-ISO-Defendants-Supp-Brief-re-Bruen.pdf [https://perma.cc/Z6UB-47AC] (last visited Apr. 10, 2024) [hereinafter Defendant's Supplemental Brief]. The Declaration reproduces without comment an 1887 Council Bluffs municipal ordinance making it illegal to "carry under his clothes or concealed about his person, or found in his possession, any pistol or firearms" and many other weapons, including Bowie knives. The California Attorney General reads "or found in his possession" as a ban on possession in the home. In context, the more appropriate reading would be for concealed carrying that did not involve wearing the weapon, for example, carrying in a bag. If the Council Bluffs government really meant something as monumental as outlawing all firearms in the home, the ordinance would be a very oblique way of saying so.

A charter revision allowed the town of Saginaw to make and enforce laws against concealed carry of "any pistol, revolver, bowie knife, dirk, slung shot, billie, sand bag [a small bag with a handle; used as an impact weapon], false knuckles [same as metal knuckles, but could be made of something else], or other dangerous weapon."[810]

Vermont (1892)

No possession "while a member of and in attendance upon any school," of "any firearms, dirk knife, bowie knife, dagger or other dangerous or deadly weapon."[811]

Rhode Island (1893)

No concealed carry of "any dirk, bowie knife, butcher knife, dagger, razor, sword in cane, air gun, billy, brass or metal knuckles, slung shot, pistol or fire arm of any description, or other weapon of like kind of description."[812]

Local ordinances on Bowie knives

As described above, state legislative enactments of municipal charters sometimes authorized a municipality to regulate Bowie knives, usually by taxation of dealers or owners, or by prohibition of concealed carry. Additionally, there were Bowie knife laws that were simply enacted by municipalities, without any need for state action. Here is a list of such laws, taken from the Declaration of Robert Spitzer as an expert supporting a California arms prohibition statute.[813] The cities are in alphabetical order by state. The year is often the year of publication of the municipal code, and not necessarily the date of enactment. All the ordinances covered Bowie knives and various other weapons.

Against concealed carry: Fresno, California (1896); Georgetown, Colorado (1877); Boise City, Idaho (1894); Danville, Illinois (1883); Sioux City, Iowa (1882); Leavenworth, Kansas (1863); Saint Paul, Minnesota (1871); Fairfield, Nebraska (1899); Jersey City, New Jersey (1871) (and no carrying of "any sword in a cane, or air-gun"); Memphis, Tennessee (1863).[814]

No carrying: Nashville, Tennessee (1881); Provo City, Utah Territory (1877).[815]

Against hostile display: Independence, Kansas (1887).[816]

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[810] Act of Mar. 28, 1891, No. 257, tit. 11, § 15, 1891 Mich. Pub. Acts 388, 409; Act of June 2, 1897, No. 465, tit. 11, § 15, 1897 Mich. Pub. Acts 962, 1030. Sand bags are discussed *infra* Part VI.B.3, knuckles in Part VI.C.1.

[811] Act of Nov. 19, 1892, No. 85, § 2, 1891–1892 Vt. Acts & Resolves 95, 95 (1892).

[812] Act of May 3, 1893, ch. 1180, § 1, 1893 R.I. Pub. Laws 231, 231.

[813] Defendant's Supplemental Brief, *supra* note 809.

[814] *Id.* at 10, 12–13, 19, 21, 23–25, 35–36, 43, 45, 66.

[815] *Id.* at 68, 70.

[816] *Id.* at 26.

Against carry with intent to do bodily harm: Syracuse, New York (1885).[817]

Extra punishment if carried by someone who breached the peace or attempted to do so: Little Rock, Arkansas (1871);[818] Denver, Colorado (1886).[819]

No sales or loans to minors by a "junk-shop keeper or pawnbroker. . . without the written consent of the parent or guardian of such minor." Fresno, California (1896).[820]

VI. OTHER WEAPONS

This Part covers restrictions on arms other than firearms or Bowie knives. Most of these restrictions were enacted in statutes that also covered Bowie knives, so the statutes were quoted in Part V. Here in Part VI, we will repeat or cross-reference the citations, but rarely quote at length.

The arms covered in this Article are in two broad classes: missile weapons and impact weapons. Missile weapons send a projectile downrange. Firearms, bows, and cannons are missile weapons. Impact weapons strike an adversary while being held by the user. Knives and swords are impact weapons, as are clubs, blackjacks, and slungshots.[821]

Section A covers sharp weapons that are not Bowie knives. The main categories are "daggers and dirks." Also included in Section A are sword canes, spears, swords, butcher knives, razors, and swords.

Section B addresses flexible impact weapons. That is, handheld weapons with a heavy tip and a flexible body, meant to be swung. The most important of these, in terms of number of laws enacted, is the slungshot. Section B also covers colts, blackjacks, sand clubs, sand bags, and billies. Additionally, Section B addresses slingshots; although they are missile weapons, they are sometimes confused with slungshots, including perhaps in statutes.

Section C covers rigid impact weapons. These are brass knuckles, knuckles made from other materials, and loaded canes (hollow canes filled with lead).

Section D deals with cannons.

A. Daggers, Dirks, and Other Sharp Weapons

1. Daggers and dirks

Dirks are fighting knives. They can come in a variety of sizes and shapes. We will begin with a list of every Bowie knife statute that also included dirks. If daggers were included in a statute, along with Bowie knives and dirks, a parenthetical so notes.

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[817] *Id.* at 51.

[818] *Id.* at 7.

[819] *Id.* at 13.

[820] *Id.* at 10.

[821] Some weapons can cross over from one category to another. A firearm can be used as a club, and a knife can be thrown as a missile. A spear can be thrown as a missile or held while striking in close combat.

As previously described, an 1837 Georgia ban on sale and open carry of dirks was held to violate the Second Amendment, whereas a ban on concealed carry was upheld.[822] But a similar law was enacted in Arkansas in 1881.[823] Other laws were:

No possession by "any slave." North Carolina (1847);[824] New Mexico Territory (1859).[825]

No possession by black people; licenses for black people. Mississippi (1865);[826] Florida (1865).[827]

Extra punishment for misuse or carrying with malign intent. Mississippi (1837);[828] California (1850),[829] (1855);[830] Indiana (1859) (also daggers);[831] Nevada (1861);[832] Idaho (1864);[833] Montana (1864, 1885); [834] Arizona Territory (1867),[835] (1875),[836] (1883);[837] Wyoming Territory (1882) (also daggers);[838] D.C. (1892) (also daggers).[839]

No concealed carry. Kentucky (1813) (included any "large knife," but did not expressly list Bowies);[840] Louisiana (1813) (included any "knife," but did not expressly list Bowies) (also daggers),[841] (1855),[842] (1898);[843] Arkansas (1837)

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822 Nunn v. State, 1 Ga. 243 (1846).

823 Act of Apr. 1, 1881, No. 96, §§ 1, 3, 1881 Ark. Acts 191, 191–92.

824 Act of Jan. 18, 1847, ch. 42, 1846–1847 N.C. Sess. Laws 107, 107 (1847).

825 Act of Feb. 3, 1859, ch. 26, 1858–1859 N.M. Laws 64, 68 (1859).

826 Act of Nov. 29, 1865, ch. 23, §§ 1, 3, 1865 Miss. Laws 165, 165–66.

827 Act of Jan. 8, 1866, ch. 1466, § 12, 1865 Fla. Laws 23, 25 (1866).

828 Act of May 13, 1837, § 9, 1837 Miss. Laws 288, 292.

829 Act of Apr. 16, 1850, ch. 99, § 127, 1850 Cal. Stat. 229, 245.

830 Act of May 5, 1855, ch. 199, 1855 Cal. Stat. 268, 268–69; *see also* Act of Apr. 27, 1855, ch. 127, § 2, 1855 Cal. Stat. 152, 152–53 (requiring surviving duelist who used a "rifle, shot-gun, pistol, bowie-knife, dirk, small-sword, back-sword or other dangerous weapon" in a duel to pay the deceased's debts and also pay damages to the deceased's family).

831 Act of Feb. 23, 1859, ch. 78, 1859 Ind. Acts 129, 129.

832 Act of Nov. 26, 1861, ch. 28, § 33, 1861 Nev. Stat. 56, 61.

833 Act of Dec. 21, 1864, ch. 3, § 35, 1864 Idaho Sess. Laws 298, 303–04.

834 ACTS, RESOLUTIONS AND MEMORIALS, OF THE TERRITORY OF MONTANA, PASSED BY THE FIRST LEGISLATIVE ASSEMBLY, CONVENED AT BANNACK, DECEMBER 12, 1864, at 183 (Virginia City, D. W. Tilton & Co. 1866) (published at ch. 4, § 39); Act of Mar. 12, 1885, § 1, 1885 Mont. Laws 74, 74–75.

835 Act of Sept. 30, 1867, § 1, 1867 Ariz. Sess. Laws 21, 21–22.

836 Act of Feb. 12, 1875, § 1, 1875 Ariz. Sess. Laws 101, 101.

837 Act of Feb. 24, 1883, No. 36, § 2, 1883 Ariz. Sess. Laws 65, 65–66.

838 Act of Mar. 4, 1882, ch. 81, 1882 Wyo. Sess. Laws 174, 174.

839 Act of July 13, 1892, ch. 159, 1892 Stat. 116, 116–17 (1892).

840 Act of Feb 3, 1813, ch. 89, § 1, 1812 Ky. Acts 100, 100–01.

841 Act of Mar. 25, 1813, § 1, 1812 La. Acts 172, 172 (1813).

842 Act of Mar. 14, 1855, No. 120, § 115, 1855 La. Acts 130, 148.

843 Act of July 13, 1898, No. 112, 1898 La. Acts. 158, 159.

("unless upon a journey");[844] Alabama (1839);[845] Virginia (1838) (if "habitually") (1881);[846] Florida (1847),[847] (1893);[848] Ohio (1859);[849] Indiana (1820),[850] (1859),[851] (1881)[852] (Bowies and daggers included in 1859 and 1881); Montana Territory (1865) (in towns),[853] (1883) (in towns) (also daggers);[854] West Virginia (1868) ("habitually");[855] Maryland (1872, Annapolis),[856] (1886),[857] (1890, Baltimore),[858] (1894, unless reasonable cause);[859] D.C. (1871), (1892) (without license) (both also for daggers);[860] Georgia (1852),[861] (1879);[862] Nebraska (1873),[863] (1899);[864] Missouri (1874) (certain locations) (also daggers);[865] North Carolina (1877) (for one county), (1879) (statewide) (both also for daggers);[866] Virginia (1884);[867] Arizona (1883) (by persons 10–16 in towns), (1887) (everyone in towns), (1891)

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844 REVISED STATUTES OF THE STATE OF ARKANSAS, ADOPTED AT THE OCTOBER SESSION OF THE GENERAL ASSEMBLY OF SAID STATE, A. D. 1837, at 280 (William McK. Ball & Sam C. Roane, eds., 1838) (published at ch. 44, div. 8, art. 1, § 13). This law did not explicitly mention Bowie knives but applied to any "butcher or large knife." *Id.*

845 Act of Feb. 1, 1839, No. 77, § 1, 1838 Ala. Laws 67, 67 (1839).

846 Act of Feb. 2, 1838, ch. 101, § 1, 1838 Va. Acts 76, 76; Act of Mar. 6, 1882, ch. 219, 1881-82 Va. Acts 233, 233 (1882).

847 Act of Jan. 6, 1847, ch. 75, § 3 1846 Fla. Laws 20, 21 (1847).

848 Act of June 2, 1893, ch. 4124, § 1, 1893 Fla. Laws 51, 51.

849 Act of Mar. 18, 1859, § 1, 1859 Ohio Laws 56, 56.

850 Act of Jan. 14, 1820, ch. 23, 1819 Ind. Acts 39, 39 (1820).

851 Act of Feb. 23, 1859, ch. 78, 1859 Ind. Acts 129, 129.

852 Act of Apr. 14, 1881, ch. 37, § 82, 1881 Ind. Acts 174, 191.

853 Act of Jan. 11, 1865, § 1, 1864 Mont. Laws 355, 355 (1865).

854 Act of Mar. 5, 1883, *reprinted in* COMPLIED STATUTES OF MONTANA: ENACTED AT THE REGULAR SESSION OF THE FIFTEENTH LEGISLATIVE ASSEMBLY OF MONTANA, EMBRACING THE LAWS OF A GENERAL AND PERMANENT NATURE, IN FORCE AT THE EXPIRATION OF THE FIFTEENTH REGULAR SESSION OF THE LEGISLATIVE ASSEMBLY at 513 (Helena, J. Pulb'g Co. 1888) (published at ch. 4, § 66).

855 THE CODE OF WEST VIRGINIA COMPRISING LEGISLATION TO THE YEAR 1870, at 691, 692 (Wheeling, John Frew 1868) (published at ch. 148, § 7).

856 Act of Feb. 26, 1872, ch. 42, § 1, 1872 Md. Laws 56, 56–57.

857 Act of Apr. 7, 1886, ch. 375, 1886 Md. Laws 602, 602.

858 Act of Apr. 8, 1890, ch. 534, § 1, 1890 Md. Laws 606, 606–07.

859 Act of Apr. 6, 1894, ch. 547, § 1, 1894 Md. Laws 833, 834.

860 Act of Aug. 10, 1871, § 1, *reprinted in* 1 THE COMPILED STATUTES IN FORCE IN THE DISTRICT OF COLUMBIA, INCLUDING THE ACTS OF THE SECOND SESSION OF THE FIFTIETH CONGRESS, 1887–89, at 178 (Washington, Gov't Prtg. Off. 1894) (published at ch. 16., § 119); *see also* Act of July 13, 1892, ch. 159, § 2, 27 Stat. 116, 116–117.

861 Act of Jan. 12, 1852, No. 165, § 2, 1851–1852 Ga. Laws 269, 269 (1852).

862 Act of Oct. 14, 1879, No. 266, 1878–1879 Ga. Laws 64, 64 (1879).

863 Act of Mar. 8, 1873, ch. 58, § 25, 1873 Neb. Laws 719, 724–725.

864 Act of Mar. 30, 1899, ch. 94, § 1, 1899 Neb. Laws 349, 349.

865 Act of Mar. 26, 1874, § 1, 1874 Mo. Laws 43, 43.

866 Act of Feb. 16, 1877, ch. 104, 1876–1877 N.C. Sess. Laws 162, 162–63 (1877); Act of Mar. 5, 1879, ch. 127, § 1, 1879 N.C. Sess. Laws 231, 231.

867 Act of Feb. 22, 1884, ch. 148, 1883–1884 Va. Acts 180, 180 (1884).

(generally, adding daggers);[868] Maryland (1890, Baltimore),[869] (1894);[870] Rhode Island (1893) (also daggers);[871] Mississippi (1896);[872] Michigan (Saginaw, 1897).[873]

No open or concealed carry in certain locations. Tennessee (1869) (horse races, fairs, public assemblies, elections);[874] Georgia (1870) (churches, elections, courthouses, public gatherings);[875] Idaho (1889) ("any city, town or village") (Bowies not included);[876] Vermont (1892) (schools) (also daggers).[877]

No open carry with bad intent. Maryland (1890, Baltimore),[878] (1894).[879]

No carry while intoxicated. Missouri (1883) (also daggers).[880]

No carry, with a few exceptions. Texas (1871) (also daggers);[881] Arkansas (1875),[882] (1881);[883] West Virginia (1882);[884] New Mexico Territory (1869) ("within any of the settlements") (also daggers),[885] (1887) (also "all kinds of daggers" plus "poinards," which are a type of small, slim dagger);[886] Arizona Territory (1889) (in towns) (also daggers);[887] Oklahoma Territory (1890),[888] (1893) (also daggers).[889]

No carry by minors. Arizona Territory (1883, ages 10–16, in towns).[890]

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[868] Act of Feb. 8, 1883, No. 19, § 1, 1883 Ariz. Sess. 21, 21–22; REVISED STATUTES OF ARIZONA 726 (Prescott, Prescott Courier Print 1887) (published at tit. 11, § 662); Act of Mar. 6, 1891, No. 2, § 1, 1893 Ariz. Sess. Laws 3, 3 (1891) (as published by the Seventeenth Legislative Assembly of the Territory of Arizona in 1893).

[869] Act of Apr. 8, 1890, ch. 534, § 1, 1890 Md. Laws 606, 606–07.

[870] Act of Apr. 6, 1894, ch. 547, 1894 Md. Laws 833, 834.

[871] Act of May 3, 1893, ch. 1180, § 1, 1893 R.I. Pub. Laws 231, 231–32.

[872] Act of Mar. 11, 1896, ch. 104, 1896 Miss. Laws 109, 109–10.

[873] Act of June 2, 1897, No. 465, tit. 11, § 15, 1897 Mich. Pub. Acts 962, 1030.

[874] Act of Dec. 1, 1869, ch. 22, § 2, 1869–1870 Tenn. Pub. Acts 23, 23–24 (1869).

[875] Act of Oct. 18, 1870, No. 285, 1870 Ga. Laws 421, 421.

[876] Act of Feb. 4, 1889, § 1, 1888 Idaho Sess. Laws 23, 23 (1889).

[877] Act of Nov. 19, 1892, No. 85, § 2, 1891–1892 Vt. Acts & Resolves 95, 95 (1892).

[878] Act of Apr. 8, 1890, ch. 534, § 1, 1890 Md. Laws 606, 606–07.

[879] Act of Apr. 6, 1894, ch. 547, § 1, 1894 Md. Laws 833, 834.

[880] Act of Mar. 5, 1883, 1883 Mo. Laws 76, 76.

[881] Act of Apr. 12, 1871, ch. 34, 1871 Tex. Gen. Laws 25, 25–26.

[882] Act of Feb. 16, 1875, § 1, 1874–1875 Ark. Acts 156, 156–57 (1875).

[883] Act of Apr. 1, 1881, No. 96, §§ 1–3, 1881 Ark. Acts 191, 191–92.

[884] Act of Mar. 24, 1882, ch. 135, § 1, 1882 W. Va. Acts 421, 421–22.

[885] Act of Jan 29, 1869, ch. 32, §§ 1–2, 1868–1869 N.M. Laws 72, 72–73 (1869).

[886] Act of Feb. 18, 1887, ch. 30, § 8, 1886 N.M. Laws 55, 57 (1887).

[887] Act of Mar. 18, 1889, No. 13, §§ 1, 6, 1889 Ariz. Sess. Laws 16, 16–17.

[888] *See* THE STATUTES OF OKLAHOMA 1890, at 495–96 (Guthrie, State Capital Prtg. Co. 1891) (published at ch. 25, art. 47).

[889] *See* THE STATUTES OF OKLAHOMA, 1893, at 503–04 (Guthrie, State Capital Prtg. Co. 1893) (published at ch. 25, art. 45).

[890] Act of Feb. 24, 1883, No. 36, § 3, 1883 Ariz. Sess. Laws 65, 66.

Specific property or vendor taxes. Florida (1838, 1889, 1891, 1893, 18-95);[891] North Carolina (1851, 1857, 1859, 1866);[892] Alabama (1875, 1876, 1883, 1884, 1899);[893] Mississippi (1857, 1871, 1876, 1878, 1880, 1892, 1894);[894] Virginia (1875, 1876, 1882, 1884, 1889, 1893);[895] Georgia (1882, 1884, 1886, 1888, 1890, 1892, 1894, 1896, 1898);[896] Kentucky (1892).[897]

Authorizing certain municipalities to license and tax vendors. North Carolina (1873–99);[898] Alabama (1879–99).[899]

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891 Act of Feb. 10, 1838, No. 24, § 1, 1838 Fla. Laws 36, 36; Act of June 3, 1889, ch. 3847, § 1(13), 1889 Fla. Laws 1, 6; Act of June 10, 1891, ch. 4010, § 9(13), 1891 Fla. Laws 1, 9; Act of June 2, 1893, ch. 4115, § 9(14) 1893 Fla. Laws 3, 13; Act of June 1, 1895, ch. 4322, § 9(14), 1895 Fla. Laws 3, 14.

892 Act of Jan. 23, 1851, ch. 121, § 5, 1850–1851 N.C. Sess. Laws 241, 243 (1851); Act of Feb. 2, 1857, ch. 34, §§ 1(23)(4) 1856–1857 N.C. Sess. Laws 28, 33–34 (1857); Act of Feb.16, 1859, ch. 25, §§ 1(27)(15), 1858–1859 N.C. Sess. Laws 28, 35-36 (1859); Act of Mar. 12, 1866, ch. 21, § 1(11), 1866 N.C. Sess. Laws 30, 33–34.

893 Act of Mar. 19, 1875, § 5, 1874–1875 Ala. Laws 3, 6 (1875); Act of Mar. 6, 1876, No. 1, § 7(15), 1875–1876 Ala. Laws 43, 82 (1876); Act of Feb. 23, 1883, No. 61, § 5(5), 1882–1883 Ala. Laws 67, 69–71 (1883); Act of Dec. 12, 1884, No. 1, § 5(5) 1884–1885 Ala. Laws 3, 5–6 (1884); Act of Feb. 23, 1899, No. 903, § 16(66–67), 1898–1899 Ala. Laws 164, 190 (1899).

894 Act of Feb. 2, 1857, ch. 1, § 3, art. 10, 1856–1857 Miss. Laws 33, 36 (1857); Act of May 13, 1871, ch. 33, art. 3, §1, 1871 Miss. Laws 816, 819-20; Act of Apr. 15, 1876, ch. 104, §§ 7, 13, 1876 Miss. Laws 129, 131, 34; Act of Mar. 5, 1878, ch. 3, §§ 8, 12 1878 Miss. Laws 23, 27, 28–29; Act of March 5, 1880, ch. 6, § 7, 1880 Miss. Laws 19, 21; Act of April 2, 1892, ch. 74, §§ 8, 18, 1892 Miss. Laws 190, 193–94, 198; Act of Feb. 10, 1894, ch. 32, § 2, 1894 Miss. Laws 27, 27.

895 Act of Mar. 31, 1875, ch. 239, §§ 5–6,1874–1875 Va. Acts 281, 281–283 (1875); Act of Mar. 27, 1876, ch. 162, § 6(18), 1875–1876 Va. Acts 162, 163–64 (1876); Act of Apr. 22, 1882, ch. 119, § 6(18), 1881–1882 Va. Acts 497, 498–99 (1882); Act of Mar. 15, 1884, ch. 450, § 6(18), 1883–1884 Va. Acts 561, 562–63 (1884); Act of Jan 16, 1890, ch. 19, § 1(18), 1889–1890 Va. Acts 18, 18–19 (1890); Act of Mar. 8, 1894, ch. 797, § 1(18), 1893–1894 Va. Acts 930, 930–31 (1894).

896 Act of Dec. 9, 1882, tit. 2, No. 18, § 2(18), 1882–1883 Ga. Laws 34, 37 (1882); Act of Dec. 22, 1884, tit. 2, No. 52, §2(18),1884–1885 Ga. Laws 20, 23 (1884); Act of Dec. 22, 1886, tit. 2, § 2(18), 1886 Ga. Laws 14, 17; Act of Dec. 26, 1888, tit. 2, No. 123, § 2(17), 1888 Ga. Laws 19, 22; Act of Dec. 26, 1890, tit. 2, No. 131, § 2(16), 1890-1891 Ga. Laws 35, 38 (1890); Act of Dec. 23, 1892, tit. 2, No. 133, § 2(16), 1892 Ga. Laws 22, 25; Act of Dec. 18, 1894, tit. 2, No. 151, § 2(16), 1894 Ga. Laws 18, 21; Act of Dec. 24, 1896, tit. 2, No. 132, § 2(16), 1896 Ga. Laws 21, 25; Act of Dec. 22, 1898, tit. 2, No. 150, § 2(16), 1898 Ga. Laws 21, 25.

897 Act of November 11, 1892, ch. 103, art. 10, subdiv. 4, § 35, 1891–1892 Ky. Acts 277, 345–46 (1892).

898 *See, e.g.*, Act of Dec. 11, 1873, ch. 7, § 3, 1873–1874 N.C. Sess. Laws 277, 278–79 (1873); Act of Mar. 8, 1883, ch. 111, § 36(9), 1883 N.C. Sess. Laws 853, 871–72; Act of Mar. 11, 1885, ch. 127, § 14(12), 1885 N.C. Sess. Laws 1088, 1096–97; Act of Mar. 7, 1887, ch. 101, § 45, 1887 N.C. Sess. Laws 978, 987–88; Act of Mar. 11, 1889, ch. 183, § 27(40), 1889 N.C. Sess. Laws 828, 834–836; Act of Feb. 3, 1891, ch. 26, § 45, 1891 N.C. Sess. Laws 695, 705; Act of Feb. 25, 1891, ch. 101, § 48, 1891 N.C. Sess. Laws 891, 902; Act of Mar. 9, 1891, ch. 327, § 44, 1891 N.C. Sess. Laws 1413, 1423; Act of Mar. 13, 1895, ch. 352, § 55(8), 1895 N.C. Sess. Laws 588, 610–11; Act of Mar. 1, 1897, ch. 71, § 44, 1897 N.C. Sess. Laws 104, 115–16; Act of Mar. 9, 1897, ch. 130, § 44, 1897 N.C. Sess. Laws 226, 236–37; Act of Mar. 6, 1899, ch. 186, § 54, 1899 N.C. Sess. Laws 483, 502–03; Act of Mar. 6, 1899, ch. 352, § 25(14), 1899 N.C. Sess. Laws 958, 967–68; Act of Mar. 6, 1899, ch. 260, § 44, 1899 N.C. Sess. Laws 755, 766.

899 *See, e.g.*, Act of Feb. 13, 1879, No. 314, § 14, 1878–1879 Ala. Laws 434, 436–37 (1879); Act of Feb. 16, 1885, No. 314, § 17, 1884–1885 Ala. Laws 543, 551–52 (1885); Act of Feb. 28, 1889, No. 550, § 17, 1888–1889 Ala. Laws 957, 964–66 (1889); Act of Feb. 16, 1891, No. 357, § 1, 1890–1891 Ala. Laws 763, 763–64 (1891); Act of Feb. 18, 1891, No. 573, § 16, 1890–1891 Ala. Laws

Authorizing certain municipalities to tax possession or carry. North Carolina (1861–97).[900]

Authorizing certain municipalities to regulate or prohibit concealed carry. Illinois (1867) (also daggers);[901] Wisconsin (1874–91) (also daggers).[902]

Exemption from seizure for unpaid property taxes. Mississippi (1861).[903]

No transfers. Arkansas (1881).[904]

Restricting sales to minors. Tennessee (1856);[905] Kentucky (1860) (except parents or guardians);[906] Indiana (1875);[907] Georgia (1876);[908] Illinois (1881) (transfers only by father, guardian, employer);[909] West Virginia (1882);[910] Kansas (1883) (also banning possession by minors);[911] Missouri (1885) (parental cons-

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1304, 1317 (1891); Act of Feb. 7, 1893, No. 140, § 21, 1892–1893 Ala. Laws 272, 287–88, 292 (1893); Act of Feb. 18, 1895, No. 345, § 33, 1894–1895 Ala. Laws 593, 612, 616 (1895); Act of Feb. 18, 1895, No. 521, § 1, 1894–1895 Ala. Laws 1079, 1079–81 (1895); Act of Dec. 7, 1896, No. 62, § 1, 1896-1897 Ala. Laws 70, 71 (1896); Act of Feb. 18, 1899, No. 566, § 3, 1898-1899 Ala. Laws 1098, 1102 (1899); Act of Feb. 20, 1899, No. 549, § 20, 1898–1899 Ala. Laws 1033, 1046 (1899).

900 *See, e.g.*, Act of Feb. 20, 1861, ch. 180, § 1, 1860-1861 N.C. Sess. Laws 218, 218–20 (1861); Act of Mar. 10, 1866, ch. 7, § 19, 1866–1867 N.C. Sess. Laws 53, 63 (1866); Act of Apr. 12, 1869, ch. 123, § 18, 1868 N.C. Sess. Laws 192, 201–02 (1869); Act of March 3, 1871, ch. 32, § 13, 1870–1871 N.C. Sess. Laws 67, 73 (1871); Act of Mar. 1, 1887, ch. 58, § 22(50), 1887 N.C. Sess. Laws 878, 883–85; Act of Mar. 7, 1887, ch. 101, § 45, 1887 N.C. Sess. Laws 978, 987–88; Act of Mar. 11, 1889, ch. 183, § 27(40), 1889 N.C. Sess. Laws 828, 834–36; Act of Feb. 3, 1891, ch. 26, § 45, 1891 N.C. Sess. Laws 695, 705; Act of Feb. 25, 1891, ch. 101, § 48, 1891 N.C. Sess. Laws 891, 902; Act of Mar. 9, 1891, ch. 327, § 44, 1891 N.C. Sess. Laws 1413, 1423; Act of Mar. 3, 1897, ch. 90, § 1, 1897 N.C. Sess. Laws 154, 154.

901 Act of Mar. 7, 1867, ch. 6, § 1(38), 1867 Ill. Laws 639, 650.

902 *See, e.g.*, Act of Mar. 10, 1874, ch. 184(4), § 3(61), 1874 Wis. Sess. Laws 311, 334; Act of Mar. 5, 1875, ch. 262(4), § 3(49), 1875 Wis. Sess. Laws 450, 471; Act of Mar. 3, 1876, ch. 103(4), § 3(43), 1876 Wis. Sess. Laws 199, 218; Act of Mar. 11, 1876, ch. 313, tit. 4, § 3(59), 1876 Wis. Sess. Laws 715, 737; Act of Mar. 7, 1877, ch. 162(5), § 3(49), 1877 Wis. Sess. Laws 346, 367; Act of Mar. 9, 1878, ch. 112, tit. 5, § 3(55),1878 Wis. Sess. Laws 98, 119–20; Act of Mar. 13, 1882, ch. 92, § 29(47), 1882 Wis. Sess. Laws 292, 309; Act of Mar. 18, 1882, ch. 169(4), § 3(48), 1882 Wis. Sess. Laws 503, 524; Act of Mar. 30, 1883, ch. 183(6), § 3(56), 1883 Wis. Sess. Laws 687, 713; Act of Apr. 3, 1883, ch. 341, § 52(83), 1883 Wis. Sess. Laws 970, 990; Act of Apr. 4, 1883, ch. 351, § 32(45), 1883 Wis. Sess. Laws 1016, 1034; Act of Mar. 7, 1885, ch. 37(4), § 3(26), 1885 Wis. Sess. Laws 110, 126; Act of Mar. 27, 1885, ch. 159(5), § 3(44), 1885 Wis. Sess. Laws 733, 753; Act of Apr. 2, 1885, ch. 227(5), § 3(50), 1885 Wis. Sess. Laws 1085, 1109; Act of Mar. 24, 1887, ch. 124, tit. 4, § 2(56), 1887 Wis. Sess. Laws 310, 336; Act of Mar. 29, 1887, ch. 161(4), § 3(26), 1887 Wis. Sess. Laws 666, 684; Act of Mar. 29, 1887, ch. 162(4), § 3(36), 1887 Wis. Sess. Laws 728, 754; Act of Apr. 11, 1887, ch. 409(4), § 36(53), 1887 Wis. Sess. Laws 1284, 1308; Act of Mar. 30, 1891, ch. 123(5), § 2(51), 1891 Wis. Sess. Laws 675, 699–700; Act of Mar. 11, 1891, ch. 23(6), § 3(28), 1891 Wis. Sess. Laws 43, 61; Act of Mar. 12, 1891, ch. 40, tit. 4, § 28(60), 1891 Wis. Sess. Laws 160, 186.

903 Act of Dec. 19, 1861, ch. 125, 1861–1862 Miss. Laws 134, 134 (1861).

904 Act of Apr. 1, 1881, ch. 96, § 3, 1881 Ark. Acts 191, 192.

905 Act of Feb. 26, 1856, ch. 81, § 2, 1855–1856 Tenn. Pub. Acts 92, 92 (1856).

906 Act of Jan. 12, 1860, ch. 33, § 23, 1859–1860 Ky. Acts 241, 245 (1860).

907 Act of Feb. 27, 1875, ch. 40, 1875 Ind. Acts 59, 59.

908 Act of Feb. 17, 1876, No. 128, 1876 Ga. Laws 112, 112.

909 Act of June 1, 1881, § 2, 1881 Ill. Laws 71, 71.

910 Act of Mar. 29, 1882, ch. 135, 1882 W. Va. Acts 421, 421–22.

911 Act of Mar. 5, 1883, ch. 105, § 2, 1883 Kan. Sess. Laws 159, 159.

ent);[912] Florida (1881, 1889, 1891);[913] Oklahoma (1890),[914] (1893) (also daggers);[915] Virginia (1890);[916] Louisiana (1890);[917] D.C. (1892);[918] North Carolina (1893);[919] Texas (1897) (parental permission) (also daggers).[920]

The next list is Bowie knife statutes that also included daggers, but not dirks:

Free blacks need a license to carry or possess. North Carolina (1841).[921]

Free blacks may not carry or possess. North Carolina (1861).[922]

Extra punishment for misuse. Texas (1856).[923]

No concealed carry within any city, town, or village. New Mexico (1853);[924] Montana Territory (1865);[925] Colorado (territory laws: 1862, 1867) (state reenactments: 1876, 1881, 1885, 1891).[926]

No open or concealed carry in certain locations. Virginia (1878) (religious meetings).[927]

No open or concealed carry generally, with a few exceptions. New Mexico Territory (1860) ("Spanish dagger").[928]

The following laws about dirks or daggers were enacted in statutes that did not mention Bowie knives:

No carry. Harrisburg, Pennsylvania (1873) ("dirk-knife").[929]

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[912] Act of Mar. 20, 1885, 1885 Mo. Laws 139, 139–40.

[913] Act of Feb. 4, 1881, ch. 3285, 1881 Fla. Laws 87, 87; Act of June 3, 1889, No. 1, 1889 Fla. Laws 1, 6; Act of June 10, 1891, ch. 4010, § 13, 1891 Fla. Laws 1, 9.

[914] THE STATUTES OF OKLAHOMA 1890, at 495–96 (Guthrie, State Capital Prtg. Co. 1891) (published at ch. 25, art. 47, § 3).

[915] THE STATUTES OF OKLAHOMA, 1893, at 503–04 (Guthrie, State Capital Prtg. Co. 1893) (published at ch. 25, art. 45, § 3).

[916] Act of Feb. 28, 1890, ch. 152, 1889–1890 Va. Acts. 118, 118 (1890).

[917] Act of July 1, 1890, No. 46, § 1, 1890 La. Acts 39, 39.

[918] Act of July 13, 1892, ch. 159, § 5, 27 Stat. 116, 117 (1892).

[919] Act of Mar. 6, 1893, ch. 514, § 1, 1893 N.C. Sess. Laws 468, 468.

[920] Act of May 14, 1897, ch. 155, § 1, 1897 Tex. Gen. Laws 221, 221–22.

[921] Act of Jan. 11, 1841, ch. 30, 1840–1841 N.C. Sess. Laws 61, 61–62 (1841).

[922] Act of Feb. 23, 1861, ch. 34, §§ 1–2, 1860–1861 N.C. Sess. Laws 68, 68 (1861).

[923] TEX. PENAL CODE arts. 610–11 (1856), *reprinted in* 1 A DIGEST OF THE GENERAL STATUTE LAWS OF THE STATE OF TEXAS: TO WHICH ARE SUBJOINED THE REPEALED LAWS OF THE REPUBLIC AND STATE OF TEXAS 534 (Austin, John Marshall & Co. 1859).

[924] Act of Jan. 14, 1853, § 1, 1852 N. M. Laws 67, 67 (1853).

[925] Act of Jan. 11, 1865, § 1, 1864 Mont. Laws 355, 355 (1865).

[926] Act of Aug. 14, 1862, § 1, 1862 Colo. Sess. Laws 56, 56; Act of Jan. 10, 1867, ch. 22, § 149, 1867 Colo. Sess. Laws 191, 229 (reenacted in 1876, published at ch. 24, § 153, 1876 Colo. Sess. Laws 261, 304); Act of Feb. 1, 1881, § 1, 1881 Colo. Sess. Laws 74, 74; Act of Apr. 10, 1885, § 1, 1885 Colo. Sess. Laws 170, 170; Act of Apr. 10, 1891, § 1, 1891 Colo. Sess. Laws 129, 129.

[927] Act of Mar. 14, 1878, ch. 311(7), § 21, 1877 Va. Acts 301, 305.

[928] Act of Feb. 2, 1860, § 1, 1859–1860 N.M. Laws 94, 94 (1860).

[929] Act of Apr. 12, 1873, No. 810, 1873 Pa. Laws 735, 735–36.

No concealed carry. California (1863),[930] (1864)[931] (dirk); Nevada (1867) (dirk);[932] Wisconsin (unless with reasonable cause) (1872) (dirk or dagger);[933] South Carolina (1880) (dirk or dagger),[934] (1897) (dirk or dagger);[935] Oregon (1885) (dirk or dagger);[936] Michigan (1887) (dirk or dagger).[937]

Carrying concealed created a presumption that the weapon was being carried for use against another person. New York (1866) ("dirk or dagger (not contained as a blade of a pocket knife)").[938]

Sureties could be required for carry if the carrier had previously threatened to breach the peace. Oregon (1853) (dirk or dagger);[939] Wisconsin (1878) (dirk or dagger).[940]

No carry by minors. Nevada (1881) (under 18),[941] (1885) (under 21) (dirk).[942]

Minnesota in 1886 banned the possession and carry of knives, dirks, and daggers for anyone who had the intent to use the weapon against another.[943]

On the whole, whatever combination of "bowie knives," "dirks," and "daggers" that a statute mentioned by name may not have been of great practical importance. Statutes that mentioned at least two of the three often had a catchall that included other "dangerous weapons." So, if a statute said, "Bowie knives, dirks, and other dangerous weapons," the statute might be applied to carrying a dagger.

This possibility would be less likely in property tax or vendor tax statutes, which did not typically include catchalls. Thus, a person who owned a dagger might not be liable for a property tax applicable to "Bowie-knives and dirks."

2. Sword canes

Except as noted, all these sword cane laws also applied to Bowie knives.

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930 Act of Apr. 27, 1863, ch. 485, 1863 Cal. Stat. 748, 748.

931 Act of Mar. 1, 1864, ch. 128, 1863–64 Cal. Stat. 115, 115–16 (1864).

932 Act of Feb. 27, 1867, ch. 30, 1867 Nev. Stat. 66, 66.

933 Act of Feb. 14, 1872, ch. 7, 1872 Wis. Sess. Laws 17, 17–18.

934 Act of Dec. 24, 1880, No. 362, § 1, 1880 S.C. Acts 447, 447–48.

935 Act of Feb. 17, 1897, No. 251, § 1, 1897 S.C. Acts 423, 423.

936 Act of Feb. 18, 1885, § 1, 1885 Or. Laws 33, 33.

937 Act of May 31, 1887, No. 129, § 1, 1887 Mich. Pub. Acts 144, 144.

938 Act of Apr. 20, 1866, ch. 716, § 1, 1866 N.Y. Laws 1523, 1523.

939 Act of Dec. 22, 1853, 1853 Or. Laws 184, 220 (published at ch. 16, § 17).

940 Act of June 7, 1878, ch. 196, § 4834, *reprinted in* REVISED STATUTES OF THE STATE OF WISCONSIN, PASSED AT THE EXTRA SESSION OF THE LEGISLATURE COMMENCING JUNE 4, 1878, AND APPROVED JUNE 7, 1878, at 1121 (1878).

941 Act of Mar. 4, 1881, ch. 104, § 1, 1881 Nev. Stat. 143, 143–44.

942 Act of Mar. 2, 1885, ch. 51, § 1, 1885 Nev. Stat. 51, 51.

943 THE PENAL CODE OF THE STATE OF MINNESOTA TO TAKE EFFECT JANUARY 1, A.D. 1886: WITH NOTES OF DECISIONS FURNISHED BY THE ATTORNEY GENERAL 127 (Saint Paul, Pioneer Press Co. 1885) (published at § 334).

Sales ban. Georgia (1837).[944] Held to violate the Second Amendment. Arkansas (1881).[945]

No giving to "any slave or free person of color." Georgia (1860).[946]

No possession or carry by "any free negro." North Carolina (1861).[947]

No concealed carry. Georgia (1852);[948] D.C. (1871),[949] (1892, without license);[950] Arizona Territory (1891);[951] Oklahoma Territory (1890),[952] (1893);[953] Rhode Island (1893).[954]

No concealed carry except for travelers. Kentucky (1813);[955] Indiana (1820),[956] (1831),[957] (1843),[958] (1859),[959] (1881)[960] (Bowies added in 1859); Arkansas (1837),[961] (1875),[962] (1881);[963] Georgia (1852),[964] (1883),[965] (1898)[966] (Bowies in 1883 and 1898); California (1863),[967] (1864)[968] (Bowies in neither); Nevada (1867).[969]

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944 Act of Dec. 25, 1837, § 4, 1837 Ga. Laws 90, 90–91.

945 Act of Apr. 1, 1881, No. 96, §§ 1–3, 1881 Ark. Acts 191, 191–92. *See supra* note 798 and accompanying text for why we read the statute as a ban on spear canes and sword canes, not swords in general.

946 Act of Dec. 19, 1860, No. 64, § 1, 1860 Ga. Laws 56, 56.

947 Act of Feb. 23, 1861, ch. 34, § 1, 1860–1861 N.C. Sess. Laws 68, 68 (1861).

948 Act of Jan. 12, 1852, No. 165, 1851–1852 Ga. Laws 269, 269 (1852).

949 Act of Aug. 10, 1871, § 1, *reprinted in* 1 THE COMPILED STATUTES IN FORCE IN THE DISTRICT OF COLUMBIA, INCLUDING THE ACTS OF THE SECOND SESSION OF THE FIFTIETH CONGRESS, 1887–89, at 178 (Washington, Gov't Prtg. Off. 1894) (published at ch. 16., § 119).

950 Act of July 13, 1892, ch. 159, § 2, 27 Stat. 116, 116–17 (1892).

951 Act of Mar. 6, 1891, No. 2, § 1, 1893 Ariz. Sess. Laws 3, 3 (1891) (as published by the Seventeenth Legislative Assembly of the Territory of Arizona in 1893).

952 THE STATUTES OF OKLAHOMA 1890, at 495–96 (Guthrie, State Capital Prtg. Co. 1891) (published at ch. 25, art. 47, § 1).

953 THE STATUTES OF OKLAHOMA, 1893, at 503–04 (Guthrie, State Capital Prtg. Co. 1893) (published at ch. 25, art. 45, § 1).

954 Act of May 3, 1893, ch. 1180, § 1, 1893 R.I. Pub. Laws 231, 231–32.

955 Act of Feb. 3, 1813, ch. 89, 1812 Ky. Acts 100, 100–01 (1813).

956 Act of Jan. 14, 1820, ch. 23, 1819 Ind. Acts 39, 29 (1820).

957 Act of Feb. 10, 1831, ch. 26, § 58, 1831 Ind. Acts 180, 192.

958 Act of Feb. 11, 1843, ch. 53, § 107, 1843 Ind. Acts 959, 982.

959 Act of Feb. 23, 1859, ch. 78, 1859 Ind. Acts 129, 129.

960 Act of Apr. 14, 1881, ch. 37, §§ 81–82, 1881 Ind. Acts 174, 191.

961 REVISED STATUTES OF THE STATE OF ARKANSAS, ADOPTED AT THE OCTOBER SESSION OF THE GENERAL ASSEMBLY OF SAID STATE, A. D. 1837, at 280 (Boston, Weeks, Jordan & Co. 1838) (published at ch. 44, div. 8, art. 1, § 13).

962 Act of Feb. 16, 1875, § 1, 1874–1875 Ark. Acts 156, 156 (1875).

963 Act of Apr. 1, 1881, ch. 96, § 2, 1881 Ark. Acts 191, 191–92.

964 Act of Jan. 12, 1852, No. 165, 1851–1852 Ga. Laws 269, 269 (1852).

965 Act of Aug. 17, 1883, No. 93, § 1, 1882–1883 Ga. Laws 48, 48–49 (1883).

966 Act of Dec. 20, 1898, No. 106, 1898 Ga. Laws 60, 60.

967 Act of Apr. 27, 1863, ch. 485, 1863 Cal. Stat. 748, 748.

968 Act of Mar. 1, 1864, ch. 128, § 1, 1863–64 Cal. Stat. 115, 115–16 (1864).

969 Act of Feb. 27, 1867, ch. 30, § 1, 1867 Nev. Stat. 66, 66.

No carry in most circumstances. Tennessee (1821),[970] (1870),[971] (1879) ("sword cane" or "loaded cane");[972] Texas (1871),[973] (1887),[974] (1887 and 1889, including bowies);[975] Arkansas (1875),[976] (1881);[977] New Mexico Territory (1869) ("within any of the settlements of this Territory");[978] Arizona Territory (1889) ("within any settlement, town, village or city," unless with good cause) (including Bowies);[979] Idaho (1889) ("any city, town or village").[980]

Carrying concealed created a presumption that the weapon was being carried for use against another person. New York (1866).[981]

No brandishing in a threatening manner, except self-defense. California (1855);[982] Idaho (1870),[983] (1875).[984]

No transfers. Arkansas (1881) ("including Bowies").[985]

No transfer to minors. Georgia (1876) (including Bowies);[986] Oklahoma (1890),[987] (1893);[988] Texas (1897) (parental permission, including Bowies).[989]

Special taxation. Florida (1838);[990] Mississippi (1854),[991] (1857),[992] (1865) (including bowies),[993] (1871),[994] (1876),[995] (1878),[996] (1880),[997] (1892),[998] (1894),[999]

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970 Act of Oct. 19, 1821, ch. 13, 1821 Tenn. Pub. Acts 15, 15–16.

971 Act of Jan. 6, 1870, ch. 41, § 2, 1869–1870 Tenn. Pub. Acts 55, 55 (1870).

972 Act of Mar. 27, 1879, ch. 186, § 1, 1879 Tenn. Pub. Acts 231, 231.

973 Act of Apr. 12, 1871, ch. 34, §§ 1–3, 1871 Tex. Gen. Laws 25, 25–26.

974 Act of Feb. 24, 1887, ch. 9, 1887 Tex. Gen. Laws 6, 7.

975 Act of Jan. 30, 1889, ch. 37, 1889 Tex. Gen. Laws 33, 33.

976 Act of Feb. 16, 1875, § 1, 1874–1875 Ark. Acts 156, 156 (1875).

977 Act of Apr. 1, 1881, ch. 96, § 1, 1881 Ark. Acts 191, 191.

978 Act of Jan. 29, 1869, ch. 32, §§ 1–2 1868–1869 N.M. Laws 72, 72-73 (1869).

979 Act of Mar. 18, 1889, No. 13, §§ 1–2, 1889 Ariz. Sess. Laws 30, 30.

980 Act of Feb. 4, 1889, § 1, 1888 Idaho Sess. Laws 23, 23 (1889).

981 Act of Apr. 20, 1866, ch. 716, §§ 1–2, 1866 N.Y. Laws 1523, 1523.

982 Act of May 5, 1855, ch. 199, § 1, 1855 Cal. Stat. 268, 268.

983 Act of Dec. 23, 1870, § 40, 1870 Idaho Sess. Laws 21, 21.

984 Act of Jan. 14, 1875, ch. 4, § 40, 1874 Idaho Sess. Laws 319, 327 (1875).

985 Act of Apr. 14, 1881, ch. 37, § 82, 1881 Ind. Acts 174, 191.

986 Act of Feb. 17, 1876, No. 128, § 1, 1876 Ga. Laws 112, 112.

987 THE STATUTES OF OKLAHOMA 1890, at 495–96 (Guthrie, State Capital Prtg. Co. 1891) (published at ch. 25, art. 47, § 3).

988 THE STATUTES OF OKLAHOMA, 1893, at 503–04 (Guthrie, State Capital Prtg. Co. 1893) (published at ch. 25, art. 45, § 3).

989 Act of May 14, 1897, ch. 155, § 1, 1897 Tex. Gen. Laws 221, 221–22.

990 Act of Feb. 10, 1838, No. 24, § 1, 1838 Fla. Laws 36, 36.

991 Act of Mar. 2, 1854, ch. 1, § 1, 1854 Miss. Laws 49, 50.

992 Act of Feb. 2, 1857, ch. 1, § 3, art. 10, 1856–1857 Miss. Laws 33, 36 (1857).

993 Act of Nov. 29, 1865, ch. 23, §§ 1, 3, 1865 Miss. Laws 165, 165–66.

994 Act of May 13, 1871, ch. 33, art. 3, § 1, 1871 Miss. Laws 816, 819–20.

995 Act of Apr. 15, 1876, ch. 104, §§ 7, 13, 1876 Miss. Laws 129, 131, 134.

996 Act of Mar. 5, 1878, ch. 3, §§ 8, 12, 1878 Miss. Laws 23, 27, 28–29.

997 Act of Mar. 5, 1880, ch. 6, §§ 7, 14, 1880 Miss. Laws 19, 21, 24–25.

998 Act of Apr. 2, 1892, ch. 74, §§ 8, 18, 1892 Miss. Laws 60, 193–94, 198.

999 Act of Feb. 10, 1894, ch. 32, 1894 Miss. Laws 27, 27–28.

(1897);[1000] North Carolina (1859),[1001] (1866),[1002] (1887),[1003] (1889),[1004] (1897) (including Bowies).[1005]

Authorizing municipal regulation: North Carolina (1860–99) (various laws allowing taxes on sales, carrying, or possession).[1006]

3. Spears

Sales and concealed carry ban. Georgia (1837).[1007] Sales ban held to violate the Second Amendment; concealed carry ban upheld.[1008]

No carry. Texas (1871) (unless carried openly with reasonable cause);[1009] Arkansas (1875),[1010] (1881) ("spear in a cane");[1011] Arizona Territory (1889) ("within any settlement, town, village, or city," unless with reasonable cause).[1012]

No concealed carry. Georgia (1852);[1013] Arizona Territory (1891);[1014] Oklahoma Territory (1890),[1015] (1893).[1016]

No transfers. Arkansas (1881) ("spear in a cane").[1017]

No transfers to minors. Oklahoma Territory (1890),[1018] (1893).[1019]

4. Razors

During the nineteenth century, men shaved with straight-edge razors. These consisted of a single straight blade, sharpened on one edge. Often, the blade could fold into the handle, like a pocket-knife.

[1000] Act of May 18, 1897, ch. 10, § 1, 1897 Miss. Laws 10, 10.

[1001] Act of Feb. 16, 1859, ch. 25, § 27(15), 1858–1859 N.C. Sess. Laws 28, 35–36 (1859).

[1002] Act of Mar. 10, 1866, ch. 7, § 19(6), 1866–1867 N.C. Sess. Laws 53, 63 (1866).

[1003] Act of Mar. 1, 1887, ch. 58, § 22(58), 1887 N.C. Sess. Laws 878, 885.

[1004] Act of Mar. 11, 1889, ch. 183, § 27(40), 1889 N.C. Sess. Laws 828, 836.

[1005] Act of Mar. 3, 1897, ch. 90, § 1, 1897 N.C. Sess. Laws 154, 154.

[1006] *See supra* note 892 for a list of relevant session laws.

[1007] Act of Dec. 25, 1837, § 1, 1837 Ga. Laws 90, 90.

[1008] Nunn v. State, 1 Ga. 243, 251 (1846).

[1009] Act of Apr. 12, 1871, ch. 34, § 1, 1871 Tex. Gen. Laws 25, 25–26.

[1010] Act of Feb. 16, 1875, § 1, 1874–1875 Ark. Acts 156, 156 (1875).

[1011] Act of Apr. 1, 1881, ch. 96, § 1, 1881 Ark. Acts 191, 191.

[1012] Act of Mar. 18, 1889, No. 13, § 1, 1889 Ariz. Sess. Laws 30, 30.

[1013] Act of Jan. 12, 1852, No. 165, § 1, 1851–1852 Ga. Laws 269, 269 (1852).

[1014] Act of Mar. 6, 1891, No. 2, § 1, 1893 Ariz. Sess. Laws 3, 3 (1891) (as published by the Seventeenth Legislative Assembly of the Territory of Arizona in 1893).

[1015] THE STATUTES OF OKLAHOMA 1890, at 495–96 (Guthrie, State Capital Prtg. Co. 1891) (published at ch. 25, art. 47, § 1).

[1016] THE STATUTES OF OKLAHOMA, 1893, at 503–04 (Guthrie, State Capital Prtg. Co. 1893) (published at ch. 25, art. 45, § 1).

[1017] Act of Apr. 1, 1881, ch. 96, § 3, 1881 Ark. Acts 191, 191.

[1018] THE STATUTES OF OKLAHOMA 1890, at 495–96 (Guthrie, State Capital Prtg. Co. 1891) (published at ch. 25, art. 47, § 3).

[1019] THE STATUTES OF OKLAHOMA, 1893, at 503–04 (Guthrie, State Capital Prtg. Co. 1893) (published at ch. 25, art. 45, § 3).

No concealed carry. D.C. (1871), (1892) (without license) ("razors, razor blades");[1020] Maryland (1872, Annapolis),[1021] (1886),[1022] (1890, Baltimore),[1023] (1894, unless reasonable cause);[1024] Tennessee (1879);[1025] South Carolina (1880),[1026] (1897);[1027] Virginia (1882, 1884, 1896);[1028] Illinois (1881);[1029] North Carolina (1883);[1030] Michigan (1887);[1031] Colorado (1891);[1032] Rhode Island (1893).[1033]

No carry in most circumstances. Arkansas (1875),[1034] (1881);[1035] West Virginia (1882) (exception for peaceable citizen with good cause).[1036]

Carry limited to self-defense. Maryland (1874).[1037]

No open carry with bad intent. Maryland (1890, Baltimore),[1038] (1894).[1039]

West Virginia in the late nineteenth century prohibited carrying handguns and many other weapons (but not long guns) in public in most circumstances. In one case, a train passenger sued a railroad for facilitating his arrest for carrying a razor.[1040] The state supreme court explained:

> [t]he razor was undoubtedly added to this section on account of the proneness of the Americanized African to carry and use the same as a deadly weapon. To such the razor is what the machete is to the Cuban. It is his implement of livelihood in time of peace, and his weapon of destruction in time of war. This is matter of common report . . . . The excuse given by the plaintiff, that he was carrying

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1020 Act of Aug. 10, 1871, § 1, *reprinted in* 1 THE COMPILED STATUTES IN FORCE IN THE DISTRICT OF COLUMBIA, INCLUDING THE ACTS OF THE SECOND SESSION OF THE FIFTIETH CONGRESS, 1887–89, at 178 (Washington, Gov't Prtg. Off. 1894) (published at ch. 16., § 119); Act of July 13, 1892, ch. 159, 27 Stat. 116, 116–17 (1892).

1021 Act of Feb. 26, 1872, ch. 42, 1872 Md. Laws 56, 57.

1022 Act of Apr. 7, 1886, ch. 375, 1886 Md. Laws 602, 602.

1023 Act of Apr. 8, 1890, ch. 534, 1890 Md. Laws 606, 606–07.

1024 Act of Apr. 6, 1894, ch. 547, 1894 Md. Laws 833, 834.

1025 Act of Mar. 27, 1879, ch. 186, § 1, 1879 Tenn. Pub. Acts 231, 231.

1026 Act of Dec. 24, 1880, No. 362, § 1, 1880 S.C. Acts 447, 447–48.

1027 Act of Feb. 17, 1897, No. 251, § 1, 1897 S.C. Acts 423, 423.

1028 Act of Mar. 6, 1882, ch. 219, 1881–1882 Va. Acts 233, 233 (1882); Act of Feb. 22, 1884, ch. 148, 1883–1884 Va. Acts 180, 180 (1884); Act of Mar. 4, 1896, ch. 745, 1895–1896 Va. Acts 826, 826 (1896).

1029 Act of Apr. 16, 1881, § 4, 1881 Ill. Laws 71, 71.

1030 Act of Feb. 6, 1883, ch. 81, 1883 N.C. Sess. Laws 133, 133.

1031 Act of May 31, 1887, No. 129, § 1, 1887 Mich. Pub. Acts 144, 144.

1032 Act of Apr. 10, 1891, § 1, 1891 Colo. Sess. Laws 129, 129.

1033 Act of May 3, 1893, ch. 1180, § 1, 1893 R.I. Pub. Laws 231, 231–32.

1034 Act of Feb. 16, 1875, § 1, 1874–1875 Ark. Acts 156, 156 (1875).

1035 Act of Apr. 1, 1881, ch. 96, § 1, 1881 Ark. Acts 191, 191.

1036 Act of Mar. 24, 1882, ch. 135, § 1, 1882 W. Va. Acts 421, 421–22.

1037 Act of Apr. 6, 1874, ch. 250, § 1, 1874 Md. Laws 366, 366–67. The Maryland law forbade the carry of "any gun, pistol, dirk, dirk-knife, razor, billy or bludgeon" in Kent, Queen Anne's, or Montgomery counties. *Id.*

1038 Act of Apr. 8, 1890, ch. 534, 1890 Md. Laws 606, 606–07.

1039 Act of Apr. 6, 1894, ch. 547, 1894 Md. Laws 833, 834.

1040 Claiborne v. Chesapeake & Ohio Ry. Co., 46 W. Va. 263 (1899).

> such razor to shave himself while in the country, is not a legal one. Such an excuse might be given by every person thus carrying a razor, and, if allowed as sufficient, would render the law of no affect.[1041]

5. Butcher knives

No concealed carry. Mississippi (1896, 1898);[1042] Rhode Island (1893).[1043]

No carry in most circumstances. Arkansas (1837, 1875);[1044] New Mexico Territory (1869) ("within any of the settlements"),[1045] (1887).[1046]

No carry to public assemblies or gatherings. Texas (1870).[1047]

6. Swords

Banning carry. Idaho (1889) ("any city, town or village").[1048]

No concealed carry. Michigan (1887);[1049] Mississippi (1896),[1050] (1898).[1051]

Punishment for misuse. Massachusetts (1719),[1052] (1728) ("rapier, or small-sword, back-sword" used in a duel);[1053] New Jersey (1796) ("rapier, or small sword, back word" in a duel);[1054] Maine (1821) ("rapier, or small sword, back swo-rd" in a duel);[1055] Connecticut (1822) (sword or rapier used in a duel);[1056] Ohio Territory (1799) ("sword, rapier" in a duel);[1057] Missouri (1837) (use of a "sword" in a fight);[1058] California (1855) ("small-sword, back-sword" used in a duel or

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1041 *Id.* at 264.

1042 Act of Mar. 11, 1896, ch. 104, § 1, 1896 Miss. Laws 109, 109–10; Act of Feb. 11, 1898, ch. 68, § 1, 1898 Miss. Laws 86, 86.

1043 Act of May 3, 1893, ch. 1180, § 1, 1893 R.I. Pub. Laws 231, 231–32.

1044 REVISED STATUTES OF THE STATE OF ARKANSAS, ADOPTED AT THE OCTOBER SESSION OF THE GENERAL ASSEMBLY OF SAID STATE, A. D. 1837, at 280 (Boston, Weeks, Jordan & Co. 1838) (published at ch. 44, div. 8, art. 1, § 13).

1045 Act of Jan. 29, 1869, ch. 32, §§ 1–2, 1868–1869 N.M. Laws 72, 72–73 (1869).

1046 Act of Feb. 18, 1887, ch. 30, §§ 1, 8, 1886 N.M. Laws 55, 55, 57 (1887).

1047 Act of Aug. 12, 1870, ch. 46, § 1, 1870 Tex. Gen. Laws 63, 63.

1048 Act of Feb. 4, 1889, § 1, 1888–1889 Idaho Sess. Laws 23, 23 (1889).

1049 Act of May 31, 1887, No. 129, § 1, 1887 Mich. Pub. Acts 144, 144.

1050 Act of Mar. 11, 1896, ch. 104, § 1, 1896 Miss. Laws 109, 109–10.

1051 Act of Feb. 11, 1898, ch. 68, § 1, 1898 Miss. Laws 86, 86.

1052 Act of May 25, 1719, No. 299, 1719 Mass. Acts 347, 347.

1053 Act of May 29, 1728, ch. 5, 1726–1729 Mass. Acts 274, 275 (1728).

1054 Act of Mar. 18, 1796, *reprinted in* LAWS OF THE STATE OF NEW JERSEY 259 (Trenton, Joseph Justice 1821) (published at § 56).

1055 Act of Feb. 28, 1821, ch. 2, § 7, 1821 Me. Laws 51, 53.

1056 Act of Jan. 1, 1822, tit. 22, § 52, 1821 Conn. Pub. Acts 151, 161.

1057 Act of Dec. 2, 1799, *reprinted in* THE STATUTES OF OHIO AND OF THE NORTHWEST TERRITORY, ADOPTED OR ENACTED FROM 1788 TO 1833 INCLUSIVE 230 (Cincinnati, Corey & Fairbank 1833) (published at ch. 98, § 10).

1058 Act of May 13, 1837, § 9, 1837 Miss. Laws 288, 292.

threatening manner);[1059] Nevada (1861) (a homicide in a duel with a "small-sword, back-sword" is murder),[1060] (1873) (used in a threatening manner);[1061] Idaho (1864),[1062] (1864) ("smallsword, backsword" in a duel or threatening manner),[1063] (1870) (threatening manner);[1064] Montana Territory (1864, 1879, 1887) (a homicide in a duel with a "small sword, back-sword" is murder),[1065] (1885) (brandishing a "swo-rd");[1066] Georgia (1866) (using a sword in a duel);[1067] Louisiana (1870) ("duel with rapier or small sword, back sword").[1068]

Limiting carry by young people. Nevada (1881) (under 18),[1069] (1885) (under 21) ("sword in case").[1070]

No giving to "any slave." North Carolina (1847);[1071] New Mexico Territory (1859).[1072]

No possession by black people. Florida (1866).[1073]

B. Slungshots and Other Flexible Impact Weapons

This Section describes a variety of weapons that are obscure to the twenty-first century reader. Although there are many books describing the history of firearms and knives, there is only one book on the history of flexible impact weapons—Robert Escobar's *Saps, Blackjacks and Slungshots: A History of Forgotten*

1059 Act of May 5, 1855, ch. 199, 1855 Cal. Stat. 268, 268–69; *see also* Act of Apr. 27, 1855, ch. 127, § 2, 1855 Cal. Stat. 152, 152–53.

1060 Act of Nov. 26, 1861, ch. 28, § 35, 1861 Nev. Stat. 56, 61.

1061 Act of Mar. 4, 1873, ch. 62, § 1, 1873 Nev. Stat. 118, 118.

1062 Act of Feb. 1, 1864, ch. 3, §§ 35–36, 1863 Idaho Sess. Laws 435, 441 (1864).

1063 Act of Dec. 21, 1864, ch. 3, § 35, 1864 Idaho Sess. Laws 298, 303–04.

1064 Act of Dec. 23, 1870, § 40, 1870 Idaho Sess. Laws 21, 21.

1065 ACTS, RESOLUTIONS AND MEMORIALS, OF THE TERRITORY OF MONTANA, PASSED BY THE FIRST LEGISLATIVE ASSEMBLY, CONVENED AT BANNACK, DECEMBER 12, 1864, at 182 (Virginia City, D. W. Tilton & Co. 1866) (published at ch. 4, § 35); THE REVISED STATUTES OF MONTANA, ENACTED AT THE REGULAR SESSION OF THE TWELFTH LEGISLATIVE ASSEMBLY OF MONTANA 359 (Helena, Geo E. Boos 1881) (published at ch. 4, § 23); COMPILED STATUTES OF MONTANA, ENACTED AT THE REGULAR SESSION OF THE FIFTIETH LEGISLATIVE ASSEMBLY OF MONTANA 505 (Helena, J. Publ'g Co. 1888) (published at ch. 4, § 23).

1066 Act of Mar. 12, 1885, 1885 Mont. Laws 74, 74–75.

1067 THE CODE OF THE STATE OF GEORGIA 873 (Atlanta, Franklin Steam Prtg. House 1867).

1068 1 DIGEST OF THE STATUTES OF THE STATE OF LOUISIANA 387 (New Orleans, Republican Off. 1870).

1069 Act of Mar. 4, 1881, ch. 104, 1881 Nev. Stat. 143, 143–44.

1070 Act of Mar. 2, 1885, ch. 51, 1885 Nev. Stat. 51, 51.

1071 Act of Jan. 18, 1847, ch. 42, 1846–1847 N.C. Sess. Laws 107, 107 (1847).

1072 Act of Feb. 3, 1859, ch. 26, § 7, 1858–1859 N.M. Laws 64, 68 (1859).

1073 Act of Jan. 15, 1866, ch. 1466, §12, 1865 Fla. Laws 23, 25 (1866).

Weapons.[1074] "At their most basic, they are all small, concealable, flexible and weighted bludgeons," he explains.[1075]

It is extremely easy to make such a weapon at home. For example, take a sock and put some pocket change or a few tablespoons of sand or dirt in the toe.[1076] Grasp the sock by the other end. You now have a flexible impact weapon. You can swing it and strike whoever is attacking you.

With these weapons, a blow to the head could be fatal, but usually not. A blow anywhere else on the body was unlikely to be lethal.[1077] As Escobar explains:

> these objects were not designed to inflict maximum damage. You do not put a soft or semi-soft covering on a weapon to increase its destructive capabilities nor do you make its striking surface smooth when it could be angular. You also don't use loads like lead powder, shot or sand instead of solid metal . . . . [T]he lead pod inside most

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[1074] ROBERT ESCOBAR, SAPS, BLACKJACKS AND SLUNGSHOTS: A HISTORY OF FORGOTTEN WEAPONS (2018). "[T]ry to find a group of weapons used as broadly as ours was or for as long while having as little written about it." *Id.* at 241; *see also* MASSAD F. AYOOB, FUNDAMENTALS OF MODERN POLICE IMPACT WEAPONS (Police Bookshelf ed. 1996) (detailing proper techniques of defensive use).

[1075] ESCOBAR, *supra* note 1074, at 9.

[1076] Should you be alone in the outdoors and decide that you need a weapon, you can turn "your socks, or wrapped up shirt, into an impromptu sand-club" by adding dirt. *Id.* at 21. "Throw in a rock or two if they are handy and you're even more prepared." *Id.*

Some examples of improvised flexible impact weapons, for good or ill:

During the 1863 anti-draft riots in New York City, two criminals, apparently taking advantage of the fact that the police were busy trying to suppress the riots, ordered two women to vacate their home within a day, or else the criminals would burn it. In defense, the women "tied stout cords to heavy lead fishing sinkers . . . . What these amounted to, ironically, were crude versions of the slung-shot so highly favored by the New York thugs themselves." JAMES MCCAGUE, THE SECOND REBELLION: THE STORY OF THE NEW YORK CITY DRAFT RIOTS OF 1863, at 155 (1968).

In 1861, an English sailor fashioned a "slung shot" from "four revolver bullets" with "some paper round them" and attached to "a lanyard." Transcript of Adolphus Manton, *in* PROCEEDINGS OF THE CENTRAL CRIMINAL COURT, 25th NOVEMBER 1861, at 78, https://www.oldbaileyonline.org/record/t18611125-55?text=t18611125-55 [https://perma.cc/9UEP-ZHKK].

During the eighteenth century, English criminals often used a "stocking filled with sand or lead shot." RICTOR NORTON, *St. Giles's Footpads & James Dalton's Gang: Footpads & Street Robbers*, *in* THE GEORGIAN UNDERWORLD ch. 9, http://rictornorton.co.uk/gu09.htm [https://perma.cc/9ZBC-9J8U].

A leader of a women's auxiliary during the 1936–1937 auto workers strike in Flint, Michigan, recalled, "we all carried a hard-milled bar of soap in one pocket and a sock in the other. That way, we couldn't be charged with carrying a weapon. But if somebody was creating trouble on the picket line, we'd slip that bar of soap into the sock and swing that sock very fast and sharp. It was as good as a blackjack." Interview by Susan Rosenthal with Genora (Johnson) Dollinger (Feb. 1995), *in Striking Flint: Genora (Johnson) Dollinger Remembers the 1936-37 General Motors Sit-Down Strike*, MARXISTS, https://www.marxists.org/history/etol/newspape/amersocialist/genora.htm#women [https://perma.cc/F2E4-5WD5] (last visited May 4, 2024).

In 2018, organized crime leader Whitey Bulger was transferred to the general prison population, and within hours was murdered by another inmate with "a lock in a sock." Bulger v. Hurwitz, 62 F.4th 127, 134 (4th Cir. Mar. 3, 2023).

[1077] "Many police departments allowed head shots only in cases where deadly force was deemed necessary." ESCOBAR, *supra* note 1074, at 232.

> saps and jacks is about the size of a spoon head so there is little margin for error if you want to maximize the impact.[1078]

The vagueness of the term "Bowie knife"—which does not consistently describe any particular type of knife—was discussed in Part V.A. Definitions of categories of flexible impact weapons are even more confusing.[1079] The meaning "depends on the year, who you ask(ed); and what country or part of the country you occupy when asking."[1080] The "deliciously sloppy usages of the past" make it difficult to determine what particular type of flexible impact weapon is being discussed in historical sources.[1081]

Escobar's book provides an appendix of definitions, which he calls "more art than science," an effort to put "a sensible framework over the whole mess."[1082] According to Escobar, "[s]aps and jacks" were shorthands "for everything except slungshots."[1083]

Whatever the term used for a particular flexible impact weapon, the class as a whole has the following characteristics:

- Non-lethal except for a blow to the head. Even then, less likely to be lethal than a firearm or knife strike to the head.
- Exceptionally compact and easy to conceal, because they are flexible.[1084] Unlike firearms or knives, which are rigid.
- Silent, like blade arms, and unlike firearms.

[1078] *Id.* at 237.

[1079] "Perhaps because they thrived outside of polite society, their names are colorful, sometimes comical, and never really used consistently." *Id.* at 11. Various names were "slungshot, blackjack, . . . jack, jacksap, billyjack, slapjack, flat sap, spoon sap, slap-stick, slapper, zapper, slock, sand-club, sandbag, billet, billie, convoy, cosh, life-preserver, persuader, starter, bum starter, priest, fish priest, Shanghai tool, monkey fist, Sweet William, joggerhead, beavertail." *Id.*

[1080] *Id.* at 12. Changes in usage are nothing new. As of the eighteenth and early nineteenth centuries, a "gun" meant a long gun; handguns were called "pistols." Later, "gun" came to encompass everything that fired a bullet. Today, and in the twentieth century, "pistol" is sometimes used as a synonym for handgun, although the more precise meaning is a semiautomatic handgun, as distinct from a revolver. *See, e.g.*, 1 WEBSTER, *supra* note 8 (unpaginated) (Gun: "But one species of fire-arms, the pistol, is never called a gun).

gun.")

[1081] *Id.* at 17.

[1082]

> If you're thinking everything mentioned in this appendix must have made research a complete nightmare, you are correct. It was difficult enough to find references to any of our terms and the fun only began then . . . . I was not . . . interested in proposing a codified way of fixing this for good but instead wanted to put a sensible framework over the whole mess that goes with the modern meanings of the terms while still honoring the past. In short, it's more art than science . . . .

Id. at 226–27.

[1083] *Id.* at 11.

[1084] "Saps and jacks remain half hidden even when openly brandished." *Id.* at 11. A sap has the stopping power of a billy club, but in a smaller package. "This made it an ideal backup [for a law enforcement officer] in case you lost your baton in a scuffle or while running." *Id.* at 73.

- Unlikely to cause surface bleeding, unlike firearms or blades.

We now turn to the flexible impact weapon that led to the most legislation in the nineteenth century, the slungshot.

1. Slungshots and colts

The "slungshot was a tool turned weapon."[1085] In the original slungshot, one end of the rope is wound around a lead weight, or other small, dense item.[1086] Sailors use slungshots to cast mooring lines and other ropes over water. Resources on a ship at sea are very finite, and slungshots are easy to construct.[1087] Definitionally, "slungshot" has been more stable than its flexible weapon cousins.[1088]

The term slungshot, however, was applied to many items that had nothing to do with nautical affairs or ropes. Many slungshots were manufactured from leather and hardly looked like sailors' tools.

Compared to other flexible impact weapons,

> slungshots are the clear champion in terms of pure impact. One strike to the head, without regard to particular target, usually results in the immediate cessation of hostility in the opponent or defense in the victim. Whether or not full unconsciousness does mercifully come, the person is usually incapacitated and in for unpleasant long term effects . . . . One reason [it hits harder] is simply the length. Both saps and blackjacks were normally less than 10 inches long.[1089]

[1085] *Id.* at 39.

[1086] "A weight, usually hard loaded, tied to the end of a rope or similar material which swings freely. The end was often a sling, presumably indicating a common linguistic link between it, the ancient sling and the slingshot." *Id.* at 14. "[A]t heart just a small round weight surrounded by a clever knot . . . [i]t was tied so that one or two ends of the rope trail away from the ball shaped knot, providing material for the handle. A common additional feature once weaponized was a loop at the opposite end of the load so the entire contraption could be secured to the wrist. The original purpose . . . was to allow one to cast a line across open water." *Id.* at 41.

[1087] One could be made with a "bit of rope, cloth, sand, fishing weights and more." *Id.* at 44.

[1088] "Slungshots are always called slungshots and clubs . . . generally called clubs." *Id.* at 133.

"The term appears common in the mid-19th century and *usually* describes the right weapon or at least something close to it." *Id.* at 226.

> Still you can unsurprisingly encounter instances where it is used to describe our entire subject matter and more (like brass knuckles). The most important note on slungshot as a term is that once into modernity but prior to the late nineteenth century it is written about very often while our other terms are almost non-existent. That's good in that etymologists say sap and blackjack only started later, it's bad in that we don't know if that means any kind of sap would have been called a slungshot back then or that the slungshot configuration was simply much more popular in those days.

Id.

[1089] *Id.* at 45.

A slungshot could be twenty-two inches.[1090] The slungshot "provided the reach of a substantial club while fitting easily inside a pocket. Unlike a club, knife or brass knuckles, it could be held in a closed hand completely unseen while . . . being ready to instantly lash out. This was very likely a factor in the slungshot's later popularity with street criminals."[1091] Compared to other impact weapons, "[t]he slungshot was even more suited for a sneak attack. With its long coiled shaft/handle and small load taking up little space in a pocket, it could be quickly unleashed and strike a man from a much greater distance than a sap or jack."[1092]

A type of slungshot known as a "life-preserver" was popular with burglars in Victorian England. Besides the advantage of concealability, the life-preservers were "less lethal for dealing with interruptions; murder only being a way of increasing police attention after the fact."[1093]

Slungshots were popular with criminals for obvious reasons, but they were also carried at least sometimes by the law-abiding. An 1863 cartoon from the popular English humor magazine *Punch*, titled "Going Out to Tea in the Suburbs," shows a "society outing" of men and women "armed to the teeth," with the life-preserver as "the most common choice in the arsenal."[1094] The cartoon, subtitled "A Pretty State of Things for 1862," portrays in exaggerated fashion the public response to the Garroting Panic of 1862.[1095]

According to a historian of New Orleans life during Reconstruction, the "people fairly bristled with lethal weaponry: revolvers, pepperbox pistols, dirks, bowie knives and slungshots—a private arsenal concealed in the pockets and waist bands of respectable gentlemen and proletarian thugs alike."[1096]

According to Escobar, "[c]ourt records of the 1800's have many cases of civilians (e.g. neither professional criminal nor cop) using slungshots, etc."[1097] But "[a]t least in the incidents combed for this book, a man bringing one out after being threatened comes up rarely. As a reminder, the slungshot is particularly well suited to the sneak attack as it is not seen until . . . it hits and does so from a

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[1090] CLIFFORD W. ASHLEY, THE ASHLEY BOOK OF KNOTS 580 (1944) ("Life preserver").

[1091] ESCOBAR, *supra* note 1074, at 44.

[1092] *Id.* at 233.

[1093] *Id.* at 76.

Attorney Abraham Lincoln's most famous case was the Almanac Trial of 1858. According to the charges, one evening around midnight Duff Armstrong fatally hit James Metzger in the head with a "slung-shot," made of "a copper ball covered with lead, sewn into a leather bag and attached to a strap." A witness who had been about 150 feet away claimed he could clearly identify Armstrong as the perpetrator because the moon was full that night. Lincoln won an acquittal by producing an almanac showing that the moon was at quarter phase, and about to set. JOHN EVANGELIST WALSH, MOONLIGHT: ABRAHAM LINCOLN AND THE ALMANAC TRIAL (2000).

[1094] ESCOBAR, *supra* note 1074, at 78.

[1095] *Going Out to Tea in the Suburbs. A Pretty State of Things in 1862*, 44 PUNCH'S ALMANACK FOR 1863 (Jan.–June); Andy Croll, *Who's Afraid of the Victorian Underworld?*, 2004 THE HISTORIAN 30, 34.

[1096] Dennis C. Rousey, *Black Policemen in New Orleans During Reconstruction*, *in* 2 THE 19TH CENTURY: FROM EMANCIPATION TO JIM CROW 223, 229 (Darlene Clark Hine & Earnestine Jenkins eds., 2001).

[1097] ESCOBAR, *supra* note 1074, at 131.

surprising distance."[1098] A "man avenging himself for a perceived slight to his honor via a possibly deadly sucker punch with these comes up quite a bit."[1099]

In sum, "[i]t's clear they were often carried by criminals with ill intent but also by men who just wanted to be ready to defend (or I guess avenge) themselves. Granted, it looks like men with short fuses who were more prone to break the law via assault than your average Joe."[1100]

Slungshot laws are different from the laws on other arms that have been discussed above. Starting in 1849, seven states and two territories outlawed sales and manufacture. Vermont (1849);[1101] New York (1849),[1102] (1882),[1103] (1884),[1104] (1889),[1105] (1899);[1106] Massachusetts (1850),[1107] (1882);[1108] Kentucky (1856);[1109] Florida (1868),[1110] (1893);[1111] Dakota Territory (1877),[1112] (1883);[1113] Illinois (1881);[1114] Minnesota (1886);[1115] Oklahoma Territory (1890).[1116]

1098 *Id.* at 74.

1099 *Id.*

1100 *Id.* at 75.

1101 Act of Nov. 12, 1849, No. 36, 1849 Vt. Acts & Resolves 26, 26.

1102 Act of Apr. 7, 1849, ch. 278, § 1, 1849 N.Y. Laws 403, 403.

1103 Act of May 1, 1882, tit. 12, § 409, 1881 N.Y. Laws 1, 102 (1882).

1104 3 THE REVISED STATUTES, CODES AND GENERAL LAWS OF THE STATE OF NEW YORK 3330 (New York, L. K. Strouse & Co. 1890).

1105 Act of Apr. 15, 1889, ch. 140, § 1, 1889 N.Y. Laws 167, 167.

1106 Act of May 16, 1899, ch. 603, § 1, 1899 N.Y. Laws 1341, 1341.

1107 Act of Apr. 15, 1850, ch. 194, § 2, 1850 Mass. Acts 401, 401.

1108 THE PUBLIC STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS, ENACTED NOVEMBER 19, 1881, TO TAKE EFFECT FEBRUARY 1, 1882, at 1164 (Boston, Wright & Potter Prtg. Co. 1886).

1109 Act of Mar. 10, 1856, ch. 636, 1855–1856 Ky. Acts 96, 96–97 (1856).

1110 DIGEST OF THE LAWS OF THE STATE OF FLORIDA, FROM THE YEAR ONE THOUSAND EIGHT HUNDRED AND TWENTY-TWO, TO THE ELEVENTH DAY OF MARCH, ONE THOUSAND EIGHT HUNDRED AND EIGHTY-ONE, INCLUSIVE 403 (Tallahassee, Floridian Book & Job Off. 1881).

1111 Act of June 2, 1893, ch. 4125, § 3, 1893 Fla. Laws 51, 52.

1112 Act of Feb. 7, 1877, *reprinted in* THE REVISED CODES OF THE TERRITORY OF DAKOTA, A.D. 1877, at 794 (Yankton, Bowen & Kingsbury 1877) (published at ch. 38, § 455).

1113 Act of Feb. 7, 1877 *recodified in* THE ANNOTATED REVISED CODES OF THE TERRITORY OF DAKOTA, 1883, at 1211 (Pierre, Carter Publ'g Co., 2d ed. 1891) (published at ch. 38, § 455).

1114

> That whoever shall have in his possession, or sell, give or loan, hire or barter, or whoever shall offer to sell, give, loan, hire or barter, to any person within this state, any slung-shot or metallic knuckles, or other deadly weapon of like character, or any person in whose possession such weapons shall be found, shall be guilty of a misdmeanor, and upon conviction shall be fined in any sum not less than ten dollars ($10) nor more than two hundred dollars ($200).

Act of Apr. 16, 1881, § 1, 1881 Ill. Laws 71, 71.

1115 THE PENAL CODE OF THE STATE OF MINNESOTA TO TAKE EFFECT JANUARY 1, A.D. 1886: WITH NOTES OF DECISIONS FURNISHED BY THE ATTORNEY GENERAL 127 (Saint Paul, Pioneer Press Co. 1885) (published at § 334).

1116 THE STATUTES OF OKLAHOMA 1890, at 475–76 (Guthrie, State Capital Prtg. Co. 1891) (published at ch. 25, art. 38, § 18).

Illinois also prohibited possession. Vermont prohibited possession for interpersonal use, and Maryland did the same for carrying. The laws still allowed use as tool, such as for nautical purposes.[1117] The Kentucky sales ban was repealed later in the century.[1118]

The nine jurisdictions with slungshot sales bans were the most for any weapon in America in the nineteenth century. Only metallic knuckles, discussed in Part VI.C.1, came close.

Most jurisdictions did not ban slungshot sales. The majority approach was similar to Bowie knives:

No giving to "any slave or free person of color," except by "the owner." Georgia (1860).[1119]

No concealed carry. California (1863),[1120] (1864);[1121] Nevada (1867);[1122] D.C. (1871),[1123] (1892, without license);[1124] Wisconsin (1872);[1125] Alabama (1873);[1126] North Carolina (1877, Alleghany County),[1127] (1879, statewide);[1128] Dakota Territory (1877);[1129] Mississippi (1878) (without good reason);[1130] South Carolina (1880);[1131] Illinois (1881);[1132] Virginia (1884);[1133] Missouri (1885);[1134] Arizona

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[1117] The first section of the Vermont statute made it a misdemeanor to manufacture or transfer a slungshot. The second section made it a felony to "carry, or be found in the possession of, use or attempt to use, as against any other person, any instrument, or weapon, of the kind usually known as a slung shot." Act of Nov. 12, 1849, No. 36, 1849 Vt. Acts & Resolves 26, 26. The felony punishment for violating the second section suggests that it referred to possessing or carrying the slungshot for the purpose of using it against another person.

The Maryland law forbade concealed carry of slungshots and open carry if done "with the intent or purpose of injuring any person." Act of Apr. 7, 1886, ch. 375, 1886 Md. Laws 602, 602.

The Maryland law apparently intended to outlaw all use of slungshots in fighting, while still allowing use as a nautical tool and for similar purposes.

[1118] *See infra* note 1188 and accompanying text.

[1119] Act of Dec. 19, 1860, No. 64, 1860 Ga. Laws 56, 56–57.

[1120] Act of Apr. 27, 1863, ch. 485, 1863 Cal. Stat. 748, 748.

[1121] Act of Mar. 1, 1864, ch. 128, 1863–1864 Cal. Stat. 115, 115–16 (1864).

[1122] Act of Feb. 27, 1867, ch. 30, 1867 Nev. Stat. 66, 66.

[1123] Act of Aug. 10, 1871, § 1, *reprinted in* 1 THE COMPILED STATUTES IN FORCE IN THE DISTRICT OF COLUMBIA, INCLUDING THE ACTS OF THE SECOND SESSION OF THE FIFTIETH CONGRESS, 1887–89, at 178 (Washington, Gov't Prtg. Off. 1894) (published at ch. 16, § 119).

[1124] Act of July 13, 1892, ch. 159, § 2, 27 Stat. 116, 116–17 (1892).

[1125] Act of Feb. 14, 1872, ch. 7, 1872 Wis. Sess. Laws 17, 17–18.

[1126] Act of Apr. 8, 1873, No. 87, 1872–1873 Ala. Laws 130, 130–31.

[1127] Act of Feb. 16, 1877, ch. 104, § 1, 1876–1877 N.C. Sess. Laws 162, 162–63 (1877).

[1128] Act of Mar. 5, 1879, ch. 127, § 1, 1879 N.C. Sess. Laws 231, 231.

[1129] Act of Feb. 7, 1877, *reprinted in* THE REVISED CODES OF THE TERRITORY OF DAKOTA, A.D. 1877, at 794 (Yankton, Bowen & Kingsbury 1877) (published at ch. 38, § 457).

[1130] Act of Feb. 28, 1878, ch. 46, § 1, 1878 Miss. Laws 175, 175.

[1131] Act of Dec. 24, 1880, No. 362, § 1, 1880 S.C. Acts 447, 447–48.

[1132] Act of Apr. 16, 1881, § 4, 1881 Ill. Laws 71, 71.

[1133] Act of Feb. 22, 1884, ch. 143, 1883–1884 Va. Laws 180, 180 (1884).

[1134] 1 THE REVISED STATUTES OF THE STATE OF MISSOURI, 1899, at 551 (Jefferson City, Trib. Prtg. Co. 1899) (published at ch. 15, art. 2, § 1862).

Territory (1887) (in towns),[1135] (1891) (in general);[1136] Oregon (1885);[1137] Michigan (1887);[1138] Oklahoma Territory (1893);[1139] Rhode Island (1893);[1140] Maryland (1886),[1141] (1890, Baltimore),[1142] (1894) (unless reasonable cause);[1143] District of Columbia (1898).[1144]

Carrying concealed created a presumption that the weapon was being carried for use against another person. New York (1866),[1145] (1884);[1146] Minnesota (1891).[1147]

No open or concealed carry in most circumstances. New Mexico Territory (1853),[1148] (1860),[1149] (1869) ("within any of the settlements"),[1150] (1887);[1151] California (1864);[1152] Texas (1871) (without reasonable cause);[1153] Harrisburg, Pennsylvania (1873);[1154] Tennessee (1879);[1155] West Virginia (1882);[1156] Dakota Territory (1877),[1157] (1883);[1158] Arizona Territory (1889) ("within any settlement,

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1135 REVISED STATUTES OF ARIZONA 726 (Prescott, Prescott Courier Print 1887) (published at tit. 11, § 662).

1136 Act of Mar. 6, 1891, No. 2, § 1, 1893 Ariz. Sess. Laws 3, 3 (1891) (as published by the Seventeenth Legislative Assembly of the Territory of Arizona in 1893).

1137 Act of Feb. 18, 1885, § 1, 1885 Or. Laws 33, 33.

1138 Act of May 31, 1887, No. 129, § 1, 1887 Mich. Pub. Acts 144, 144.

1139 THE STATUTES OF OKLAHOMA, 1893, at 503–04 (Guthrie, State Capital Prtg. Co. 1893) (published at ch. 25, art. 45, § 1).

1140 Act of May 3, 1893, ch. 1180, § 1, 1893 R.I. Laws 231, 231–32.

1141 Act of Apr. 7, 1886, ch. 375, § 1, 1886 Md. Laws 602, 602.

1142 Act of Apr. 8, 1890, ch. 534, § 1, 1890 Md. Laws 606, 606–07.

1143 Act of Apr. 6, 1894, ch. 547, § 1, 1894 Md. Laws 833, 834.

1144 Act of May 11, 1898, ch. 295, 30 Stat. 405, 405–06 (1898).

1145 Act of Apr. 20, 1866, ch. 716, §§1–2, 1866 N.Y. Laws 1523, 1523.

1146 3 THE REVISED STATUTES, CODES AND GENERAL LAWS OF THE STATE OF NEW YORK 3330 (New York, L. K. Strouse & Co. 1890).

1147 2 GENERAL STATUTES OF THE STATE OF MINNESOTA, IN FORCE JANUARY, 1891, at 517 (St. Paul, JNO. F. Kelly 1891).

1148 Act of Jan. 14, 1853, § 1, 1852 N.M. Laws 67, 67 (1853).

1149 Act of Feb. 2, 1860, §§ 1, 5, 1859-1860 N.M. Laws 94, 94, 96 (1860).

1150 Act of Jan. 29, 1869, ch. 32, § 1–2, 1868–1869 N.M. Laws 72, 72–73 (1869).

1151 Act of Feb. 18, 1887, ch. 30, §§ 1, 8–10, 1886 N.M. Laws 55, 55, 57 (1887).

1152 Act of Mar. 1, 1864, ch. 128, 1863–1864 Cal. Stat. 115, 115–16 (1864).

1153 Act of Apr. 12, 1871, ch. 34, § 2, 1871 Tex. Gen. Laws 25, 25.

1154 Act of Apr. 12, 1873, No. 810, 1873 Pa. Laws 735, 735–36.

1155 Act of Mar. 27, 1879, ch. 186, § 1, 1879 Tenn. Pub. Acts 231, 231.

1156 Act of Mar. 24, 1882, ch. 135, § 1, 1882 W. Va. Acts 421, 421–22.

1157 Act of Feb. 7, 1877, *reprinted in* THE REVISED CODES OF THE TERRITORY OF DAKOTA, A.D. 1877, at 794 (Yankton, Bowen & Kingsbury 1877) (published at ch. 38, § 457).

1158 Act of Feb. 7, 1877, *recodified in* THE ANNOTATED REVISED CODES OF THE TERRITORY OF DAKOTA, 1883, at 1211 (Pierre, Carter Publ'g Co., 2 ed. 1891) (published at ch. 38, § 456–57).

town, village, or city," unless with good cause);[1159] Oklahoma Territory (1890);[1160] North Dakota (1895).[1161]

No carry to public assemblies or gatherings. Texas (1871);[1162] Missouri (1885).[1163]

Ban on carry with intent to injure. Maryland (1886, open carry),[1164] (1890, Baltimore, open carry),[1165] (1894, open carry);[1166] Minnesota (1886).[1167]

No sale to minors. Kentucky (1860) (except parents or guardians);[1168] Indiana (1875);[1169] West Virginia (1882);[1170] Kansas (1883) (also banning possession by minors);[1171] Missouri (1885) (under 21);[1172] New York (1899) (18, unless police magistrate consents);[1173] Oklahoma (1890),[1174] (1893) (under 21);[1175] Texas (1897, parental consent). [1176]

Limiting carry by young people. Nevada (1881) (under 18),[1177] (1885) (under 21);[1178] Arizona Territory (1883, ages 10-16, in towns).[1179]

Specific taxation. Kentucky (1892) (occupational tax for vendors).[1180]

1159 Act of Mar. 18, 1889, No. 13, § 1, 1889 Ariz. Sess. Laws 30, 30.

1160 THE STATUTES OF OKLAHOMA 1890, at 476 (Guthrie, State Capital Prtg. Co. 1891) (published at ch. 25, art. 38, § 19).

1161 THE REVISED CODES OF THE STATE OF NORTH DAKOTA 1895, at 1293 (Bismarck, Tribune Co. 1895) (published at ch. 40, § 7313).

1162 2 A DIGEST OF THE LAWS OF TEXAS: CONTAINING THE LAWS IN FORCE, AND THE REPEALED LAWS ON WHICH RIGHTS REST, FROM 1754 TO 1874, at 1323 (Washington, W. H. & O. H. Morrison 4th ed. 1874) (published at art. 6514).

1163 1 THE REVISED STATUTES OF THE STATE OF MISSOURI, 1899, at 551 (Jefferson City, Trib. Prtg. Co. 1899) (published at ch. 15, art. 2, § 1862).

1164 Act of Apr. 7, 1886, ch. 375, 1886 Md. Laws 602, 602.

1165 Act of Apr. 8, 1890, ch. 534, 1890 Md. Laws 606, 606–07.

1166 Act of Apr. 6, 1894, ch. 547, 1894 Md. Laws 833, 834.

1167 THE PENAL CODE OF THE STATE OF MINNESOTA TO TAKE EFFECT JANUARY 1, A.D. 1886: WITH NOTES OF DECISIONS FURNISHED BY THE ATTORNEY GENERAL 127 (Saint Paul, Pioneer Press Co. 1885) (published at § 334).

1168 Act of Jan. 12, 1860, ch. 33, § 23, 1859–1860 Ky. Acts 241, 245.

1169 Act of Feb. 27, 1875, ch. 40, § 1, 1875 Ind. Acts 59, 59.

1170 Act of Mar. 24, 1882, ch. 135, § 1, 1882 W. Va. Acts 421, 421–22.

1171 Act of Mar. 5, 1883, ch. 105, § 1, 1883 Kan. Sess. Laws 159, 159.

1172 Act of Mar. 20, 1885, 1885 Mo. Laws 139, 140.

1173 Act of May 16, 1899, ch. 603, 1899 N.Y. Laws 1341, 1341.

1174 THE STATUTES OF OKLAHOMA 1890, at 495 (Guthrie, State Capital Prtg. Co. 1891) (published at ch. 25, art. 47, § 3).

1175 THE STATUTES OF OKLAHOMA, 1893, at 503–04 (Guthrie, State Capital Prtg. Co. 1893) (published at ch. 25, art. 45, § 3).

1176 Act of May 14, 1897, ch. 155, § 1, 1897 Tex. Gen. Laws 221, 221–22.

1177 Act of Mar. 4, 1881, ch. 104, 1881 Nev. Stat. 143, 143–44.

1178 Act of Mar. 2, 1885, ch. 51, 1885 Nev. Stat. 51, 51.

1179 Act of Feb. 24, 1883, No. 36, § 3, 1883 Ariz. Sess. Laws 65, 66.

1180 Act of November 11, 1892, ch. 103, art. 10, subdiv. 4, § 35, 1891–1892 Ky. Acts 277, 345–46 (1892).

Authorizing municipalities to regulate. Illinois (1867) (Bloomington, concealed carry, "colt, or slung-shot");[1181] Wisconsin (1874–91) (concealed carry, colt, or slung shot);[1182] Michigan (1891), (1897) (Saginaw, concealed carry).[1183]

No brandishing. Illinois (1874),[1184] (1879).[1185]

In the nineteenth century, "colt" seems to have been an alternative term for "slungshot." The *Shorter Oxford English Dictionary* defines a "colt" as "4. A short piece of weighted rope used as a weapon, spec. (Naut.) a similar instrument used for corporal punishment, slang, M18."[1186]

An 1856 Kentucky law prohibiting slungshot sales also applied to two other types of arms:

> that any person or persons who may hereafter be found guilty of vending, buying, selling, or doling in the weapons popularly known as colts, brass knuckles, slung-shots, or any imitation or substitute therefor, shall forfeit or pay 25 dollars.[1187]

The Kentucky ban on sale of "colts," stayed on the books for several decades, and was eventually replaced with a ban only on sales to minors, plus a tort cause of action for anyone injured with the listed weapons as a result of an illegal sale.[1188]

[1181] Act of Mar. 7, 1867, ch. 6, § 1(38), 1867 Ill. Laws 639, 650.

[1182] *See, e.g.*, Act of Mar. 10, 1874, ch. 184(4), § 3(61), 1874 Wis. Sess. Laws 311, 334; Act of Mar. 5, 1875, ch. 262(4), § 3(49), 1875 Wis. Sess. Laws 450, 471; Act of Mar. 3, 1876, ch. 103(4), § 3(43), 1876 Wis. Sess. Laws 199, 218; Act of Mar. 11, 1876, ch. 313, tit. 4, § 3(59), 1876 Wis. Sess. Laws 715, 737; Act of Mar. 7, 1877, ch. 162(5), § 3(49), 1877 Wis. Sess. Laws 346, 367; Act of Mar. 9, 1878, ch. 112, tit. 5, § 3(55), 1878 Wis. Sess. Laws 98, 119–20; Act of Mar. 13, 1882, ch. 92, § 29(47), 1882 Wis. Sess. Laws 292, 309; Act of Mar. 18, 1882, ch. 169(4), § 3(48), 1882 Wis. Sess. Laws 503, 524; Act of Mar. 30, 1883, ch. 183(6), § 3(56), 1883 Wis. Sess. Laws 687, 713; Act of Apr. 3, 1883, ch. 341, § 52(83), 1883 Wis. Sess. Laws 970, 990; Act of Apr. 4, 1883, ch. 351, § 32(45), 1883 Wis. Sess. Laws 1016, 1034; Act of Mar. 7, 1885, ch. 37(4), § 3(26), 1885 Wis. Sess. Laws 110, 126; Act of Mar. 27, 1885, ch. 159(5), § 3(44), 1885 Wis. Sess. Laws 733, 753; Act of Apr. 2, 1885, ch. 227(5), § 3(50), 1885 Wis. Sess. Laws 1085, 1109; Act of Mar. 24, 1887, ch. 124, tit. 4, § 2(56), 1887 Wis. Sess. Laws 310, 336; Act of Apr. 11, 1887, ch. 409(4), § 36(53), 1887 Wis. Sess. Laws 1284, 1308; Act of Mar. 29, 1887, ch. 162(4), § 3(36), 1887 Wis. Sess. Laws 728, 754; Act of Apr. 11, 1887, ch. 409(4), § 36(53), 1887 Wis. Sess. Laws 1284, 1308; Act of Mar. 30, 1891, ch. 123(5), § 2(51), 1891 Wis. Sess. Laws 675, 699–700; Act of Mar. 11, 1891, ch. 23(6), § 3(28), 1891 Wis. Sess. Laws 43, 61; Act of Mar. 12, 1891, ch. 40, tit. 4, § 28(60), 1891 Wis. Sess. Laws 160, 186.

[1183] Act of Mar. 28, 1891, No. 257, tit. 11, § 15, 1891 Mich. Pub. Acts 388, 409; Act of June 2, 1897, No. 465, tit. 11, § 15, 1897 Mich. Pub. Acts 962, 1030.

[1184] THE REVISED STATUTES OF THE STATE OF ILLINOIS, A.D. 1874, at 360 (Springfield, Ill. J. Co. 1874) (published at § 56).

[1185] Act of May 24, 1879, § 1, 1879 Ill. Laws 91, 91

[1186] *Colt*, SHORTER OXFORD ENGLISH DICTIONARY 453 (1st ed. 1934).

[1187] Act of Mar. 10, 1856, ch. 636, § 1, 1855–1856 Ky. Acts 96, 96–97 (1856).

[1188] One might guess that "colts" referred to the revolvers produced by Colt's Manufacturing Co., in New Haven, Connecticut. The first models of Samuel Colt's revolver handguns were introduced in the late 1830s, and by 1855, they were a huge commercial success. Protected by a patent that did not expire until 1857, they faced no competition in the category of high-quality modern revolver.

In short, the laws for slungshots/colts are the most restrictive of any of the weapons examined in this article. Most jurisdictions that chose to regulate followed the typical course for other weapons—such as concealed carry bans or limits on sales to minors. As for bans on carry in general, there are of course the usual suspects, namely some of the jurisdictions that also banned open handgun carry, and likewise banned carrying most other weapons, while still allowing long gun open carry. However, the Dakota Territory banned slungshot carry, and Dakota was not among the jurisdictions that banned handgun carry.

More importantly, there were nine states or territories that at some point banned manufacture or sale, and two of them banned possession. This is substantially more than the number that imposed such restrictions on any other arm in the nineteenth century.

We reviewed every pre-1900 case on Westlaw with the words "slungshot," "slung shot," or "slung-shot." Few of them are instructive on right to arms law. Some involve a different weapon, such as a gun or knife, and simply quote a statute that also mentions slungshots.[1189] Many involve homicides or assaults; a defendant of course could not raise the right to arms.[1190] A few asked whether a

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The theory that the Kentucky legislature was taking aim at the Colt's revolvers is buttressed by the late nineteenth century version of the statute, which changed the spelling to "Colt's."

By the time Kentucky's revised statute changed "colts" to "Colt's," and banned sales only to minors, the Colt's Manufacturing revolver patent was expired; there were many companies selling high-quality modern revolvers at affordable prices. At that point, a sales restriction on Colt's revolvers only would have made no sense, although perhaps similar revolvers could be said to be covered by "or any imitation of substitute therefor."

Even so, in the latter nineteenth century a Kentucky ban on revolvers "similar" to Colt's would be the opposite of gun control efforts of the time in other states. As discussed in Parts IV.B. & C., those were bans on the most concealable handguns, and they exempted large handguns ("Army and Navy" models) like the Colt's.

We suggest that the 1855 Kentucky statute was not about handguns. If the successor statutes were, they were anomalous to the extent that they singled out large handguns for stricter regulations than small handguns.

[1189] *See, e.g.*, State v. Seal, 47 Mo. App. 603, 604 (1892) (defendant convicted of "exhibiting a gun in a rude, angry and threatening manner"; statute also applied to slungshots); People v. Izzo, 14 N.Y.S. 906 (1891) (conviction for carrying a concealed dagger with intent to use in a crime reversed because of improper testimony; statute also applied to slungshots).

[1190] *See, e.g.*, State v. Marshall, 57 P. 902 (Or. 1899) (insanity defense for assault with a slungshot); People v. Turner, 50 P. 537 (Cal. 1897) (cross-examination of victim who identified defendant as perpetrator of assault with a slungshot); People v. Wyman, 15 Cal. 70, 71 (1860) (upholding conviction of manslaughter for stabbing victim in the ribs; victim's nose had been broken, and a physician testified that the break was not caused by a knife, and "might have been made with a slungshot, a round stick, or possibly with the fist"); State v. Melton, 15 S.W. 139 (Mo. 1890) (claim of self-defense not supported by the facts); State v. Fowler, 2 N.W. 983 (Iowa 1879) (admissibility of witness testimony in support of self-defense); State v. Yeaton, 53 Me. 125 (1865) (refused entrance to an event at a private school, defendants assaulted the school personnel with slungshots); People v. Casey, 72 N.Y. 393, 396 (1878) (defendant convicted of assault with a sharp weapon; indictment had also mentioned "certain knife, pistol, slung-shot, billy and club"; jury conviction of sharp weapon was implausible, since evidence showed a bludgeon and not a cut, but defendant's attorney had failed to object below); People v. Emerson, 5 N.Y.S. 374, 375 (Spec. Term 1888) (defendant convicted of running an illegal lottery; prosecution was correctly allowed to introduce testimony about the nature of "a lottery policy," just as other cases allow testimony about "the nature and description of a weapon commonly known as a 'slungshot,' or, under section 508, what is an instrument adapted or commonly used for the commission of burglary, etc.").

municipality had the power to enact an ordinance.[1191] Two cases involved sailors who carried slungshots, and the courts did not consider the slungshots to indicate anything nefarious about the sailors' characters.[1192] In a lawsuit about a "rough and abusive" passenger who had been struck by a train employee with a slungshot and ejected from a slow-moving train for not paying the fare, an Illinois appellate court ruled that the trial court had improperly excluded evidence that the train employee had legitimate defensive purposes for carrying a "billy or slungshot" (terms that the court used interchangeably).[1193]

The one case that addressed the constitutionality of slungshot laws in depth was the 1871 *English v. State*, which upheld the recently enacted Texas statute against public carry of handguns and many other arms, while allowing long-gun carry.[1194] As for the Second Amendment right to bear arms, the Texas Supreme Court held that arms protected were the types of arms useful in a militia.

> Arms of what kind? Certainly such as are useful and proper to an armed militia. The deadly weapons spoken of in the statute are pistols, dirks, daggers, slungshots, swordcanes, spears, brass-knuckles and bowie knives. Can it be understood that these were contemplated by the framers of our bill of rights? Most of them are the wicked devices of modern craft. . . .
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> . . . .
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> . . . To refer the deadly devices and instruments called in the statute "deadly weapons," to the proper or necessary arms of a "well-regulated militia," is simply ridiculous. No kind of travesty, however subtle or ingenious, could so misconstrue this provision of the [C]onstitution of the United States, as to make it cover and protect that pernicious vice, from which so many murders, assassinations, and deadly assaults have sprung, and which it was doubtless the intention of the legislature to punish and prohibit. The word "arms" in the connection we find it in the [C]onstitution of the United States, refers to the arms of a militiaman or soldier,

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[1191] *See, e.g.*, Collins v. Hall, 17 S.E. 622 (Ga. 1893) (municipality did not have the power to enact a concealed carry ban on various arms, including slungshots); *Ex parte* Caldwell, 39 S.W. 761 (Mo. 1897) (municipal law imposing fine for carrying concealed weapons was consistent with city charter; defendant's weapon not specified, but ordinance included slungshots).

[1192] Gardner v. Bibbins, 9 F. Cas. 1159, 1162 (S.D.N.Y. 1833) ("He produces the evidence of a laborer, to prove that the libellant was in possession of a slung-shot on shore, which might have been used as a dangeous weapon; but he does not pretend, in his own deposition, that he ever regarded those circumstances as importing any danger to him or to the vessel."); Smith v. United States, 1 Wash. Terr. 262, 270 (1869) ("The evidence excluded appears to have been offered for the purpose of showing that Butler . . . 'had a slung-shot on board the bark *Marinus* at the time of the affray.' It nowhere appears in the evidence that Butler, at the time of the affray, was making an assault upon the prisoner, or attempting or threatening to make any.").

[1193] Chicago, Burlington & Quincy R.R. v. Boger, 1 Ill. App. 472, 475 (1877) ("The appellant offered to prove by the witness that a short time before he had had trouble with roughs and confidence men jumping on the train as it was passing out of the city, where he had been attacked by them, and that he carried the billy for his personal protection against any future assault. We think this evidence should have been admitted to the jury.").

[1194] 35 Tex. 473 (1871).

> and the word is used in its military sense. The arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster pistols and carbine; of the artillery, the field piece, siege gun, and mortar, with side arms.
>
> The terms dirks, daggers, slungshots, sword-canes, brass-knuckles and bowie knives, belong to no military vocabulary. Were a soldier on duty found with any of these things about his person, he would be punished for an offense against discipline.[1195]

The Texas State Constitution right to arms guaranteed "the right to keep and bear arms in the lawful defense of himself or the state, under such regulations as the legislature may prescribe."[1196] The language authorizing regulations in the 1866 constitution was a change from the 1845 statehood constitution, and the 1836 Constitution of the Republic of Texas.[1197] The court held that "arms" in the Texas Constitution meant the same thing as in the Second Amendment.[1198]

According to the court, the carry ban was a reasonable regulation.

> We confess it appears to us little short of ridiculous, that any one should claim the right to carry upon his person any of the mischievous devices inhibited by the statute, into a peaceable public assembly, as, for instance into a church, a lecture room, a ball room, or any other place where ladies and gentlemen are congregated together.[1199]

As for Texans' preferences for carrying arms, it came from the pernicious Spanish influence on the State—which had once been part of New Spain, and then part of the United States of Mexico.

> A portion of our system of laws, as well as our public morality, is derived from a people the most peculiar perhaps of any other in the history and derivation of its own system. Spain, at different periods of the world, was dominated over by the Carthagenians, the Romans, the Vandals, the Snevi, the Allani, the Visigoths, and Arabs; and to this day there are found in the Spanish codes traces of the laws and customs of each of these nations blended together

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1195 *Id.* at 474, 476–77.

1196 TEX. CONST. of 1868, art. I, § 13: "Every person shall have the right to keep and bear arms, in the lawful defence of himself or the State, under such regulations as the Legislature may prescribe."

1197 TEX. CONST. of 1845, art. I, § 13 ("Every citizen shall have the right to keep and bear arms in the lawful defence of himself or the State."); CONST. OF THE REPUBLIC OF TEX. OF 1836, DECLARATION OF RIGHTS, § 14 ("Every citizen shall have the right to bear arms in defence of himself and the Republic. The military shall at all times and in all cases be subordinate to the civil power.").

1198 *English*, 35 Tex. at 478–79.

1199 *Id.*

into a system by no means to be compared with the sound philosophy and pure morality of the common law.[1200]

The English decision did not mention the 1856 *Cockrum* case, which had stated that the right to keep and bear Bowie knives is protected by Texas Constitution and the Second Amendment, while misuse in violent crime is not.[1201]

2. Slingshots

Slingshots are entirely different from slungshots. A slungshot is an impact weapon, and a slingshot is a missile weapon. The first slingshot law does not appear until 1872, the next one 1886, and the remainder in the 1890s. According to Escobar, "we don't know if 'slingshot' was a confused attempt to outlaw slungshots, but it's a good guess."[1202]

Today we think of actual slingshots as children's toys, as famously carried by mischievous cartoon character Dennis the Menace. Dennis was not inclined to "malicious mischief," but if he had been, the expected result would have been a broken window or a dead bird. A slingshot, however, can be a formidable weapon.

In the legions of classical Rome, the legionnaire soldier was expected to be proficient with a sling and a rock. Roman soldiers carried slings. So if a soldier's sword were lost or broken in combat, he could still use the sling.[1203] German researcher Jörg Sprave determined that stones shot from Roman slings in the second century could reach 100 mph and had similar stopping power to a .44 magnum handgun.[1204] According to Malcolm Gladwell, "[a]n experienced slinger could kill or seriously injure a target at a distance of up to two hundred yards."[1205]

The Bible story of the young shepherd David killing the giant Goliath with a sling reflects the typicality of slings as combat weapon in ancient times.[1206]

To be sure, a "slingshot" is not a "sling." But a powerful slingshot hurling a rock is certainly a weapon that can be, and has been, used for hunting, for defense, and for offense.

The following statutes restricted "slingshots." Whether they were meant to apply to slungshots or to slingshots is unknown.

[1200] *Id.* at 480.

[1201] *See* text at notes 702–04.

[1202] ESCOBAR, *supra* note 1074, at 105.

[1203] Heather Pringle, *Ancient Slingshot Was as Deadly as a .44 Magnum*, NAT'L GEOGRAPHIC (May 24, 2017), https://www.nationalgeographic.com/history/article/ancient-slingshot-lethal-44-magnum-scotland [https://perma.cc/34G2-NLFG].

[1204] Tim Collins, *Roman Sling Bullets Used Against ScottishTribes 2,000 Years Ago Were as Deadly as a .44 Magnum*, DAILYMAIL (May 25, 2017, 11:35 AM), https://www.dailymail.co.uk/sciencetech/article-4541318/Roman-sling-bullets-deadly-44-Magnum.html [https://perma.cc/YT9T-VSH6].

[1205] MALCOLM GLADWELL, DAVID AND GOLIATH: UNDERDOGS, MISFITS, AND THE ART OF BATTLING GIANTS 9 (2013).

[1206] *Samuel* 1:17 (King James).

No concealed carry. Wisconsin (1887);[1207] Mississippi (1896),[1208] (1898);[1209] Maryland (1872) (in Annapolis);[1210] Washington (1886);[1211] Colorado (1891);[1212] South Carolina (1897).[1213]

No sales to minors. North Carolina (1893).[1214]

Authorizing municipal regulation. Nebraska (1895) (Lincoln, concealed carry).[1215]

If the laws applied to actual slingshots, they fit into the mainstream established by Bowie knife laws. There were no prohibitions on possession, open carry, or sales to adults. If the laws applied to slungshots, they add to the total of states with standard restrictions, rather than prohibitions on sales.

3. Sand clubs

A sand club is a small bag of sand attached to a short handle.[1216] A sand club is also called a "sand bag" or "sandbag."[1217] If a sand club is filled with something other than sand, such as lead pellets, it might be called a "blackjack" or a "sap."[1218] All these clubs were often carried by law enforcement officers.

One advantage for either law enforcement or criminal use is that a sand club does not leave a mark on the target.[1219] The "ability here outstrips that of saps, jacks, slungshots and all their variations" because of the soft load.[1220]

[1207] Act of Apr. 11, 1887, ch. 409(4), § 36(53), 1887 Wis. Sess. Laws 1284, 1308.

[1208] Act of Mar. 11, 1896, ch. 104, § 1, 1896 Miss. Laws 109, 109–10.

[1209] Act of Feb. 11, 1898, ch. 68, § 1, 1898 Miss. Laws 88, 88.

[1210] Act of Feb. 26, 1872, ch. 42, § 1, 1872 Md. Laws 56, 56–57.

[1211] Act of Jan. 20, 1886, § 1, 1885–1886 Wash. Sess. Laws 81, 81–82.

[1212] Act of Apr. 10, 1891, § 1, 1891 Colo. Sess. Laws 129, 129.

[1213] Act of Feb. 17, 1897, No. 251, § 1, 1897 S.C. Acts 423, 423.

[1214] Act of Mar. 6, 1893, ch. 514, §§ 1–2, 1893 N.C. Sess. Laws 468, 468–69.

[1215] Act of Aug. 26, 1895, art. 16, §§ 1–3, 1895 Neb. Laws 209, 209–10.

[1216] "A long sausage-shaped bag of sand used as a weapon." ERIC PARTRIDGE, A DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH 725 (1937). *See also* ESCOBAR, *supra* note 1074, at 19 ("a sand-club, formed by filling an eel-skin with sand") (quoting 1 THE LONDON MEDICAL RECORD 576 (Ernest Abraham Hart ed., 1873)) (describing an 1871 homicide in San Francisco).

Like other flexible impact weapons other than the slungshot, a sand club is sometimes called a "sap." For example, in a 1983 case,

> Officer Casey testified that at first he thought the object, which was very common in the North Park area of Pittsburgh, was a "sap." That is, a sock filled with sand that when swung, according to the officer, was "almost a stone, and [if] you hit somebody in the side of the head or temple with it, you'll kill him. It's a very effective weapon."

Commonwealth v. Hook, 459 A.2d 379, 384 n.2 (Pa. Super. Ct. 1983) (Popovich, J., dissenting).

[1217] ERIC PARTRIDGE, A DICTIONARY OF SLANG AND UNCONVENTIONAL ENGLISH 725 (1937).

[1218] *See, e.g.*, Commonwealth v. Hook, 459 A.2d 379, 384 n.2 (Pa. Super. Ct. 1983) (Popovich, J., dissenting).

[1219] ESCOBAR, *supra* note 1074, at 19, 21.

[1220] *Id.* at 21.

The sand club "might be the only easily adjustable impact weapon known to man. . . . If you want up its destructive capabilities . . . just add water. Wet sand weighs more."[1221]

Ban on manufacture and sale. New York (1882),[1222] (1884),[1223] (1889),[1224] (1899) ("sand-club");[1225] Minnesota (1886) ("sand-club").[1226]

Ban on carry with intent to injure. New York (1866) ("sand club");[1227] Maryland (1886) ("sand-club"), (1890, Baltimore),[1228] (1894) ("sand club," open carry);[1229] Michigan (1891), (1897) (Saginaw, concealed carry, "sand bag");[1230] Minnesota (1886) ("sand-club").[1231]

Concealed carry creates a presumption of misuse. New York (1866) ("sand club").[1232]

License required for carry. New Jersey (1873) (Jersey City, "sand-club," unless with a permit, by anyone except some law enforcement),[1233] (1885) (same for Hoboken);[1234] California (1890) (Oakland, "sand club"),[1235] (1891) (Stockton, "sand-club").[1236]

Ban on concealed carry. New Jersey (1871) (Jersey City, "sand-club" by anyone "excepting policemen and private watchmen");[1237] Michigan (1887) ("sand

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1221 *Id.*

1222 Act of May 1, 1882, tit. 12, § 409, 1881 N.Y. Laws 1, 102 (1882).

1223 Act of Mar. 21, 1884, ch. 46, § 7, 1884 N.Y. Laws 44, 46.

1224 Act of Apr. 15, 1889, ch. 140, § 1, 1889 N.Y. Laws 167, 167.

1225 Act of May 16, 1899, ch. 603, 1899 N.Y. Laws 1341, 1341.

1226 THE PENAL CODE OF THE STATE OF MINNESOTA TO TAKE EFFECT JANUARY 1, A.D. 1886: WITH NOTES OF DECISIONS FURNISHED BY THE ATTORNEY GENERAL 127 (Saint Paul, Pioneer Press Co. 1885) (published at § 333).

1227 Act of Apr. 20, 1866, ch. 716, §§ 1–2, 1866 N.Y. Laws 1523, 1523.

1228 Act of Apr. 7, 1886, ch. 375, 1886 Md. Laws 602, 602; Act of Apr. 8, 1890, ch. 534, § 1, 1890 Md. Laws 606, 606–07.

1229 Act of Apr. 6, 1894, ch. 547, § 1, 1894 Md. Laws 833, 834.

1230 Act of Mar. 28, 1891, No. 257, tit. 11, § 15, 1891 Mich. Pub. Acts 388, 409; Act of June 2, 1897, No. 465, tit. 11, § 15, 1897 Mich. Pub. Acts 962, 1030.

1231 THE PENAL CODE OF THE STATE OF MINNESOTA TO TAKE EFFECT JANUARY 1, A.D. 1886: WITH NOTES OF DECISIONS FURNISHED BY THE ATTORNEY GENERAL 127 (Saint Paul, Pioneer Press Co. 1885) (published at § 334).

1232 Act of Apr. 20, 1866, ch. 716, §§ 1–2, 1866 N.Y. Laws 1523, 1523.

1233 Act of June 20, 1873, *reprinted in* ORDINANCES OF JERSEY CITY, PASSED BY THE BOARD OF ALDERMAN SINCE MAY 1, 1871, at 86–87 (New York, Kennard & Hay Stationery Mfg. & Prtg. Co. 1874).

1234 Act of Oct. 17, 1885, § 1, *reprinted in* ORDINANCES OF THE CITY OF HOBOKEN, FROM THE INCORPORATION OF THE CITY TO JAN. 1, 1892, at 240–41 (Hoboken, Evening News Print 1892).

1235 Act of May 15, 1890, No. 1141, § 1, *reprinted in* CITY CHARTER OF THE CITY OF OAKLAND, CAL., ALSO GENERAL MUNICIPAL ORDINANCES OF SAID CITY IN EFFECT OCTOBER 1, 1898, at 332–33 (Oakland, Enquirer Publ'g Co. 1898).

1236 Act of Mar. 31, 1891, No. 53, § 1, *reprinted in* CHARTER AND ORDINANCES OF THE CITY OF STOCKTON 240 (Stockton, Stockton Mail, Printers & Bookbinders 1908).

1237 Act of July 21, 1871, § 1, *reprinted in* ORDINANCES OF JERSEY CITY, PASSED BY THE BOARD OF ALDERMAN SINCE MAY 1, 1871, at 41 (New York, Kennard & Hay Stationery Mfg. & Prtg. Co. 1874).

bag" by anyone except "officers of the peace and night watches");[1238] Maryland (1890) (Baltimore, "sand-club," unless "a conservator of the peace"),[1239] (1894) (unless reasonable cause).[1240] The pervasive law enforcement use was perhaps an indicia that responsible citizens might choose similar arms.

4. Blackjacks

Blackjack laws begin to appear in the last quarter of the nineteenth century. The dating indicates that the statutes were referring to the modern blackjack.[1241]

The "classic modern blackjack" is "a coil spring body with cylindrical shaped head and a hard load. As such this focuses the impact into a small area and loses the soft sap's lower peak force distribution."[1242] The "blackjack" is distinct from the broader, earlier nineteenth century use of "jack" to refer to all sorts of flexible impact weapons.

The blackjack became "a police constant for about 100 years."[1243] "Policemen's uniforms in [the United States] had a special pocket where they were stored."[1244] Theodore Roosevelt carried one when he was Police Commissioner of New York City, and when he was President of the United States.[1245]

Blackjacks were favored by law enforcement officers for the same reasons that officers liked saps and jacks in general:

> [E]ven in the days when law enforcement had much freer rein than today, stabbing a suspect with a knife you technically should or should not have had on you was going to be a problem. Shooting him would be even more complicated. By process of elimination we can understand how saps became the go to backup tool for an officer. At least you were already officially issued a club . . . . In this way saps came to straddle that unique middle ground between law and lawless that was their place for so long.[1246]

1238 Act of May 31, 1887, No. 129, § 1, 1887 Mich. Pub. Acts 144, 144.

1239 Act of Apr. 8, 1890, ch. 534, 1890 Md. Laws 606, 606–07.

1240 Act of Apr. 6, 1894, ch. 547, 1894 Md. Laws 833, 834.

1241 ESCOBAR, *supra* note 1074, at 85. But confusingly, "Later authors apparently then applied the term retroactively to all kinds of saps. . . ." *Id.* In San Francisco, "unlike elsewhere," "the term slungshot" was "applied almost universally" to blackjacks. *Id.* at 101.

1242 *Id.* at 127. Yet "there were modern blackjacks with other methods of construction," according to very early twentieth century order forms, and some of these variants were still being made in the 1970s. *Id.*

1243 *Id.* at 135.

1244 *Id.* at 11.

1245 R.L. WILSON & GREGORY C. WILSON, THEODORE ROOSEVELT: OUTDOORSMAN 138, 138 (1971).

1246 ESCOBAR, *supra* note 1074, at 105–06.

Starting in 1882, New York banned sale or manufacture, with a police exemption that Roosevelt used.[1247] The New York law was eccentric. Other jurisdictions that specifically regulated blackjacks imposed lesser restrictions.

No concealed carry. North Carolina (Alleghany County, 1877),[1248] statewide (1879);[1249] Maryland (1886);[1250] D.C. (1892, without license);[1251] Rhode Island (1893);[1252] Maryland (1894) (unless reasonable cause).[1253]

Carrying concealed created a presumption that the weapon was being carried for use against another person. New York (1866);[1254] Michigan (1887).[1255]

No carry. Tennessee (1879);[1256] Oklahoma (1890),[1257] (1893).[1258]

Limiting Sales to Minors. New York (1889),[1259] (1893).[1260]

5. Billies vs. Billy clubs

A "billy" or "billie" can be confusing. "A policeman's old fashioned billy club was usually a solid piece of turned hardwood."[1261] In contrast, "the words billie and billet were used for saps and blackjacks in particular from the late nineteenth century to early in the 20th century."[1262]

Specific laws were as follows:

Ban on manufacture and sale. New York (1882),[1263] (1884),[1264] (1889),[1265] (1899) ("billy").[1266]

1247 Act of May 1, 1882, tit. 12, § 409, 1881 N.Y. Laws 1, 102 (1882); Act of Mar. 21, 1884, ch. 46, § 7, 1884 N.Y. Laws 44, 46; Act of Apr. 15, 1889, ch. 140, §§ 1–2, 1889 N.Y. Laws 167, 167; Act of May 16, 1899, ch. 603, 1899 N.Y. Laws 1341, 1341.

1248 Act of Feb. 16, 1877, ch. 104, § 1, 1876–1877 N.C. Sess. Laws 162, 162–63 (1877).

1249 Act of Mar. 5, 1879, ch. 127, § 1, 1879 N.C. Sess. Laws 231, 231.

1250 Act of Apr. 7, 1886, ch. 375, § 1, 1866 Md. Laws 602, 602.

1251 Act of July 13, 1892, ch. 159, 27 Stat. 116–17 (1892).

1252 Act of May 3, 1893, ch. 1180, § 1, 1893 R.I. Laws 231, 231–32.

1253 Act of Apr. 6, 1894, ch. 547, § 1, 1894 Md. Laws 833, 834.

1254 Act of Apr. 20, 1866, ch. 716, § 2, 1866 N.Y. Laws 1523, 1523.

1255 Act of May 31, 1887, No. 129, § 1, 1887 Mich. Pub. Acts 144, 144.

1256 Act of Mar. 27, 1879, ch. 186, § 1, 1879 Tenn. Pub. Acts 231, 231.

1257 THE STATUTES OF OKLAHOMA 1890, at 495 (Guthrie, State Capital Prtg. Co. 1891) (published at ch. 25, art. 47, § 1).

1258 THE STATUTES OF OKLAHOMA, 1893, at 503–04 (Guthrie, State Capital Prtg. Co. 1893) (published at ch. 25, art. 45, § 1).

1259 Act of Apr. 15, 1889, ch. 140, § 1, 1889 N.Y. Laws 167, 167.

1260 THE STATUTES OF OKLAHOMA, 1893, at 503–04 (Guthrie, State Capital Prtg. Co. 1893) (published at ch. 25, art. 45, § 3).

1261 ESCOBAR, *supra* note 1074, at 9.

1262 *Id.* at 226; *see id.* at 3 (describing a 1910 hardware store catalogue: "Notice that the sap and blackjacks are just called billies." The slungshot has a separate heading.).

1263 Act of May 1, 1882, tit. 12, § 409, 1881 N.Y. Laws 1, 102 (1882).

1264 3 THE REVISED STATUTES, CODES AND GENERAL LAWS OF THE STATE OF NEW YORK 3330 (New York, L. K. Strouse & Co. 1890) (published at § 1).

1265 Act of Apr. 15, 1889, ch. 140, § 1, 1889 N.Y. Laws 167, 167.

1266 Act of May 16, 1899, ch. 603, § 1, 1899 N.Y. Laws 1341, 1341.

Ban on carry with intent to injure. Maryland (1886, open carry) ("bill-y").[1267]

No concealed carry. Rhode Island (1893) ("billy")[1268]; Maryland (1872, Annapolis),[1269] (1886),[1270] (1890, Baltimore),[1271] (1894, unless reasonable cause) ("billy");[1272] Michigan (1887) ("pocket-billie").[1273]

No carry, with some exceptions. Oklahoma Territory (1890),[1274] (1893) ("billy").[1275]

Authorizing municipal regulation. Maryland (1890) (Baltimore, "bill-ey");[1276] Michigan (1891), (1897) (Saginaw, concealed carry, "billie");[1277] Nebraska (1895) (Lincoln, concealed carry, billy).[1278]

No disposing to a minor. Oklahoma Territory (1890),[1279] (1893) ("bil-ly").[1280]

C. Rigid Impact Weapons

1. Knuckles

Knuckles are devices attached to one's second through fifth fingers to make the fist a more powerful weapon. They can be made of brass, other metals, or non-metallic material.[1281]

Abraham Lincoln's friend, the lawyer Ward Hill Lamon, served as Lincol-n's bodyguard for his midnight train ride into Washington, D.C., to assume the

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1267 Act of Apr. 7, 1886, ch. 375, § 1, 1886 Md. Laws 602, 602.

1268 Act of May 3, 1893, ch. 1180, § 1, 1893 R.I. Pub. Laws 231, 231–32.

1269 Act of Feb. 26, 1872, ch. 42, § 1, 1872 Md. Laws 56, 56–57.

1270 Act of Apr. 7, 1886, ch. 375, § 1, 1886 Md. Laws 602, 602.

1271 Act of Apr. 8, 1890, ch. 534, § 1, 1890 Md. Laws 606, 606–07.

1272 Act of Apr. 6, 1894, ch. 547, § 1, 1894 Md. Laws 833, 834.

1273 Act of May 31, 1887, No. 129, § 1, 1887 Mich. Pub. Acts 144, 144.

1274 *See* THE STATUTES OF OKLAHOMA 1890, at 495–96 (Guthrie, State Capital Prtg. Co. 1891) (published at ch. 25, art. 47).

1275 *See* THE STATUTES OF OKLAHOMA, 1893, at 503–04 (Guthrie, State Capital Prtg. Co. 1893) (published at ch. 25, art. 45, § 2).

1276 Act of Apr. 8, 1890, ch. 534, § 1, 1890 Md. Laws 606, 606–07.

1277 Act of Mar. 28, 1891, No. 257, § 1, tit. 11, § 15, 1891 Mich. Pub. Acts 388, 409; Act of June 2, 1897, No. 465, tit. 11, § 15, 1897 Mich. Pub. Acts 962, 1030.

1278 Act of Aug. 26, 1895, art. 16, §§ 1–2, 1895 Neb. Laws 209, 209–10.

1279 THE STATUTES OF OKLAHOMA 1890, at 495 (Guthrie, State Capital Prtg. Co. 1891) (published at ch. 25, art. 47, § 3).

1280 THE STATUTES OF OKLAHOMA, 1893, at 503–04 (Guthrie, State Capital Prtg. Co. 1893) (published at ch. 25, art. 45, § 2).

1281 Knuckles are "fashioned from a single piece of metal." ESCOBAR, *supra* note 1074, at 9. They are descendants of the *cestus*, a glove worn by Greek and Roman boxers, sometimes loaded with a weight. *Id.* at 199; *cf.* VIRGIL, THE AENEID 371 (John Dryden trans., 1697) ("The gloves of death—with seven distinguished folds Of tough bull-hides; the space within is spread With iron or heavy loads of lead.").

presidency. Lamon carried a pair of "fine pistols, a huge bowie knife, a black-jack, and a pair of brass knuckles."[1282]

Six states banned sales, and some of them also banned manufacture. Kentucky ("brass knuckles") (1856);[1283] Florida ("metallic knuckles") (1868),[1284] (1893);[1285] New York ("metal knuckles") (1881),[1286] (1884),[1287] (1889),[1288] (1899) ("metal knuckles");[1289] Arkansas (1881) ("metal knuckles");[1290] Massachusetts (1882);[1291] Minnesota (1886) ("metal knuckles").[1292]

The Kentucky ban was later repealed.[1293] Only Illinois outlawed possession for adults (1881),[1294] (1893).[1295] Kansas included knuckles in the long list of arms, other than rifles and shotguns, for which possession by minors was forbiden (1883) ("brass knuckles").[1296]

The majority approach was nonprohibitory:

No concealed carry. Florida ("metallic knuckles") (1868);[1297] D.C. (1871),[1298] (1892, without license),[1299] ("brass or other metal knuckles"); Maryland (1872 for Annapolis, "brass, iron, or other metal knuckles"),[1300] (1886) ("metal knuckles"),[1301] (1890, Baltimore) ("metal knuckles"),[1302] (1894) ("metal knuckles");[1303] Wisconsin (unless with reasonable cause) ("brass knuckles") (1872);[1304]

1282 HAROLD HOLZER, LINCOLN PRESIDENT-ELECT: ABRAHAM LINCOLN AND THE GREAT SECESSION WINTER 1860–1861, at 391 (2008).

1283 Act of Mar. 10, 1856, ch. 636, § 1, 1855–1856 Ky. Acts 96, 96 (1856).

1284 Act of Aug. 6, 1868, ch. 1637, § 10, 1868 Fla. Laws 61, 95.

1285 Act of June 2, 1893, ch. 4, § 3, 1893 Fla. Laws 51, 52.

1286 Act of May 1, 1882, tit. 12, § 409, 1881 N.Y. Laws 1, 102 (1882).

1287 Act of Mar. 21, 1884, ch. 46, § 7, 1884 N.Y. Laws 44, 46.

1288 Act of Apr. 15, 1889, ch. 140, § 1, 1889 N.Y. Laws 167, 167.

1289 Act of May 16, 1899, ch. 603, § 1, 1899 N.Y. Laws 1341, 1341.

1290 Act of Apr. 1, 1881, ch. 96, § 3, 1881 Ark. Acts 191, 192.

1291 THE PUBLIC STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS, ENACTED NOVEMBER 19, 1881, TO TAKE EFFECT FEBRUARY 1, 1882, at 1164 (Boston, Wright & Potter Prtg. Co. 1886) (published at ch. 206, § 11).

1292 THE PENAL CODE OF THE STATE OF MINNESOTA TO TAKE EFFECT JANUARY 1, A.D. 1886: WITH NOTES OF DECISIONS FURNISHED BY THE ATTORNEY GENERAL 127 (Saint Paul, Pioneer Press Co. 1885) (published at § 333).

1293 *See supra* note 1283.

1294 Act of Apr. 16, 1881, § 1, 1881 Ill. Laws 71, 71.

1295 Act of Apr. 16, 1881, *recodified in* THE REVISED STATUTES OF THE STATE OF ILLINOIS, 1893, at 477–78 (Chicago, Chi. L. News Co. 1893) (published at § 1).

1296 Act of Mar. 5, 1883, ch. 105, § 1, 1883 Kan. Sess. Laws 159, 159.

1297 Act of Aug. 6, 1868, ch. 1637, § 14, 1868 Fla. Laws 61, 95.

1298 Act of Aug. 10, 1871, § 1, *reprinted in* 1 THE COMPILED STATUTES IN FORCE IN THE DISTRICT OF COLUMBIA, INCLUDING THE ACTS OF THE SECOND SESSION OF THE FIFTIETH CONGRESS, 1887–89, at 178 (Washington, Gov't Prtg. Off. 1894) (published at ch. 16., § 119).

1299 Act of July 13, 1892, ch. 159, § 1, 27 Stat. 116, 116–17 (1892).

1300 Act of Feb. 26, 1872, ch. 42, § 1, 1872 Md. Laws 56, 56–57.

1301 Act of Apr. 7, 1886, ch. 375, § 1, 1886 Md. Laws 602, 602.

1302 Act of Apr. 8, 1890, ch. 534, § 1, 1890 Md. Laws 606, 606–07.

1303 Act of Apr. 6, 1894, ch. 547, § 1, 1894 Md. Laws 833, 834.

1304 Act of Feb. 14, 1872, ch. 7, § 1, 1872 Wis. Sess. Laws 17, 17–18.

Alabama ("brass knuckles") (1873);[1305] North Carolina (1877, Alleghany County, "brass, iron or metallic knuckles"),[1306] (1879, statewide);[1307] Mississippi (1878) (brass knuckles) (without good reason),[1308] (1896) ("brass or metalic knuckles),[1309] (1898) ("brass or metallic knuckles);[1310] "brass or metalic knuckles"); Washington Territory (1886);[1311] Michigan (1887);[1312] Arizona Territory (1887),[1313] (1891) ("brass knuckles, or other knuckles of metal");[1314] Maryland (1886);[1315] (1890) (Baltimore),[1316] (1894)[1317] ("metal knuckles"); Rhode Island (1893)[1318] ("brass or metal knuckles"); South Carolina (1897).[1319]

Carrying concealed created a presumption that the weapon was being carried for use against another person. Illinois ("steel or iron knuckles") (1845),[1320] (1879);[1321] New York ("metal knuckles") (1866),[1322] (1882);[1323] South Carolina ("metal knuckles") (1880).[1324]

No carry in most circumstances. Texas (1871) ("brass-knuckle");[1325] Arkansas (1881) ("brass or metal knucks");[1326] West Virginia (1882) ("metalic or other false knuckles");[1327] Arizona Territory (1889) ("brass knuckles" "within any settle-

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1305 Act of Apr. 8, 1873, No. 87, 1872–1873 Ala. Laws 130, 130–31 (1873).

1306 Act of Feb. 16, 1877, ch. 104, § 1, 1876–1877 N.C. Sess. Laws 162, 162–63 (1877).

1307 Act of Mar. 5, 1879, ch. 127, § 1, 1879 N.C. Sess. Laws 231, 231.

1308 Act of Feb. 28, 1878, ch. 46, § 1, 1878 Miss. Laws 175, 175.

1309 Act of Mar. 11, 1896, ch. 104, § 1, 1896 Miss. Laws 109, 109–10.

1310 Act of Feb. 11, 1898, ch. 68, § 1, 1898 Miss. Laws 86, 86.

1311 Act of Jan. 20, 1886, § 1, 1885–1886 Wash. Sess. Laws 81, 81–82 (1886).

1312 Act of May 31, 1887, No. 129, § 1, 1887 Mich. Pub. Acts 144, 144.

1313 REVISED STATUTES OF ARIZONA 726 (Prescott, Prescott Courier Print 1887) (published at tit. 11, § 662).

1314 Act of Mar. 6, 1891, No. 2, § 1, 1893 Ariz. Sess. Laws 3, 3 (1891) (as published by the Seventeenth Legislative Assembly of the Territory of Arizona in 1893).

1315 Act of Apr. 7, 1886, ch. 375, 1886 Md. Laws 602, 602.

1316 Act of Apr. 8, 1890, ch. 534, § 1, 1890 Md. Laws 606, 606–07.

1317 Act of Apr. 6, 1894, ch. 547, 1894 Md. Laws 833, 834.

1318 Act of May 3, 1893, ch. 1180, § 1, 1893 R.I. Pub. Laws 231, 231–32.

1319 Act of Feb. 17, 1897, No. 251, § 1, 1897 S.C. Acts 423, 423.

1320 THE REVISED STATUTES OF THE STATE OF ILLINOIS, A.D. 1874, at 453 (Springfield, Ill. J. Co. 1874) (published at ch. 38, § 56).

1321 Act of July 1, 1879, *reprinted in* REVISED STATUTES OF THE STATE OF ILLINOIS, 1880, at 365 (Chicago, Chi. Legal News Co. 1880) (published at ch. 38, § 56).

1322 Act of Apr. 20, 1866, ch. 716, § 2, 1866 N.Y. Laws 1523, 1523.

1323 Act of May 1, 1882, tit. 12, § 409, 1881 N.Y. Laws 1, 102 (1882).

1324 Act of Dec. 24, 1880, No. 362, § 1, 1880 S.C. Acts 447, 447–48.

1325 Act of Apr. 12, 1871, ch. 34, § 1, 1871 Tex. Gen. Laws 25, 25.

1326 Act of Apr. 1, 1881, No. 96, §§ 1, 3, 1881 Ark. Acts 191, 191–92.

1327 Act of Mar. 29, 1882, ch. 135, § 1, 1882 W. Va. Acts 421, 421–22.

ment, town, village or city");[1328] Oklahoma Territory (1890),[1329] (1893)[1330] ("metal knuckles").

No carry or possession with intent to injure. Minnesota (1886) ("metal knuckles");[1331] Maryland (1886) (open carry),[1332] (1890, Baltimore, open carry),[1333] (1894, open carry),[1334] ("metal knuckles").

No carry by minors. Arizona Territory (1883) ("brass-knuckles," ages 10–16, in towns).[1335]

No sales to minors. Kentucky (1859) ("brass-knucks");[1336] Indiana (1875) ("knucks");[1337] Kansas (1883) (also banning possession by minors, "brass knuckles");[1338] West Virginia (1882) ("metalic or other false knuckles");[1339] North Carolina (1893) ("brass knucks");[1340] Texas (1897) (parental permission, "knuckles made of any metal or hard substance").[1341]

No transfer to minors. Oklahoma (1890),[1342] (1893)[1343] ("metal knuckles").[1344]

No sales to a minor without written consent of a police magistrate. New York (1889).[1345]

No brandishing. Illinois (1874),[1346] (1879)[1347] ("brass, steel or iron knuckles").

[1328] Act of Mar. 18, 1889, No. 13, § 1, 1889 Ariz. Sess. Laws 16, 16.

[1329] *See* THE STATUTES OF OKLAHOMA 1890, at 495 (Guthrie, State Capital Prtg. Co. 1891) (published at ch. 25, art. 47).

[1330] *See* THE STATUTES OF OKLAHOMA, 1893, at 503–04 (Guthrie, State Capital Prtg. Co. 1893) (published at ch. 25, art. 45, § 2).

[1331] THE PENAL CODE OF THE STATE OF MINNESOTA TO TAKE EFFECT JANUARY 1, A.D. 1886: WITH NOTES OF DECISIONS FURNISHED BY THE ATTORNEY GENERAL 127 (Saint Paul, Pioneer Press Co. 1885) (published at § 334).

[1332] Act of Apr. 7, 1886, ch. 375, § 1, 1886 Md. Laws 602, 602.

[1333] Act of Apr. 8, 1890, ch. 534, § 1, 1890 Md. Laws 606, 606–07.

[1334] Act of Apr. 6, 1894, ch. 547, § 1, 1894 Md. Laws 833, 834.

[1335] Act of Feb. 24, 1883, No. 36, § 3, 1883 Ariz. Sess. Laws 65, 66.

[1336] Act of Jan. 12, 1860, ch. 33, § 23, 1859–1860 Ky. Acts 241, 245 (1960).

[1337] Act of Feb. 27, 1875, ch. 40, § 1, 1875 Ind. Acts 59, 59.

[1338] Act of Mar. 5, 1883, ch. 105, § 2, 1883 Kan. Sess. Laws 159, 159.

[1339] Act of Mar. 29, 1882, ch. 135, § 1, 1882 W. Va. Acts 421, 421–22.

[1340] Act of Mar. 6, 1893, ch. 514, § 1, 1893 N.C. Sess. Laws 468, 468–69.

[1341] Act of May 14, 1897, ch. 155, § 1, 1897 Tex. Gen. Laws 221, 221–22.

[1342] THE STATUTES OF OKLAHOMA 1890, at 495 (Guthrie, State Capital Prtg. Co. 1891) (published at ch. 25, art. 47, § 3).

[1343] THE STATUTES OF OKLAHOMA, 1893, at 503–04 (Guthrie, State Capital Prtg. Co. 1893) (published at ch. 25, art. 45, § 2).

[1344] THE STATUTES OF OKLAHOMA, 1893, at 503–04 (Guthrie, State Capital Prtg. Co. 1893) (published at ch. 25, art. 45, § 2).

[1345] Act of Apr. 15, 1889, ch. 140, § 1, 1889 N.Y. Laws 167, 167.1889 NY Laws 167.

[1346] THE REVISED STATUTES OF THE STATE OF ILLINOIS, A.D. 1874, at 360 (Springfield, Ill. J. Co. 1874) (published at § 56).

[1347] Act of July 1, 1879, *reprinted in* REVISED STATUTES OF THE STATE OF ILLINOIS, 1880, at 365 (Chicago, Chi. Legal News Co. 1880) (published at ch. 38, § 56).

Authorizing municipal regulation. Kentucky (1860) (Harrodsburg, sales to minors, slaves, or free blacks);[1348] Illinois (1867) (Bloomington, concealed carry, "cross knuckles, or knuckles of brass, lead or other metal");[1349] Wisconsin (1874–91) (concealed carry, "cross knuckles, or knuckles of lead, brass or other metal");[1350] Alabama (1885–99) (licensing dealers of "brass knuckles");[1351] Michigan (1891), (1897) (Saginaw, concealed carry, "false knuckles" [non-metallic]);[1352] Nebraska (1895) (Lincoln, concealed carry, "metal knuckles").[1353]

Ban on manufacture and sale. Minnesota (1886) ("metal knuckles");[1354] Florida (1893) ("metallic knuckles").[1355]

Ban on transfers. Arkansas (1881) ("Brass or metal knucks").[1356]

License required to sell. South Carolina ("metal knuckles") (1891).[1357]

Specific property or vendor taxes. Georgia (1892, 1894, 1896, 1898) ("metal knucks");[1358] Kentucky (1892) ("brass-knucks").[1359]

1348 Act of Jan. 12, 1860, ch. 33, § 23, 1859–1860 Ky. Acts 241, 245 (1860).

1349 Act of Mar. 7, 1867, ch. 6, § 1(38), 1867 Ill. Laws 647, 650.

1350 Act of Mar. 10, 1874, ch. 184(4), § 3(61), 1874 Wis. Sess. Laws 311, 334; Act of Mar. 5, 1875, ch. 262(4), § 3(49), 1875 Wis. Sess. Laws 450, 471; Act of Mar. 3, 1876, ch. 103(4), § 3(43), 1876 Wis. Sess. Laws 199, 218; Act of Mar. 11, 1876, ch. 313, tit. 4, § 3(59), 1876 Wis. Sess. Laws 715, 737; Act of Mar. 7, 1877, ch. 162(5), § 3(49), 1877 Wis. Sess. Laws 346, 367; Act of Mar. 9, 1878, ch. 112, tit. 5, § 3(55),1878 Wis. Sess. Laws 98, 119–20; Act of Mar. 13, 1882, ch. 92, § 29(47), 1882 Wis. Sess. Laws 292, 309; Act of Mar. 18, 1882, ch. 169(4), § 3(48), 1882 Wis. Sess. Laws 503, 524; Act of Mar. 30, 1883, ch. 183(6), § 3(56), 1883 Wis. Sess. Laws 687, 713; Act of Apr. 4, 1883, ch. 351, § 32(45), 1883 Wis. Sess. Laws 1016, 1034; Act of Mar. 7, 1885, ch. 37(4), § 3(26), 1885 Wis. Sess. Laws 110, 126; Act of Mar. 27, 1885, ch. 159(5), § 3(44), 1885 Wis. Sess. Laws 733, 753; Act of Apr. 2, 1885, ch. 227(5), § 3(50), 1885 Wis. Sess. Laws 1085, 1109; Act of Mar. 24, 1887, ch. 124, tit. 4, § 2(56), 1887 Wis. Sess. Laws 310, 336; Act of Mar. 29, 1887, ch. 161(4), § 3(26), 1887 Wis. Sess. Laws 666, 684; Act of Mar. 29, 1887, ch. 162(4), § 3(36), 1887 Wis. Sess. Laws 728, 754; Act of Apr. 11, 1887, ch. 409(4), § 36(53), 1887 Wis. Sess. Laws 1284, 1308; Act of Mar. 30, 1891, ch. 123(5), § 2(51), 1891 Wis. Sess. Laws 675, 699–700; Act of Mar. 11, 1891, ch. 23(6), § 3(28), 1891 Wis. Sess. Laws 43, 61; Act of Mar. 20, 1891, ch. 59(6), 4(62), 1891 Wis. Sess. Laws 321, 355.

1351 Act of Feb. 16, 1885, No. 314, § 17(9), 1884–1885 Ala. Laws 543, 552 (1885); Act of Feb. 28, 1889, No. 550, § 17(9), 1888–1889 Ala. Laws 957, 965–66 (1889); Act of Feb. 16, 1891, No. 357, § 1(9), 1890–1891 Ala. Laws 763, 764 (1891); Act of Dec. 5, 1896, No. 62, § 1(9), 1896–1897 Ala. Laws 70, 71 (1896); Act of Feb. 18, 1899, No. 566, § 3(9), 1898–1899 Ala. Laws 1098, 1102 (1899).

1352 Act of Mar. 28, 1891, No. 257, tit. 11, § 15, 1891 Mich. Pub. Acts 388, 409; Act of June 2, 1897, No. 465, tit. 11, § 15, 1897 Mich. Pub. Acts 962, 1030.

1353 Act of Aug. 26, 1895, art. 16, § 1, 1895 Neb. Laws 209, 209.

1354 THE PENAL CODE OF THE STATE OF MINNESOTA TO TAKE EFFECT JANUARY 1, A.D. 1886: WITH NOTES OF DECISIONS FURNISHED BY THE ATTORNEY GENERAL 127 (Saint Paul, Pioneer Press Co. 1885) (published at § 333).

1355 Act of June 2, 1893, ch. 4124, § 3, 1893 Fla. Laws 51, 52.

1356 Act of Apr. 1, 1881, No. 96, § 3, 1881 Ark. Acts 191, 192.

1357 Act of Dec. 24, 1891, No. 703, § 2, 1891 S.C. Acts 1101, 1102.

1358 Act of Dec. 23, 1892, tit. 2, No. 133, § 2(16), 1892 Ga. Laws 22, 25; Act of Dec. 18, 1894, tit. 2, No. 151, § 2(16), 1894 Ga. Laws 18, 21; Act of Dec. 24, 1896, tit. 2, No. 132, § 2(16), 1896 Ga. Laws 21, 25; Act of Dec. 22, 1898, tit. 2, No. 150, § 2(16), 1899 Ga. Laws 21, 25.

1359 Act of November 11, 1892, ch. 103, art. 10, subdiv. 4, § 35, 1891–1892 Ky. Acts 277, 345–46 (1892).

While the statutes varied in what kind of "knuckles" were illegal, a Texas court ruled that "brass knuckles" encompassed knuckles made of steel or other materials.[1360]

Throughout this article we have focused on laws that named specific weapons. However, it should be recognized that many laws, particularly those involving public carry, had catch-all phrases such as "other deadly weapon." These laws might encompass weapons not named in the statute. Such a law against concealed carry in Missouri was held to encompass "a pair of brass knucks."[1361]

Consistent with the express text of the Missouri state constitution, the Missouri Court of Appeals said that concealed carry of knuckles was not part of the right to arms.[1362] Alabama's statute against concealed carry had an exception for carrying a firearm or knife with good reason to apprehend an attack. Defendant had indisputably been carrying knuckles because of danger of imminent attack, but his conviction was upheld, because the statutory exception allowing concealed carry did not include knuckles. The Alabama Supreme Court held that the trial court did not err in determining "that this provision did not embrace brass knuckles, slung-shots, or weapons of like kind . . . ."[1363]

> The carrying concealed of a barbarous weapon of this class, which is usually the instrument of an assassin, and an index of a murderous heart, is absolutely prohibited by section 3776 of the Criminal Code of this state. The law does not recognize it as a weapon of self-defense.[1364]

2. Loaded canes

A loaded cane has a hollowed section filled with lead.[1365] It is a powerful impact weapon.[1366]

[1360] Harris v. State, 3 S.W. 477, 478 (Tex. Ct. App.1887).

[1361] State v. Hall, 20 Mo. App. 397 (1886) (statute prohibited concealed carry of "fire arms, bowie knife, dirk, dagger, slungshot, or other deadly weapon").

[1362] A St. Louis ordinance forbade concealed carry without a permit of "cross-knuckles, or knuckles of lead, brass or other metal." City of St. Louis v. Vert, 84 Mo. 204, 206–07 (1884). "In the [C]onstitution the citizen has many priceless rights guaranteed to him; but unluckily for appellant, the 'right' to carry concealed in his hip pocket knuckles of brass, a weapon of dangerous and deadly character, is not a "right' protected by any constitutional guaranty." *Id.* at 209; Mo. Const. of 1875, art. II, § 17 ("[T]he right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons.").

[1363] Bell v. State, 8 So. 133 (1889).

[1364] *Id.* 133–34 (1889).

[1365] Harry Schenawolf, *Loaded Cane–How Revolutionary War Officers and Gentlemen Protected Themselves from Drunken Soldiers and Muggings*, REVOLUTIONARY WAR J. (June 28, 2019), https://www.revolutionarywarjournal.com/loaded-cane-how-revolutionary-war-officers-and-gentlemen-dealt-with-drunken-soldiers-and-riff-raff/ [https://perma.cc/EYZ7-86ND].

[1366] *Id.*

No concealed carry. North Carolina 1877 (Alleghany County),[1367] 1879 (statewide).[1368]

No carry in most circumstances. Tennessee (1821),[1369] (1870),[1370] (1879) ("sword cane" or "loaded cane");[1371] Oklahoma Territory (1890),[1372] (1893).[1373]

No disposing to a minor. North Carolina (1893);[1374] Oklahoma Territory (1890),[1375] (1893).[1376]

D. Trap or Spring Guns

Trap guns, sometimes called spring guns, are rigged to aim and fire at an animal or intruder when a device is tripped or sprung.[1377] Historically, these were sometimes used against burglars, poachers, or graverobbers, and sometimes to hunt animals.[1378] While some firearms were designed solely for these purposes,[1379] no trap-gun regulation forbade possessing such arms or any other arms. Rather, a few states forbade the actual setting of a gun to function as a trap gun (whether designed for that purpose or not), and sometimes only forbade setting the trap for a specific purpose.

No setting any trap gun. New Jersey (1771);[1380] Minnesota (1869);[1381] Wisconsin (1869);[1382] Michigan (1875) (unless left "in the immediate presence of some competent person");[1383] North Dakota (1895) (unless left "in the immediate presence of some competent person").[1384]

[1367] Act of Feb. 16, 1877, ch. 104, § 1, 1876–1877 N.C. Sess. Laws 162, 162–63 (1877).

[1368] Act of Mar. 5, 1879, ch. 127, § 1, 1879 N.C. Sess. Laws 231, 231.

[1369] Act of Oct. 19, 1821, ch. 13, 1821 Tenn. Pub. Acts 15, 15–16.

[1370] Act of Jan. 6, 1870, ch. 41, 1869–1870 Tenn. Pub. Acts 55, 55 (1870).

[1371] Act of Mar. 27, 1879, ch. 186, §§ 1–3, 1879 Tenn. Pub. Acts 231, 231.

[1372] *See* THE STATUTES OF OKLAHOMA 1890, at 495 (Guthrie, State Capital Prtg. Co. 1891) (published at ch. 25, art. 47).

[1373] *See* THE STATUTES OF OKLAHOMA, 1893, at 503–04 (Guthrie, State Capital Prtg. Co. 1893) (published at ch. 25, art. 45, § 2).

[1374] Act of Mar. 6, 1893, ch. 514, 1893 N.C. Sess. Laws 468, 468–49.

[1375] THE STATUTES OF OKLAHOMA 1890, at 495 (Guthrie, State Capital Prtg. Co. 1891) (published at ch. 25, art. 47, § 3).

[1376] THE STATUTES OF OKLAHOMA, 1893, at 503–04 (Guthrie, State Capital Prtg. Co. 1893) (published at ch. 25, art. 45, § 2).

[1377] *See* WINANT, FIREARMS CURIOSA, *supra* note 31, at 95.

[1378] *See, e.g.*, *id.* at 95 ("Some of the trap guns . . . designed solely to shoot foraging small game, were almost sure to get dead center hits. The poacher-shooting trap guns were less dependable."); JAMES BLAKE BAILEY, THE DIARY OF A RESURRECTIONIST 1811-1812 TO WHICH ARE ADDED AN ACCOUNT OF THE RESURRECTION MEN IN LONDON AND A SHORT HISTORY OF THE PASSING OF THE ANATOMY ACT 75 (London, Swan Sonnenschein & Co. ed. 1896) ("[S]pring guns were set in many of the cemeteries [to] prevent the depredations of the resurrection-men.").

[1379] *See* WINANT, FIREARMS CURIOSA, *supra* note 31, at 108–21.

[1380] Act of Dec. 21, 1771, ch. 540, §§ 9–10, 1763–1775 N.J. Laws 343, 346 (1771).

[1381] Act of Feb. 27, 1869, ch. 39, § 1, 1869 Minn. Laws 50, 50.

[1382] Act of Feb. 25, 1869, ch. 33, § 1, 1869 Wis. Sess. Laws 35, 35.

[1383] Act of Apr. 22, 1875, No. 97, 1875 Mich. Pub. Acts 136, 136.

[1384] THE REVISED CODES OF THE STATE OF NORTH DAKOTA 1895, at 1259 (Bismarck, Trib. Co. 1895) (published at § 7094).

No setting a trap gun to injure another person. Utah (1865) ("to injure another's person or property");[1385] Vermont (1884).[1386]

No setting a trap gun for hunting. Vermont (1884);[1387] North Dakota (1891) (to shoot "any buffalo, elk, deer, antelope or mountain sheep"),[1388] (1899).[1389]

E. Cannons

As detailed in Part II.F, the laws of the colonial and Founding eras presumed personally owned cannons. Under the Constitution, cannons were necessary so that Congress could "grant Letters of Marque and Reprisal."[1390] Such letters were granted during the War of 1812.[1391] Cannons were advertised for sale in an 1813 newspaper ad in Newport, Rhode Island, one of America's busiest seaports.[1392]

An international declaration in 1856 prohibited signatory nations from issuing letters of marque and reprisal.[1393] The United States chose not to join. During the Civil War, the Confederacy issued letters of marque and reprisal.[1394] The Spanish-American War of 1898, like previous naval wars, generated cases about the ownership of prizes.[1395]

On the land, legislation provided rules for cannon owners. The 1881 Pennsylvania legislature made it a misdemeanor to "knowingly and willfully sell" to buyers under sixteen-years-old "any cannon, revolver, pistol or other such deadly

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[1385] ACTS, RESOLUTIONS AND MEMORIALS PASSED AT THE SEVERAL ANNUAL SESSIONS OF LEGISLATIVE ASSEMBLY OF THE TERRITORY OF UTAH 59 (Great Salt Lake City, Henry McEwan 1866) (published at tit. 8, § 102).

[1386] Act of Nov. 25, 1884, No. 76, 1884 Vt. Acts & Resolves 74, 74–75.

[1387] *Id.*

[1388] Act of Mar. 7, 1891, ch. 70, § 1, 1891 N.D. Laws 193, 193–94.

[1389] Act of Mar. 8, 1899, ch. 93, § 7(11), 1899 N.D. Laws 122, 125.

[1390] U.S. CONST. art. I, § 8.

[1391] Act of June 18, 1812, ch. 102, 2 Stat. 755, 755 (1812). The privateers "were of incalculable benefit to us, and inflicted enormous damage" on Great Britain. THEODORE ROOSEVELT, THE NAVAL WAR OF 1812, at 416 (1882).

[1392] *Cannon, Gun-Powder, Shot, &c.*, R.I. REPUBLICAN, June 10, 1813, at 4, https://chroniclingamerica.loc.gov/lccn/sn83025561/1813-06-10/ed-1/seq-4/ [https://perma.cc/RYT2-49DT].

[1393] Paris Declaration respecting Maritime Law, art. 1 (Apr. 16, 1856) ("Privateering is and remains abolished."). Later, the United States announced it would comply with the Declaration, even though the United States has never formally joined the Declaration.

[1394] Cooperstein, *supra* note 251, at 246. In 1863, Congress passed and President Lincoln signed a law authorizing privateering for three years, but no letters were granted. *See* Act of Mar. 3, 1863, ch. 85, 12 Stat. 758, 758 (1863); Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 YALE J.L. & HUMANS. 1, 72–73 (2007).

[1395] The Paquete Habana, 175 U.S. 677 (1900) (applying customary international law that coastal fishing vessels may not be seized).

For contemporary arguments in favor of issuing letters of marque and reprisal against pirates around Somalia, see Todd Emerson Hutchins, Comment, *Structuring a Sustainable Letters of Marque Regime: How Commissioning Privateers Can Defeat The Somali Pirates*, 99 CALIF. L. REV. 819 (2011); Joshua Staub, *Letters of Marque: A Short-Term Solution to an Age Old Problem*, 40 J. MAR. L. & COM. 261 (2009).

weapon."[1396] By implication, sales of cannons to persons sixteen and older were legal.

Most nineteenth-century cannon laws prevented people from firing cannons in certain locations, typically public ones. In 1845, Ohio forbade anyone to "fire any cannon . . . upon any public street or highway, or nearer than ten rods to the same," "except in case of invasion by a foreign enemy or to suppress insurrections or mobs, or for the purpose of raising drowned human bodies, or for the purpose of blasting or removing rocks."[1397]

Other localities also prevented people from firing cannons in certain locations. Northern Liberties Township, Pennsylvania (1815),[1398] Cincinnati, Ohio (1818),[1399] Jersey City, New Jersey (1843),[1400] St. Louis, Missouri (1843),[1401] Detroit, Michigan (1848),[1402] Dayton, Ohio (1842),[1403] Peoria, Illinois (1856),[1404] (1869),[1405] Chicago, Illinois (1861),[1406] San Francisco, California (1866),[1407] Merid-

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1396 Act of June 10, 1881, No. 124, 1881 Pa. Laws 111, 111–12.

1397 Act of Feb. 10, 1845, § 1, 1844 Ohio Laws 17, 17 (1845).

1398 Act of Nov. 6, 1815 (allowing them "within the regulated parts . . . in said township, without permission from the president of the board of commissioners"), *reprinted in* A DIGEST OF ACTS OF ASSEMBLY, RELATING TO THE INCORPORATED DISTRICT OF NORTHERN LIBERTIES, AND OF THE ORDINANCES FOR THE GOVERNMENT OF THE DISTRICT 94 (Philadelphia, Fayette Pierson 1847) (published at § 7, sec. 8).

1399 Act of June 19, 1818 ("within the limits of said city"), *reprinted in* ACT INCORPORATING THE CITY OF CINCINNATI, AND THE ORDINANCES OF SAID CITY NOW IN FORCE 44 (Cincinnati, Morgan et al. eds., 1828); Act of Mar. 9, 1825, ("[I]t shall not be lawful for any person or persons having charge or being on board of any boat upon the Ohio river . . . to cause any cannon . . . to discharge its contents towards the city."), *reprinted in id.* at 44–45.

1400 Act of July 28, 1843 ("within this city . . . unless in defense of his property or person"), *reprinted in* ORDINANCES OF JERSEY CITY 9 (Jersey City, Southard & Post 1844) (published at tit. 4, § 7).

1401 Act of Sept. 16, 1843, § 10 ("within the city"), *reprinted in* THE REVISED ORDINANCES OF THE CITY OF SAINT LOUIS, REVISED AND DIGESTED BY THE FIFTH CITY COUNCIL 304 (St. Louis, Chambers & Knapp 1843).

1402 THE REVISED CHARTER AND ORDINANCES OF THE CITY OF DETROIT 199 (Detroit, Wilbur F. Storey, 1855) (published at tit. 6, ch. 38, § 10) ("within this city, unless by permission of the Mayor or two Aldermen").

1403 Act of Sept. 16, 1842 ("within the bounds of the building lots, or cemetery ground in this city, or within one hundred yards of any public road, within this corporation, except by permission of council"), *reprinted in* LAWS AND ORDINANCES OF THE CITY OF DAYTON 229 (Dayton, Dayton Empire 1862) (published at ch. 17, § 38)

1404 Act of Oct. 18, 1856 ("in said city, without permission from the mayor or city marshal"), *reprinted in* THE CITY CHARTER WITH THE SEVERAL LAWS AMENDATORY THERETO, AND THE REVISED ORDINANCES OF THE CITY OF PEORIA, ILLINOIS 168 (Peoria, Nason & Hill 1857) (published at ch. 40, § 1).

1405 Act of Oct. 15, 1869 ("in said city, without permission from the mayor or superintendent of police"), *reprinted in* THE CITY CHARTER AND REVISED ORDINANCES OF THE CITY OF PEORIA, ILLINOIS 254 (Peoria, N.C. Nason, 1869) (published at No. 50, § 1).

1406 Act of Feb. 18, 1861, § 78, 1861 Ill. Laws 118, 144 ("within the city limits . . . without permission from the mayor or common council").

1407 Act of May 4, 1866, No. 697, ch. 3, § 22 ("within that portion of this city and county lying between Larkin and Ninth Streets and the outer line of the streets forming the water-front, except by special permission"), *reprinted in* THE GENERAL ORDERS OF THE BOARD OF SUPERVISORS, PROVIDING REGULATION FOR THE GOVERNMENT OF THE CITY AND COUNTY OF SAN FRANCISCO 13 (San Francisco, Cosmopolitan Prtg. Co. 1869).

en, Connecticut (1869),[1408] Dover, New Hampshire (1870),[1409] Little Rock, Arkansas (1869),[1410] Martinsburg, West Virginia (1857),[1411] La Crosse, Wisconsin (18-81),[1412] Lynchburg, Virginia (1887),[1413] and Lincoln, Nebraska (1895).[1414]

These regulations indicate both that private citizens possessed cannons and that they were common enough to place limitations on where they could be fired.

The obvious dangers of firing a cannon in town are justifications for the discharge restrictions. The near-complete absence of any other restrictions in the nineteenth century might be explained by great rarity of use of cannons in crime. Cannons are often fixed in a single location, such as a rooftop. If wheeled, they must be slowly moved by draft animals. It would seem difficult for criminals to make use of them.[1415]

VII. DOCTRINAL ANALYSIS

This Part offers doctrinal suggestions based on the legal history above.

- Part A summarizes bans on sales or possession of particular arms.

[1408] Act of Nov. 1, 1869, § 1("within the limits of said city"), *reprinted in* THE CHARTER AND BY-LAWS OF THE CITY OF MERIDEN 135 (Hartford, Case, Lockwood, Brainard Co. 1875).

[1409] THE CHARTER, WITH ITS AMENDMENTS, AND THE GENERAL ORDINANCES OF THE CITY OF DOVER 32 (Dover, Libbey & Co. 1870) (published at ch. 252, § 5) ("within the compact part of any town").

[1410] Act of July 15, 1869 ("No person shall fire or discharge any cannon . . . without permission from the mayor, which permission shall limit the time of such firing, and shall be subject to be revoked by the mayor at any time after it has been granted."), *reprinted in* A DIGEST OF THE LAWS AND ORDINANCES OF THE CITY OF LITTLE Rock 231 (Little Rock, Republican Steam Press 1871) (published at § 288).

[1411] Act of May 25, 1857 ("within such parts of the town which are or shall be laid out into lots, or within two hundred yards of said limits"), *reprinted in* Ordinances AND BY-LAWS OF THE CORPORATION OF MARTINSBURG 25 (Martinsburg, Indep. Prtg. Co. 1875) (published at ch. 8, § 3).

[1412] Act of Feb. 11, 1881 ("within the limits of the city of La Crosse, without having first obtained written permission from the mayor"), *reprinted in* CHARTER AND ORDINANCES OF THE CITY OF LA CROSSE, WITH THE RULES OF THE COMMON COUNCIL 202 (La Crosse, Republican & Leader 1888) (published at No. 27, § 1).

[1413] Act of July 1, 1887 ("in the city" or "within one hundred yards of any dwelling-house without the consent of the owner or occupant of such house"), *reprinted in* THE CODE OF THE CITY OF LYNCHBURG, VA., CONTAINING THE CHARTER OF 1880, WITH THE AMENDMENTS OF 1884, 1886 AND 1887, AND THE GENERAL ORDINANCES IN FORCE JULY 1ST, 1887, at 116 (Lynchburg, J.P. Bell & Co. 1887) (published at § 14).

[1414] Act of Aug. 26, 1895, art. 26 ("in any street, avenue, alley, park, or place, within the corporate limits of the city"), *reprinted in* REVISED ORDINANCES OF LINCOLN, NEB. 238 (Lincoln, J. Co. 1895).

[1415] Mortars are a different story. They are short tubes and man-portable. The rear sits on the ground and the front is elevated by legs, such as a bipod. *See, e.g.*, Mortar, BRITANNICA, https://www.britannica.com/technology/mortar-weapon [https://perma.cc/G44J-HC7U] (last visited Apr. 11, 2024). Some of the above laws also covered mortars. *See supra* notes 1398–14. The absence of legislative attention, other than discharge restrictions for inappropriate places, may, as with cannons, be the result of the rarity of criminal use. We guess that few criminals were interested in bombarding fortified buildings.

- Part B describes the constitutional background following the adoption of the Fourteenth Amendment; notwithstanding clear congressional intent to make the Bill of Rights enforceable against the States, the Supreme Court held that States could disregard the Bill of Rights, including the Second Amendment.
- Part C applies legal history to two core Second Amendment doctrines. First, *Heller*'s affirmation on prohibitions of "dangerous and unusual weapons." Second, the *Bruen* question of how many jurisdictions make a precedential "tradition."
- Part D applies history and doctrine to four specific issues:
    - First, the historical bans on slungshots and knuckles might be justifiable under *Heller*'s allowance of bans on arms "not typically poss essed by law-abiding citizens."
    - Second, bans on modern semiautomatic firearms and magazines lack historical support.
    - As for minors, the final third of the nineteenth century provides substantial support for limitations on purchases by minors of some arms without parental consent. The tradition of restrictions on minors does not support modern long gun bans for young adults aged eighteen to twenty.
    - Finally, penalties for misuse of a particular arm in a violent crime are supported by tradition. They do not involve activity that is protected by the Second Amendment.

A. Summary of Possession or Sales Bans

From 1607 through 1899, American bans on possession or sale to adults of particular arms were uncommon. For firearms, the bans were:

- Georgia (1837), all handguns except horse pistols.[1416] Held unconstitutional in *Nunn v. State*.[1417]
- Tennessee (1879)[1418] and Arkansas (1881).[1419] Bans on sales of concealable handguns. Based on militia-centric interpretations of the state constitutions, the laws did not ban the largest and most powerful revolvers, namely those like the Army or Navy models.
- Florida (1893).[1420] Discretionary licensing and an exorbitant licensing fee for repeating rifles. The law was "never intended to be applied to the white population" and "conceded to be in contravention of the Constitution and non-enforceable if contested."[1421]

1416 *See supra* note 612.

1417 *See supra* note 493.

1418 *See supra* notes 499, 1155.

1419 *See supra* notes 500–01, 798.

1420 *See supra* note 506 and accompanying text.

1421 Watson v. Stone, 148 Fla. 516, 524 (1941) (Buford, J., concurring).

For some nonfirearms arms, several states enacted sales bans:

- Bowie knife. Sales bans in Georgia, Tennessee, and later in Arkansas.[1422] Georgia ban held to violate the Second Amendment.[1423] Prohibitive transfer or occupational vendor taxes in Alabama and Florida, which were repealed.[1424] Personal property taxes at levels high enough to discourage possession by poor people in Mississippi, Alabama, and North Carolina.[1425]
- Dirk. Georgia (1837) (held to violate Second Amendment);[1426] Arkansas (1881).[1427]
- Sword cane. Georgia (1837), held to violate the Second Amendment.[1428] Arkansas (1881).[1429]
- Slungshot or "colt." Sales bans in nine states or territories.[1430] The Kentucky ban was later repealed.[1431] Illinois also banned possession.[1432]
- Sand club or blackjack. New York (1881), (1884), (1889), (1899).[1433]
- Billy. New York (1881), (1884), (1889), (1899).[1434]
- Metallic knuckles. Sales bans in eight states, later repealed in Kentucky.[1435] Illinois also banned possession.[1436]

B. The Constitutional and Racial Background of Possession or Sales Bans

The legal background of the laws discussed above was very different than it is today. The Supreme Court in *Barron v. Baltimore* had said that the Bill of Rights was not binding on the states.[1437] Some state courts, which Akhil Amar calls "the *Barron* contrarians," had taken a different view.[1438] These include the Georgia Supreme Court in *Nunn v. State*, which used the Second Amendment to overturn a statute prohibiting handguns, Bowie knives, and various other arms.[1439]

1422 *See supra* notes 612 (Georgia), 631 (Tennessee), 798 (Arkansas).
1423 *See supra* note 493.
1424 *See supra* notes 582, 666.
1425 *See supra* notes 574 (Mississippi), 598 (Alabama), 672 (North Carolina).
1426 *See supra* notes 613–13, 798–99.
1427 *See supra* note 798.
1428 *See supra* notes 612–13.
1429 *See supra* note 798.
1430 *See supra* notes 1101–16.
1431 *See supra* note 1188.
1432 *See supra* note 1114.
1433 *See supra* notes 1222–25, 1247.
1434 *See supra* notes 1263–66.
1435 *See supra* notes 1283.
1436 *See supra* notes 1294–95.
1437 32 U.S. 243 (1833).
1438 AMAR, *supra* note 497, at 145.
1439 *See supra* note 493.

After the Civil War, the Fourteenth Amendment was ratified, with express congressional intent to make the Bill of Rights, specifically including the Second Amendment, enforceable against the States, as among the "privileges or immunities of citizens of the United States."[1440] But the Supreme Court mostly nullified the Privilege or Immunities Clause in the *Slaughter-House Cases*.[1441] The Court's decisions in *United States v. Cruikshank*[1442] and *Presser v. Illinois*[1443] had seemed to many to affirm the *Slaughter-House* approach specifically for Second Amendment rights.

The idea that the Fourteenth Amendment's Due Process Clause might "incorporate" individual elements in the Bill of Rights did not appear until the Court's 1897 incorporation of the Fifth Amendment Takings Clause in *Chicago, Burlington & Quincy Railroad Company v. Chicago*.[1444] It took the Court until the 1920s to begin selective incorporation, starting with parts of the First Amendment; until the 1940s to begin incorporating the criminal law and procedure provisions of Amendments Four, Five, Six, and Eight; until 2010 to incorporate the Second Amendment;[1445] and until 2019 to incorporate the Excessive Fines Clause of the Eighth Amendment.[1446] So in the nineteenth century, reasonable state legislators might have believed they had no obligation to respect anything in the Bill of Rights, including the Second Amendment.

Many states had their own state constitutional guarantees of the right to keep and bear arms.[1447] But New York did not, and that is a partial explanation of its eccentric ban on the sale or manufacture of blackjacks and sand clubs.[1448] The two other most prohibitive states were Tennessee and Arkansas, which banned sales of all handguns except the most powerful ones—the Army & Navy type revolvers.[1449] Both states also banned sales of Bowie knives, and Arkansas did the same for sword canes.[1450] In both states, the state supreme courts interpreted the state constitutional right to arms as solely applicable to militia-suitable arms.[1451]

Even with a militia-centric premise, the legislatures and courts of Tennessee and Arkansas were incorrect. The Tennessee Supreme Court in *Aymette* had upheld a statute against Bowie knives on the grounds that such knives are not militia-type arms.[1452] The 1836 Texas War of Independence and the Civil War of

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1440 McDonald v. City of Chicago, 561 U.S. 743, 838–60 (2010) (Thomas, J., concurring).

1441 83 U.S. 36 (1873).

1442 92 U.S. 542 (1875).

1443 116 U.S. 252 (1886).

1444 166 U.S. 226 (1897).

1445 McDonald v. City of Chicago, 561 U.S. 743 (2010).

1446 Timbs v. Indiana, 139 S. Ct. 682 (2019).

1447 *See* JOHNSON ET AL., *supra* note 17, at 791–804 (providing texts of all state guarantees, and years of enactment).

1448 In 1909, the legislature enacted a statutory Bill of Rights, including a verbatim copy of the Second Amendment. N.Y. Civ. Rights Law, art. 2, § 4 (1909); Act of Feb. 17, 1909, ch. 14, 1909 N.Y. Laws 13,13. As a mere statute, it could not override any other statute the legislature chose to enact.

1449 *See supra* notes 498–99, 639–40.

1450 *See supra* notes 631, 798.

1451 *See supra* notes 636, 794–97.

1452 Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840).

1861–1865, decisively proved the opposite. Indeed, the Tennessee legislature suspended the Bowie knife law for the duration of the Civil War.[1453] During the war, the Alabama legislature, having used property taxes to discourage Bowie ownership, had to pay for manufacturing Bowie knives of the state militia.[1454]

Overall, restrictions on the right to keep and bear arms in the nineteenth century were most frequent in slave states that later became Jim Crow states.[1455] The modern precedential value of these white supremacy laws may be limited.[1456]

This does not mean that all nineteenth century arms control laws were entirely racist. In the slave—later Jim Crow—states, laws that disarmed poor whites as well as blacks were enacted.[1457]

The law of Massachusetts is a good refutation of the notion that every arms control law is necessarily racist. During the nineteenth century, the state constitution's right to arms was interpreted in the standard way, as an important but not unlimited right of all people.[1458] The Massachusetts right was interpreted to protect the rights of everyone to own and carry arms. Unlike some restrictive Southern cases, Massachusetts courts never claimed that only militia-type arms were protected. A person's right to bear arms could be restricted if a court found that the person had been carrying in a manner leading to a breach of the peace. If so, the person could only continue to carry if he posted a bond. [1459]

Massachusetts was always a leading anti-slavery state and was the first state in which the highest court held slavery to violate the state constitution. By the end of the nineteenth century, Massachusetts was the only state that had not outlawed at least some interracial marriages.[1460] In anti-racist Massachusetts, the right to own and carry arms was necessarily respected. And Massachusetts was an early adopter of a ban on sales of slungshots and brass knuckles.[1461]

The Massachusetts story does not prove or disprove the wisdom of sales bans on slungshots and brass knuckles. It does disprove the notion that all historic arms control laws were motivated by racial animus.

[1453] *See supra* note 644.

[1454] *See supra* note 590.

[1455] *See supra*, Part V.B.

[1456] *See* Justin W. Aimonetti & Christian Talley, *Race, Ramos, and the Second Amendment Standard of Review*, 107 VA. L. REV. ONLINE 193 (2021) (arguing that Jim Crow gun-control laws are not valid precedents today).

[1457] For example, the laws in some southeastern states imposed relatively high annual property taxes on owning Bowie knives or handguns. The Tennessee and Arkansas bans on sales of handguns other than the Army & Navy models favored people who could afford the largest and most powerful handguns. Many former officers of the Confederate military had retained their service handguns; then as now, military officers tend to be disproportionately from the better-educated and wealthier classes. *See supra*, Part IV.B–C.

[1458] MASS. CONST., part 1, art. XVII (1780).

[1459] *See, e.g.*, Commonwealth v. Murphy, 44 N.E. 138 (Mass. 1896) (upholding ban on armed parades without advance permission, citing to state cases that states may regulate the mode of carry); Commonwealth v. Blanding, 3 Pick. 304, 314 (Mass. 1825) ("The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction.")

[1460] PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA (2009).

[1461] *See supra* notes 1107, 1291.

C. Modern Doctrines

1. "Dangerous and unusual" versus "not typically possessed by law-abiding citizens": The distinction applied to slungshots and brass knuckles.

Heller cited a litany of precedents for the prohibition of carrying certain arms. Some of the sources called such arms "dangerous and unusual," and others said, "dangerous or unusual."[1462] From these precedents, *Heller* extrapolated a

[1462] District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (first citing 4 WILLIAM BLACKSTONE, COMMENTARIES *148–49 (1769) ("The offence of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the statute of Northampton, 2 Edw. III. C.3. upon pain of forfeiture of the arms, and imprisonment during the king's pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour."); then citing 3 THE WORKS OF THE HONOURABLE JAMES WILSON 79 (Bird Wilson ed., 1804) ("In some cases, there may be an affray, where there is no actual violence; as where a man arms hims'lf with dangerous and unusual weapons, in such a manner, as will naturally diffuse a terro'r among the people."); then citing JOHN A. DUNLAP, THE NEW-YORK JUSTICE 8 (1815) ("It is likewise said to be an affray, at common law, for a man to arm himself with dangerous and unusual weapons, in such manner as will naturally cause terror to the people."); then citing CHARLES HUMPHREYS, COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822) ("Riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the people of the land, which is punishable by forfeiture of the arms, and fine and imprisonment. But here it should be remembered, that in this country the constitution guarranties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify the people unnecessarily."); then citing 1 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 271–72 (2d ed. 1831) ("as where people arm themselves with dangerous and unusual weapons; in such a manner as will naturally cause a terror to the people; which is said to have been always an offence at common law, and is strictly prohibited by several statutes."); then citing HENRY J. STEPHEN, SUMMARY OF THE CRIMINAL LAW 48 (1840) ("Riding or going armed with dangerous or unusual Weapons" is "[b]y statute of Northampton, 2 Edw. III, c. 3, . . . a misdemeanor, punishable with forfeiture of the arms and imprisonment during the king's pleasure."); then citing ELLIS LEWIS, AN ABRIDGMENT OF THE CRIMINAL LAW OF THE UNITED STATES 64 (1847) ("where persons openly arm themselves with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law, an affray may be committed without actual violence."); then citing FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 726 (2d ed., 1852) ("there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law, and is strictly prohibited by the statute [Statute of Northampton]."); then citing State v. Langford, 10 N.C. 381, 383–84 (1824) ("[T]here may be an affray when there is no actual violence: as when a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people; which is said always to have been an offence at common law, and is strictly prohibited by statute."); then citing O'Neill v. State, 16 Ala. 65, 67 (1849) ("It is probable, however, that if persons arm themselves with deadly or unusual weapons for the purpose of an affray, and in such manner as to strike terror to the people, they may be guilty of this offence, without coming to actual blows."); then citing English v. State, 35 Tex. 473, 476–77 (1872) ("Blackstone says, the offense of riding or going round with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land."); and then citing State v. Lanier, 71 N.C. 288, 289 (1874) ("The elementary writers say that the offence of going armed with dangerous or unusual weapons is a crime against the public peace by terrifying the good people of the land, and this Court has declared the same to be the common law in State v. Huntley, 3 Ired. 418.")).

rule that the government may forbid possession (not just carrying) of arms that are dangerous and unusual.[1463]

Bruen, noting some of the many nineteenth-century laws against concealed carry, inferred the principle that governments may regulate the manner of carry.[1464] That is, the government may require that carry be open rather than concealed (in compliance with nineteenth century sensibilities), or the government may require that carry be concealed rather than open (in compliance with modern sensibilities, in some areas). As for the jurisdictions that prohibited all modes of handgun carry, the Court dismissed them as outliers.[1465]

We can synthesize two subrules from *Heller*'s dangerous and unusual rule and from *Bruen*'s modes of carry rule. Subrule 1: the types of arms for which possession can be prohibited can include those for which carry in every mode was historically prohibited. Subrule 2: in applying subrule 1, outlier jurisdictions that banned all modes of handgun carry are low-value precedents. The subrules provide some additional structure for "dangerous and unusual" and reduce judicial temptation to use the phrase for epithetical jurisprudence.[1466]

Therefore, the 1871 Texas and 1890 Oklahoma Territory laws banning almost all carrying of handguns are of little value in assessing the constitutional status of other arms that were also prohibited from carry in those jurisdictions.

As *Bruen* points out, just because a weapon might have been considered "dangerous and unusual" at one point in time does not prevent it from becoming "common" later; if so, it becomes protected. *Bruen* articulates the rule in response to claims that handguns had been considered dangerous and unusual in the colonial period:

> Whatever the likelihood that handguns were considered "dangerous and unusual" during the colonial period, they are indisputably in "common use" for self-defense today. They are, in fact, "the quintessential self-defense weapon." Thus, even if these colonial laws prohibited the carrying of handguns because they were considered "dangerous and unusual weapons" in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today.[1467]

[1463] *Id.* at 627.

[1464] "The historical evidence from antebellum America does demonstrate that *the manner* of public carry was subject to reasonable regulation . . . . States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly." N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 6 (2022) (emphasis added).

[1465] *See* Part VII.B.

[1466] *Cf.* Joseph H. Drake, Note, *Epithetical Jurisprudence and the Annexation of Fixtures*, 18 MICH. L. REV. 405 (1919–1920) (creating the phrase); Jerome Frank, *Epithetical Jurisprudence and the Work of the Securities and Exchange Commission in the Administration of Chapter X of the Bankruptcy Act*, 18 N.Y.U. L.Q. REV. 317 (1941) (popularizing it).

[1467] *Bruen*, 597 U.S. at 4 (citing *Heller*, 554 U.S. at 629).

The *Bruen* argument above is arguendo. Handguns were never "dangerous and unusual." To the contrary, they were mandatory militia arms for officers and horsemen, who were expected to bring their own handguns to militia service.[1468]

As described in Part III.D, firearms with ammunition capacities over ten rounds were never considered "dangerous and unusual" in the nineteenth century. During the alcohol prohibition era of the 1920s and early 1930s, however, six states enacted laws that limited ammunition capacity in certain contexts, albeit less severely than prohibitory twenty-first century laws.[1469] If one were to argue that these Prohibition-era restrictions were permissible at the time as "dangerous and unusual" laws, that argument could no longer be applied today. Today (unlike in 1690 or 1925), Americans own over one-hundred-million handguns and hundreds of millions of magazines with capacities over ten rounds.[1470]

2. How many jurisdictions make a tradition?

Bruen offers some guidelines for how the government can carry its burden of proof to demonstrate a "historical tradition of firearm regulation" necessary to uphold a law.[1471] *Bruen* held that "the historical record compiled by respondents

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[1468] *See supra* Part II.D.

[1469] Act of Apr. 22, 1927, ch. 1052, §§ 1–4, 1927 R.I. Pub. Laws 256, 256–257 (banning sales of guns that fire more than twelve shots semi-automatically without reloading); Act of June 2, 1927, No. 372, § 3, 1927 Mich. Pub. Acts 887, 888–89 (prohibiting sale of firearms "which can be fired more than sixteen times without reloading"); Act of Apr. 10, 1933, ch. 190, §§ 1, 3, 1933 Minn. Laws 231, 232–33 (prohibiting the "machine gun," and including semi-automatics "which said firearms shall have been changed, altered or modified to increase the magazine capacity from the original design as manufactured by the manufacturers"); Act of Apr. 8, 1933, No. 166, 1933 Ohio Laws 189, 189–90 (license needed for semi-automatics with capacity of more than 18); Act of May 20, 1933, ch. 450, 1933 Cal. Stat. 1169, 1169–70 (licensing system for machine guns, defined to include semi-automatics actually equipped with detachable magazines of more than ten rounds); Act of Mar. 7, 1934, ch. 96, §§ 1(a), 4, 1933–1934 Va. Acts 137, 137–38 (defining machine guns as anything able to fire more than sixteen times without reloading, and prohibiting possession for an "offensive or aggressive purpose"; presumption of such purpose when possessed outside one's residence or place of business, or possessed by an alien; registration required for "machine gun" pistols of calibers larger than .30 or 7.62 mm).

All these laws were later repealed. *See* David B. Kopel, *The History of Firearms Magazines and of Magazine Prohibition*, 78 ALBANY L. REV. 849, 864–66 (2015) (Michigan repeal in 1959; R.I. limit raised to fourteen and .22 caliber exempted in 1959, full repeal in 1975; Ohio limit raised to thirty-two and .22 caliber exempted in 1971, full repeal in 2014, statute had not applied to sale of magazines, but only to unlicensed insertion of a magazine into a firearm); Act of May 17, 1963, ch. 753, § 609.67, subdiv. 1, 1963 Minn. Laws 1185, 1228–29. (defining "machine gun" as automatics only); Act of Apr. 5, 1965, ch. 33, 1964–1965 Cal. Stat. 913, 913 ("machine gun" fires more than one shot "by a single function of the trigger."); Act of Feb. 14, 1975, ch. 14, art. 5, § 1, 1975 Va. Acts 18, 67 (defining "machine gun" as automatics only); Act of July 1, 1979, ch. 895, § 1, 1979 N.C. Sess. Laws 1230, 1230 (eliminating licensing for pump guns).

[1470] "48.0% of gun owners—about 39 million individuals—have owned magazines that hold over 10 rounds (up to 542 million such magazines in total)" and "approximately 171 million handguns." William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned*, at 1–2 (Sept. 13, 2022), https://bit.ly/3HaqmKv [https://perma.cc/HLX3-BYYQ] (last visited Mar. 23, 2024).

[1471] *Bruen*, 597 U.S. at 24.

does not demonstrate a tradition" of restricting public handgun carry.[1472] Here is a list of the (insufficient) sources cited by advocates of the notion that the right to "bear Arms" can be prohibited or can be limited only to persons whom the government believes have shown a "special need." For some of these sources, the Court was not convinced by the advocates' characterization of the laws, but the Court addressed them arguendo:[1473]

- Two colonial statutes against the carrying of dangerous and unusual weapons (1692 Massachusetts, 1699 New Hampshire).[1474]
- One colonial law restricting concealed carry for everyone and handgun carry for "planters," a/k/a frontiersmen (1686 East Jersey).[1475]
- Three late-eighteenth-century and early-nineteenth-century state laws that "parallel[] the colonial statutes" (1786 Virginia, 1795 Massachusetts, 1801 Tennessee).[1476]
- Two nineteenth-century common-law offenses for going armed for a wicked or terrifying purpose (1843 North Carolina, 1849 Alabama).[1477]
- Four statutory prohibitions on handgun carry (1821 Tennessee,[1478] 1870 Tennessee,[1479] 1871 Texas (without reasonable cause),[1480] 1887 West Virginia (without good cause)).[1481]
- One state statute against going armed to the terror of the public (1870 South Carolina).[1482]
- Eleven nineteenth-century surety statutes, requiring that a person found by a court to have threatened to breach the peace must post a bond in order to continue carrying (1836 Massachusetts,[1483] 1870 West Virginia,[1484] and "nine other jurisdictions").[1485]

[1472] *Id.* at 38–39.

[1473] *Id.* at 47 ("even if" the government's reading was correct, the record would not justify the challenged regulation).

[1474] *Id.* at 46. Like many of the "dangerous and unusual" laws cited by *Heller*, these laws intended to prohibit "bearing arms to terrorize the people." *Id.* at 47.

[1475] *Id.* at 47.

[1476] *Bruen*, 597 U.S. at 49.

[1477] *Id.* at 51–52.

[1478] *Id.* at 54.

[1479] *Id.* at 64. This law was interpreted by courts, however, as allowing the carry of "large pistols suitable for military use." *Id.*

[1480] *Id.*

[1481] *Bruen*, 597 U.S. at 65.

[1482] *Id.* at 64.

[1483] *Id.* at 55–56.

[1484] *Id.* at 64.

[1485] *Id.* at 56. "'[U]nder surety laws . . . everyone started out with robust carrying rights' and only those reasonably accused [of creating fear of an injury or breach of the peace] were required to show a special need in order to avoid posting a bond." *Id.* at 57 (quoting Wrenn v. District of Columbia, 864 F.3d 650, 661 (D.C. Cir. 2017)).

- Two western territory laws banning handgun carry (1869 New Mexico,[1486] 1881 Arizona).[1487]
- Two western territory laws banning the carry of any arms in towns, cities, and villages (1875 Wyoming,[1488] 1889 Idaho.)[1489]
- One western territory law banning all handgun carry and most long-gun carry (1890 Oklahoma).[1490]
- One western state law instructing but not convincing large cities to ban all carry (1881 Kansas).[1491]

So, the general rule seems to be: in any given time period, it is possible to find several jurisdictions that in some way prohibited the exercise of the right to bear arms. But the aggregate of jurisdictions with prohibitory laws is insufficient to overcome the mainstream approach of respecting the right to bear arms.

Let us put aside the Court's arguendo treatment of tendentious claims, such as assertions that laws against carrying dangerous and unusual weapons to terrify the public were actually prohibitions on peaceable defensive carry. For laws that actually did prohibit peaceable carry in many circumstances, there were:

- East Jersey, which, for a few years in the late seventeenth century, prohibited any form of handgun carry by "planters" (frontiersmen).[1492]
- Tennessee in 1821, but the state supreme court and state statute later acknowledged the right to open carry of Army & Navy revolvers (the best and most powerful handguns of the time).[1493] Texas 1871[1494] and West Virginia 1887.[1495] All three state supreme courts at the relevant time interpreted their state constitutional rights to arms as militia-centric.
- Two western territories with general prohibitions on defensive handgun carry, and three with prohibitions on such carry in towns. All the territorial restrictions were later repudiated by statehood constitutions and jurisprudence thereunder.[1496]
- A Kansas State legislature instruction for large towns to ban handgun carry, which most towns apparently ignored.[1497]

From this list, we might cull even further, by eliminating the state laws that were upheld only because the relevant state constitutions were interpreted as

1486 *Bruen*, 597 U.S. at 66.
1487 *Id.*
1488 *Id.*
1489 *Id.*
1490 *Id.* at 66–67.
1491 *Bruen*, 597 U.S. at 69–70; JOHNSON ET AL., *supra* note 17, at 517.
1492 *See supra* note 1475.
1493 *See supra* note 1479.
1494 *See supra* note 1480.
1495 *See supra* note 1481.
1496 JOHNSON ET AL., *supra* note 17, at 517–18.
1497 *Id.* at 517; *see also* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 69–70 (2022).

militia-centric, in contrast to *Heller*'s interpretation of the Second Amendment. We could also cull the territorial laws that were repudiated by the people of the territories as soon as they could form their own constitutions. The list of precedential carry bans is thus reduced to "half a colony" for eight years (East Jersey),[1498] and one state instruction to local governments that was ignored (Kansas).[1499] That leaves carry bans with only two feeble precedents relevant to the Second Amendment.

Our analysis indicates that *Bruen* was correctly decided, there being very few good precedents for general bans on bearing arms. We did not, however, write the *Bruen* opinion. Justice Thomas's list of precedents, not ours, is legally controlling. That list shows that even substantial handfuls of restrictive minority precedents are insufficient to overcome the text of the Second Amendment.

On the other hand, some advocates suggest that *Bruen*'s long list of insufficient precedents does not provide the controlling rule. Rather, they say that one of our articles does. In discussing the use of historical analogies, Justice Thomas's opinion cited—with approval—a legal history article we had written about the "Sensitive Places" Doctrine. The doctrine is based on *Heller*'s statement that bearing arms can be prohibited in "sensitive places such as schools and government buildings."[1500] Our article had surveyed the history of locational limits on bearing arms, and was cited by *Bruen*:

> Although the historical record yields relatively few 18th- and 19th-century "sensitive places" where weapons were altogether prohibited—*e.g.*, legislative assemblies, polling places, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions. See D. Kopel & J. Greenlee, The "Sensitive Places" Doctrine, 13 Charleston L. Rev. 205, 229–36, 244–47 (2018) . . . . We therefore can assume it settled that these locations were "sensitive places" where arms carrying could be prohibited consistent with the Second Amendment.[1501]

The above suggests that "relatively few" precedents may be needed for "uncontested" laws. Perhaps this is particularly true for laws that simply affect the fringe of a right (putting a few places off-limits for bearing arms) as opposed to laws with

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[1498] *Bruen*, 597 U.S. at 49 ("At most eight years of history in half a Colony roughly a century before the founding sheds little light on how to properly interpret the Second Amendment.").

[1499] JOHNSON ET AL., *supra* note 17, at 517; *see also Bruen*, 597 U.S. at 69–70.

[1500] District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

[1501] *Bruen*, 597 U.S. at 30. It is correct that bans on polling places were not contested. The ban on courthouses was in fact contested, and, in our view, correctly upheld. *See* State v. Hill, 53 Ga. 472, 477–78 (1874):

> The right to go into a court-house and peacefully and safely seek its privileges, is just as sacred as the right to carry arms, and if the temple of justice is turned into a barracks, and a visitor to it is compelled to mingle in a crowd of men loaded down with pistols and Bowie-knives, or bristling with guns and bayonets, his right of free access to the courts is just as much restricted as is the right to bear arms infringed by prohibiting the practice before courts of justice.

broader restrictions. Certainly, there was lots of litigation in the nineteenth century challenging various restrictions on keeping and bearing firearms and knives, including the cases described in Parts IV and V.[1502]

D. *Application of History and Modern Doctrine to Particular Types of Laws*

1. Sales prohibitions on slungshots and knuckles

If we are going to count historical precedents as rigorously as *Bruen* did, it is not clear that even the most prohibitory laws from the nineteenth century—the bans on slungshot sales and manufacture in nine states or territories—can clear the hurdle. Nor can such laws be retroactively justified under *Heller* and *Bruen* as covering "dangerous and unusual" weapons. We do not have manufacturing data, but it seems unlikely that slungshots and knuckles were so rare as to be considered "unusual."

However, another part of *Heller* may provide reconciliation. The "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes . . . ."[1503] Based on Escobar's overview, legitimate defensive carry of slungshots was not common; carry by people who were not professional criminals was mainly for fast revenge to verbal insults, rather than for protection against violent attack. Some of the judicial remarks quoted in Part VI are, while not conclusive, supportive of this interpretation.[1504]

This approach distinguishes slungshots and knuckles from blackjacks, which were highly favored by law enforcement officers. Some modern courts have ruled that widespread law enforcement use is powerful evidence that a type of arm is "typically possessed by law-abiding citizens for lawful purposes." That principle was recognized for electric weapons, such as stun guns or tasers, in Justice Alito's concurrence in *Caetano v. Massachusetts* and by the Michigan Court of Appeals.[1505] The Connecticut Supreme Court took the same approach for "police batons."[1506]

Our analysis of non-gun, non-blade arms is tentative. While the history of flexible impact weapons is told only in a single book, recently published, there

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[1502] *See* David B. Kopel, *The First Century of Right to Arms Litigation*, 14 GEO. J.L. & PUB. POL'Y 127 (2016).

[1503] *Heller*, 554 U.S. at 625.

[1504] *See, e.g.*, *supra* note 1202.

[1505] Caetano v. Massachusetts, 577 U.S. 411, 416–17, 419 (2016) (Alito, J., concurring) (noting that Massachusetts "allows law enforcement and correctional officers to carry stun guns and Tasers, presumably for such purposes as nonlethal crowd control. Subduing members of a mob is little different from 'suppress[ing] Insurrections,' a traditional role of the militia.") (quoting *Heller*, 554 U.S, at 625); People v. Yanna, 824 N.W.2d 241, 245 (Mich. Ct. App. 2012) ("By some reports, nearly 95 percent of police departments in America use Tasers [leaving] no reason to doubt that the majority of Tasers and stun guns are used only for lawful purposes.").

[1506] State v. DeCiccio, 105 A.3d 165, 200 (Conn. 2014) ("[E]xpandable metal police batons, also known as collapsible batons, are instruments manufactured specifically for law enforcement use as nonlethal weapons. Furthermore, the widespread use of the baton by the police, who currently perform functions that were historically the province of the militia.") (citing David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1534 ("demonstrat[ing] the weapon's traditional military utility")). The court also relied on military use to hold that "dirk knives" are Second Amendment arms. *Id.* at 192–93.

is no similar scholarship of which we are aware regarding knuckles.[1507] With this Article being the only piece post-*Heller* to examine flexible and rigid impact weapons, we do not claim to have resolved every legal issue. We do point out that, as with Bowie knives, the mainstream historical American approach was non-prohibitory.

2. Modern semiautomatic firearms and magazines

The most controversial bans on particular arms today are possession or sales bans on semiautomatic rifles and on magazines with capacities over ten or (less often) fifteen rounds. These bans are unsupported. First, "[d]rawing from" America's "historical tradition," the Supreme Court has held that "the Second Amendment protects" arms that are "in common use at the time."[1508] Thus, in *Heller*, the Court held that because "handguns are the most popular weapon chosen by Americans" and therefore in common use, "a complete prohibition of their use is invalid."[1509] Concurring in *Caetano*—a per curiam reversal of a decision that upheld a stun gun prohibition—Justices Alito and Thomas reasoned that, because "stun guns are widely owned and accepted as a legitimate means of self-defense across the country, Massachusetts's categorical ban of such weapons therefore violates the Second Amendment."[1510]

As for the ever-shifting category of so-called "assault weapons," "about 24.6 million individuals[ ]have owned an AR-15 or similarly styled rifle (up to 44 million such rifles in total)."[1511] The best estimate for magazines over 10 rounds is 542 million, owned by 48% of gun owners.[1512] Such firearms and magazines are unquestionably in common use; according to the Court's interpretation of legal history, they cannot be banned.

Being common arms, the firearms and magazines cannot be treated as "dangerous and unusual weapons." A weapon that is "unusual" is the antithesis of a weapon that is "common." Thus, an arm "in common use" cannot be dangerous and unusual.[1513] The Supreme Court's per curiam opinion in *Caetano* did not address the dangerousness of stun guns because the Court had already determined that the lower court's "unusual" analysis was flawed.[1514] Justices Alito and Thomas, concurring, elaborated:

[1507] A Westlaw search for law journal articles with "knuckles" in the title yielded no results.

[1508] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 47 (2022) (quoting *Heller*, 554 U.S. at 627).

[1509] *Heller*, 554 U.S. at 629.

[1510] *Caetano*, 577 U.S. at 420 (Alito, J., concurring).

[1511] English, *supra* note 1470, at 2; David B. Kopel, *Defining "Assault Weapons"*, THE REGUL. REV. (Nov. 14, 2018), https://www.theregreview.org/2018/11/14/kopel-defining-assault-weapons/ [https://perma.cc/CSN7-9S3S] ("assault weapon" bills have encompassed almost every type of firearm, other than machine guns).

[1512] English, *supra* note 1470, at 24–25.

[1513] *See* Friedman v. City of Highland Park, 784 F.3d 406, 409 (7th Cir. 2015) ("[If] the banned weapons are commonly owned . . . then they are not unusual").

[1514] *Caetano*, 577 U.S. at 412 (Alito, J., concurring).

> As the per curiam opinion recognizes, this is a conjunctive test: A weapon may not be banned unless it is *both* dangerous and unusual. Because the Court rejects the lower court's conclusion that stun guns are "unusual," it does not need to consider the lower court's conclusion that they are also "dangerous."[1515]

As some of the most popular arms in America,[1516] semiautomatic rifles and magazines cannot be "dangerous and unusual."

None of the above analysis of the rules from pre-*Bruen* cases is new, nor was most of it disputed even by lower courts that upheld bans pre-*Bruen.* The courts agreed that semiautomatic firearms and standard magazines are "in common use," or they assumed commonality arguendo. The courts upheld the bans by interest-balancing, which *Bruen* forbids.[1517]

What this Article demonstrates is that such a ban cannot be rescued by historical analogy. In considering analogies, *Bruen* states that there are "at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense."[1518] "How" means: "whether modern and historical regulations impose a comparable burden on the right of armed self-defense."[1519] "Why" means: "whether that burden is comparably justified."[1520]

As Part IV showed, the history of nineteenth century bans on particular types of firearms is close to nil. Likewise, as described in Part II, the only colonial analogy was the New Netherland limit on flintlock quantity, and that briefly existing law disappeared when New Netherland was assimilated into the American colonies, where there were zero laws against particular types of arms.[1521]

The 1837 Georgia ban on most handguns and on "Bowie or any other kinds of knives, manufactured and sold for the purpose of wearing or carrying the same as arms of offence or defence; pistols, dirks, sword-canes, spears" was held in 1846 to violate the Second Amendment in *Nunn v. State.*[1522] Being much closer to the Founding than are post-Reconstruction enactments, *Nunn* is powerful precedent. All the more so given how the *Heller* Court extolled *Nunn.*[1523]

[1515] *Id.* at 417 (Alito, J., concurring).

[1516] The number of AR rifles (just one type of "assault weapon") is larger than the "total U.S. daily newspaper circulation (print and digital combined) in 2020 . . . 24.3 million" for weekdays. *Newspapers Fact Sheet*, PEW RSCH. CTR. (Nov. 10, 2023), https://pewrsr.ch/3CNXFS0 [https://perma.cc/8B4T-P5BJ].

[1517] *See, e.g.*, Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242 (2d Cir. 2015); Worman v. Healey, 922 F.3d 26 (1st Cir. 2019).

[1518] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 29 (2022). In *Bruen*'s analysis, *Heller* and *McDonald* declared that "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry." *Id.* (citing *McDonald*, 561 U.S. at 767).

[1519] *Id.*

[1520] *Id.*

[1521] *See supra* Part II.A. (English Colonies), Part II.C (New Netherland).

[1522] 1 Ga. 243 (1846).

[1523] District of Columbia v. Heller, 554 U.S. 570, 612–13 (2008).

The 1879 Tennessee and 1881 Arkansas laws against the sale of handguns smaller than the Army & Navy models, and bans on the sale of certain blade arms, were validated under state court decisions that held the states' constitutional right to arms to be applicable only to militia-type arms.[1524]

Even if those precedents controlled the Second Amendment, which they do not, they did not ban guns because they were supposedly too powerful, as modern rifles and magazines are sometimes claimed to be. To the contrary, the Tennessee and Arkansas laws banned concealable firearms that were, being smaller, less powerful than the large, state-of-art revolvers that were recognized to be constitutionally protected. Thus, the Tennessee and Arkansas laws against small, concealable handguns have a very different "why" than bans on modern rifles and rifles.

Indeed, modern prohibition advocates point to similarities between modern AR semiautomatic rifles and modern military automatic rifles such as the M16 and M4. The prohibitionist argument thus concedes the very strong militia suitability of AR rifles. That makes prohibition unconstitutional under every nineteenth century case precedent, including the ones that upheld bans on certain arms. The unanimous judicial view of the time was that, at the least, no government could outlaw militia-suitable arms.

The only arguable nineteenth-century statutory precedent for bans on modern rifles and magazines is Florida's 1893 licensing law for Winchesters and other repeating rifles. That law was conceded to be unconstitutional and was "never intended to be applied to the white population."[1525]

Bans on modern rifles and magazines cannot be rescued by diverting attention away from the legal history of firearms law, and instead pointing to laws about other arms. Dozens of state and territorial legislatures enacted laws about Bowie knives, as well as dirks and daggers.[1526] Prohibitory laws for these blades are fewer than the number of bans on carrying handguns,[1527] and *Bruen* found the handgun laws insufficient to establish a tradition constricting the Second Amendment.[1528]

As for other non-blade impact weapons, the sales and manufacture bans in a minority of states for slungshots and knuckles could be considered as involving arms "not typically possessed by law-abiding citizens for lawful purposes."[1529]

Other flexible impact arms, most notably blackjacks, were "typically possessed by law-abiding citizens for lawful purposes," especially by law enforcement officers. Likewise, modern semiautomatic rifles and standard magazines are also highly preferred by today's law enforcement officers.

For blackjacks and sand clubs, only one state, New York, enacted a sales and manufacture ban.[1530] That came at a time when the legislature was unencumbered by a Second Amendment enforceable against the states or by a state constit-

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[1524] *See supra* notes 501, 503.

[1525] *See supra* notes 506–30.

[1526] *See supra* Part VI.1.A.

[1527] *See supra* Part IV.A.

[1528] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 24, 38–39 (2022).

[1529] *Heller*, 554 U.S. at 625.

[1530] *See supra* notes 1222–25, 1247.

ution right to arms. As *Bruen* teaches, a lone eccentric state does not create a national legal tradition.

For every arm surveyed in this Article, the mainstream American legal tradition was to limit the mode of carry (no concealed carry), to limit sales to minors (either with bans or requirements for parental permission), and/or to impose extra punishment for use in a crime. Because the "how" for such regulations is less burdensome than a ban on possession, the fact that most states banned concealed carry of Bowie knives, for example, is not a precedent to criminalize the mere possession of modern rifles and magazines.

Moreover, because repeating arms with greater than 10- and 15-round capacities predate the Second Amendment and were common by the ratification of the Fourteenth Amendment, *Bruen* seemingly precludes analogizing to historical restrictions for Bowie knives. In adjudicating a modern-day restriction on the carrying of handguns, the *Bruen* Court considered only historical regulations on the carrying of handguns. The Court did not consider any laws regulating the carrying of Bowie knives, slungshots, dirks, daggers, brass knuckles, razors, or any other non-handgun for which carry was historically restricted.[1531]

3. Minors

Restrictions on transfers of particular arms to minors were numerous in the last third of the nineteenth century. In two previous articles, we provided the legal history of age-based firearm restrictions.[1532] In Parts V and VI of this Article, we have described many age restrictions for other arms.

Some of those restrictions listed an age, while others simply said "minor." The distinction is important today, since there are current laws that prohibit arms for young adults eighteen to twenty, who today are legally recognized as adults. Similarly, if an 1870 law had limited the exercise of a civil right only to "voters," that law today would not be a good precedent for restricting the civil rights of women, although it might still be a good precedent for restricting the right for non-citizens.

The following laws, in chronological order of first enactment, restricted sales of at least one type of arm based on age; some of them also restricted non-sale transfers: Alabama (1856, male minor),[1533] Tennessee (1856, minor),[1534] Kentucky (1860, minor, parental permission),[1535] Indiana (1875, age 21),[1536] Georgia (1876, minor),[1537] Illinois (1881, parent or employer consent, age 18),[1538] West

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[1531] *See generally id.*

[1532] Kopel & Greenlee, *supra* note 99; David B. Kopel & Joseph G.S. Greenlee, *History and Tradition in Modern Circuit Cases on the Second Amendment Rights of Young People*, 43 S. ILL. U. L.J. 119 (2018).

[1533] *See supra* note 586.

[1534] *See supra* note 905.

[1535] *See supra* note 733.

[1536] *See supra* note 737.

[1537] *See supra* note 620.

[1538] *See supra* note 756.

Virginia (1882, age 21),[1539] Kansas (1883, minor, also banning possession),[1540] Missouri (1885, minor parental consent),[1541] Texas (1889, minor, parental consent),[1542] Florida (1889, minor),[1543] Louisiana (1890, age 21),[1544] New York (1889, consent of police magistrate),[1545] Oklahoma Territory (1890, age 21),[1546] Virginia (1890, "minor under sixteen years of age"),[1547] D.C. (1892, minor),[1548] North Carolina (1893, minor).[1549] A few laws limited carry based on age: Nevada (1881, no concealed carry, age 18)[1550] (1885, raised to 21),[1551] Arizona Territory (1883, ages 10 to 16, no carry in towns).[1552]

Only Kansas criminalized possession of a regulated arm based on age.[1553] None of the Kansas age restrictions applied to rifles or shotguns.[1554] Moreover, the first laws come over sixty years after the Second Amendment, and only three of them precede the Fourteenth Amendment.[1555] According to *Bruen*, "late-19th-century evidence . . . does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence."[1556] Earlier evidence shows that in the colonial and Founding eras, no age-based firearm restrictions applied to eighteen-to-twenty-year-olds, and as part of the militia, they were required to possess a wide array of firearms, edged weapons, and accoutrements.[1557] Thus, whatever may be concluded from analogies to statutory precedents, modern restrictions on long gun acquisition by young adults ages eighteen to twenty are constitutionally dubious, and bans on possession appear indefensible.

4. Penalties for criminal misuse

As described in Parts V and VI, there were also many laws imposing extra penalties of use of particular arms in violent crimes.[1558] We have not surveyed the colonial criminal codes to look for analogues. There was a longstanding tradition

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1539 *See supra* notes 762, 765.
1540 *See supra* note 911.
1541 *See supra* note 912.
1542 *See supra* note 714.
1543 *See supra* note 667.
1544 *See supra* note 917.
1545 *See supra* note 1345.
1546 *See supra* note 914.
1547 *See supra* note 916.
1548 *See supra* note 918.
1549 *See* text *supra* note 677.
1550 *See* text *supra* note 941.
1551 *See* text *supra* note 942.
1552 *See* text *supra* note 748.
1553 *See* text *supra* note 1296.
1554 *See id.*
1555 *See* text *supra* notes 1533–53.
1556 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 66 n.28 (2022).
1557 Kopel & Greenlee, *supra* note 99, at 533–89.
1558 *See supra* Parts V. & VI.

in common law, sometimes codified in statutes, with special punishment for breaches of the peace involving weapons.[1559]

For the most part, the search of precedents is unnecessary. Perpetrating criminal homicides, armed robberies, or armed burglaries is not conduct that is protected by the Second Amendment. Violent crimes with firearms, Bowie knives, or other arms harm "the security of a free State."[1560] Likewise, the First Amendment freedom of speech does not protect verbal or written conspiracies in restraint of trade, in violation of antitrust laws.[1561]

CONCLUSION

According to the Supreme Court's *Bruen* decision, the Second Amendment's textual "unqualified command" about "the right to keep and bear arms" is not violated by established traditions in our legal history for regulation of the right. No bans on types of arms from English legal history are relevant to Second Amendment analysis under *Bruen*, for none were adopted in America. During the colonial period and the Founding Era, there were no bans in the English colonies or the new nation on types of arms.

[1559] *See, e.g.*, David B. Kopel & George A. Mocsary, *Errors of Omission: Words Missing from the Ninth Circuit's Young v. Hawaii*, 2021 U. ILL. L. REV. ONLINE 172, 174–83 (2021).

[1560] U.S. CONST. amend. II. "Such admonitory regulation of the abuse must not be carried too far. It certainly has a limit. For if the legislature were to affix a punishment to the abuse of this right, so great, as in its nature, it must deter the citizen from its lawful exercise, that would be tantamount to a prohibition of the right." Cockrum v. State, 24 Tex. 394, 403 (1859) (upholding law imposing extra punishment for use of a Bowie knife in manslaughter).

Beyond the scope of this Article are extra penalties for possessing arms while committing a nonviolent crime. For example, body armor is a Second Amendment "arm." *See* District of Columbia v. Heller, 554 U.S. 570, 581 (2008) (quoting dictionary definitions of "arms" that include "armour for defence" or "any thing a man wears for his defence"). Laws that punished arms possession in the course of a crime even if the possession had nothing to do with a crime might raise constitutional problems. A bill introduced in the US Senate in 1999 would have imposed a sentence enhancement of up to thirty-six months for committing any crime while using body armor—for example, if the proprietor of a liquor store, who always wore body armor for protection from robbers, filled out his tax forms at work and cheated on the taxes. S. 254, § 1644, U.S. Sen., 106th Cong., 1st Sess. (1999) (Sen. Lautenberg); David B. Kopel & James Winchester, *Unfair and Unconstitutional: The New Federal Juvenile Crime and Gun Control Proposals* pt. VIII (Independence Inst. Working Paper no. 3-99, 1999).

Today's U.S Sentencing Guidelines impose a two-step (up to thirty-six months) sentence enhancement for possessing a firearm during a drug trafficking crime. The only exception is if the defendant can show that any connection of the gun to the crime was "clearly improbable." U.S.S.G. § 2D1.1(b)(1) Cmt. 11. One federal district court recently held that there was "a substantial question" for appellate review as to whether the "clearly improbable" standard is consistent "with the nation's traditions of firearm regulation." United States v. Alaniz, No. 1:21-cr-00243-BLW, 2022 WL 4585896, *3 (D. Ida. Sept. 29, 2022), *aff'd* 69 F.4th 1124 (9th Cir. 2023).

[1561] *See, e.g.*, Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502–03 (1949) (First Amendment does not "make it . . . impossible ever to enforce laws against agreements in restraint of trade.").

Under *Bruen*, the nineteenth century is relevant to the extent that it informs the original meaning.[1562] Thus, legal history close to the Founding is most important, and the latter part of the century much less so.[1563] Based on this Article's survey of all state and territorial laws before 1900, bans on the sale or possession of any type of arm are eccentricities that do not overcome the plain text of the Second Amendment. Punitive taxation of some arms existed in three southeastern states, but these laws did not create a national tradition. Bans on concealed carry were very common, and under *Heller* and *Bruen* limitations on the mode of handgun carry have been expressly stated to be constitutional, as long as some mode of carry (open or concealed) was allowed.

The deviant jurisdictions that entirely banned carry of Bowie knives, daggers, or other arms are almost entirely the same as the few that excessively restricted handgun carry. *Bruen* held that a few repressive jurisdictions did not establish a national tradition allowing a general ban on carrying handguns.

In contrast, many American jurisdictions limited sales to minors or imposed enhanced punishment for misuse of certain weapons. For at least some weapons, there is an established American tradition in favor of such laws.

As described in Part III, firearms improved more in the nineteenth century than in any century before or since. Although repeating arms had been around for centuries, during the nineteenth century, they became affordable to an average consumer. The semiautomatic handgun with detachable magazines was an innovation of the nineteenth century. Despite the amazing technological progress during the nineteenth century, only one American statute—a racist Florida law from 1893—treated repeating firearms worse than other firearms. Indeed, the two most repressive handgun laws from the Jim Crow period—Tennessee (1879) and Arkansas (1881)—privileged the most powerful repeating handguns above lesser handguns. American legal history from 1606 to 1899 provides no precedent for special laws against semiautomatic firearms or against magazines.

The mainstream of American legal history supports controls on the mode of carry, limitations for minors, and punishment for misuse. The mainstream history does not support prohibitions of arms that are well known to be kept for lawful purposes, including self-defense.

[1562] N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 34 (2022) ("[W]hen it comes to interpreting the Constitution, not all history is created equal. 'Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them.*'") (quoting *Heller*, 554 U.S. at 634–35 (emphasis added in *Bruen*)); The Second Amendment's "meaning is fixed according to the understandings of those who ratified it" *Id.* at 28.

[1563] *Bruen*, 597 U.S. at 37 ("*Heller*'s interest in mid- to late-19th-century commentary was secondary . . . . In other words, this nineteenth-century evidence was 'treated as mere confirmation of what the Court thought had already been established'" by earlier evidence.) (quoting Gamble v. United States, 139 S. Ct. 1960, 1975–76 (2019)); *Heller*, 554 U.S. at 614 ("[D]iscussions [that] took place 75 years after the ratification of the Second Amendment . . . do not provide as much insight into its original meaning as earlier sources.").

INTERPRETIVE DIVERGENCE IN THE NEW YORK COURT OF APPEALS

Ethan J. Leib[*]

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It can sometimes feel as if those who study legal interpretation assume that there should be basic harmonization in the law of interpretation: that courts should be interpreting legal documents—wills, contracts, statutes, constitutions—with similar concerns in mind.[1] Quite aside from occasional comparative work about statutory and contract interpretation,[2] the more recent politicization of statutory interpretation in particular[3] might lead one to suspect that either a judge is mostly a textualist or formalist about interpretation on the one hand—or a policy-oriented contextualist on the other, drawing on information extrinsic to text to develop a legal conclusion about the meaning of a legal instrument. Even if certain interpretive tools are especially calibrated for one interpretive domain and wouldn't have much of a place in the other—*contra proferentem* in contract interpretation[4] has no obvious corollary to construing against the drafter in statutory cases[5]—it might be reasonable to expect that "plain meaning" types would consistently hew to text in private and public law cases and that more contextualist judges would consistently look to extrinsic markers of intent or be willing to consider policy-based arguments about interpretation or construction in either kind of case. Those who interpret using legislative history to provide

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1 *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1970 (2011) ("Statutory interpretation, like the interpretation of contracts, wills, and trusts, entails the judicial interpretation of a text previously negotiated by others. Many of the same overarching questions arise in each of these contexts . . . ."); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1083 (2017) (treating contract interpretation as of a piece with other forms of legal interpretation); *id.* at 1094–95 (using the private law of interpreting private instruments to illuminate public law interpretation); *id.* at 1129 (noting approvingly that a public law model of interpretation "matches interpretation in private law"). *See generally* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (Sari Bashi trans., Princeton Univ. Press 2007) (arguing for a comprehensive theory of legal interpretation, harmonizing constitutional, statutory, administrative, will, and contract interpretation). A lengthy and important study of legal interpretation by Kent Greenawalt certainly considers and supports some rationales for interpretive divergence. *See generally* KENT GREENAWALT, LEGAL INTERPRETATION (2010); KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION (2013); KENT GREENAWALT, REALMS OF LEGAL INTERPRETATION: CORE ELEMENTS AND CRITICAL VARIATIONS (2018).

2 *See, e.g.*, Daniel A. Farber, *Legislative Deals and Statutory Bequests*, 75 MINN. L. REV. 667, 667–68 (1991); James E. Westbrook, *A Comparison of the Interpretation of Statutes and Collective Bargaining Agreements: Grasping the Pivot of Tao*, 60 MO. L. REV. 283, 283 (1995); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 541, 547–48 (1983); Frank H. Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15–17 (1984); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 708 (1992); Gillian K. Hadfield, *Incomplete Contracts and Statutes*, 12 INT'L REV. L. & ECON. 257, 257257 (1992). For some hesitation about the comparative work, see Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41 (1995); and Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145 (1998).

3 *See* Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849 (2014).

4 *See* Ethan J. Leib & Steve Thel, Contra Proferentem *and the Role of the Jury in Contract Interpretation*, 87 TEMP. L. REV. 773 (2015); Joanna McCunn, *The* Contra Proferentem *Rule: Contract Law's Great Survivor*, 39 OXFORD J. LEGAL STUD. 483 (2019).

5 *But see* Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353, 366–67 (2007) (trying to develop a corollary for constitutional interpretation). Maybe the Rule of Lenity works this way in statutory interpretation?

helpful context for statutory text may be expected to admit parol evidence in contract interpretation. We tend to associate permissive admission of extrinsic evidence with a politically liberal ideology and more restrictive interpreters as politically conservative, however imperfect the correlation.

This Article focuses attention on the New York Court of Appeals, which is decidedly formalist about contract interpretation but decidedly contextualist about statutory interpretation. It explores some recent exemplary cases to show where the New York Court of Appeals tends to land in what turns out to be, for this court at least, two different battlefields in the law of interpretation. Finding that there is "interpretive divergence" between statutory and contract cases, the Article then reflects on the practice of divergence more generally, revisiting assumptions about why anyone might have thought harmonization was sensible in the first place.[6] Part I develops a descriptive summary of New York's statutory interpretation (Part I.A) and its contract interpretation (Part I.B) jurisprudences.[7] Part II then pivots from New York's rather different choices about how to interpret statutes on the one hand and contracts on the other to ruminate upon what else judges, lawyers, and scholars might learn from this case study of New York's law of interpretation. Ultimately, the stability of these divergent regimes reveals that the law of interpretation can be successfully fragmented and that the project of figuring out what to do with a legal instrument can be (and perhaps should be) domain-sensitive rather than assimilated to an overarching theory of interpretation, as such.

I. NEW YORK JURISPRUDENCE

A. New York Statutory Interpretation

About twenty years ago, New York Court of Appeals watcher Professor Eric Lane offered a survey of—in the article's title—"how to read a statute in New York."[8] Although he began by acknowledging "statutory text as the touchstone

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[6] This work follows a strain of scholarship interrogating other kinds of divergences in practices of interpretation. *See, e.g.*, Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433 (2012) (exploring the appropriateness of different modalities of interpretation depending on the institutional constraints at different courts); Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1 (2018) (exploring the empirical reality of divergences at different courts); Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215 (2012) (exploring potential divergences between elected and appointed judges); Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 910–2928 (2013) (focusing on potential local judge divergences); Ethan J. Leib, *The Textual Canons in Contract Cases: A Preliminary Study*, 2022 WIS. L. REV. 1109, 1112–13 (2022) [hereinafter *Textual Canons in Contract Cases*] (identifying divergent use of various linguistic canons among contract and non-contract cases in two jurisdictions).

[7] Although I suspect the Appellate Divisions and lower state courts in New York are not always following the law of interpretation as practiced at the New York Court of Appeals, I leave those divergences for another time. This Article focuses on the interpretive regimes used at New York's highest court.

[8] *See* Eric Lane, *How to Read a Statute in New York: A Response to Judge Kaye and Some More*, 28 HOFSTRA L. REV. 85, 85 (1999).

of interpretation" for the New York Court of Appeals,[9] he developed several other findings from his study of the court. Most significantly, Lane concluded that "the Court of Appeals often appears uncomfortable with simply applying clear text alone, reaching for what it characterizes as legislative history for support of its already announced clear statutory reading."[10] He also found that New York has a broad definition of legislative history that can include executive branch documents, and that New York will resort to "common law" decision-making even in statutory cases, often because legislative records can be thin in the state.[11] Still, Lane identified that the New York Court of Appeals openly attests that its "preeminent responsibility in [the] endeavor [of statutory interpretation] is to search for and effectuate the Legislature's purpose."[12] He highlighted that for the court in its statutory interpretation cases, "legislative intent is the great and controlling principle"[13] and that "inquiry must be made of the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history."[14]

In short, without fine-tuning distinctions between purpose and intent because the caselaw often treated them interchangeably, Lane found New York statutory interpretation practice at the Court of Appeals to be neither particularly formalist nor particularly textualist. Somewhat regrettably to Lane (because he found the court's search for legislative history to be thin and because he thought the court gave too much credence to executive branch materials), he found the court "giv[es] weight to legislative history [even] in the face of a clear textual answer"[15] and "relies heavily on legislative history in its search for the meaning of unclear statutes."[16] Yet as Chief Judge Judith Kaye once observed, "in nearly every statutory case that reaches a state's highest court, there exist at least two plausible interpretations, each in some way supported by text."[17] So it is no surprise that she oversaw a court (as chief judge from 1993 to 2008) that was not especially textualist about statutory interpretation[18] but instead drew upon purpose, context, policy, common-law gap-filling,[19] and legislative history to adjudicate statutory cases.[20]

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[9] *Id.* at 88.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 90 (quoting Fumarelli v. Marsam Dev., Inc., 703 N.E.2d 251, 254 (N.Y. 1998)).

[13] *Id.* at 92 (quoting Council of N.Y. v. Giuliani, 710 N.E.2d 255, 259 (N.Y. 1999)).

[14] *Id.* at 90 (quoting Mowczan v. Bacon, 703 N.E.2d 242, 244 (N.Y. 1998)).

[15] *Id.* at 94.

[16] *Id.* at 110 (citing a long string of cases from 1998 and 1999).

[17] Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 28 (1995).

[18] Lane, *supra* note 8, at 125–26 (contrasting New York's legisprudence with "textualism").

[19] Kaye, *supra* note 17, at 33–34 ("I think it clear that common-law courts interpreting statutes and filling the gaps have no choice but to 'make law' in circumstances where neither the statutory text nor the 'legislative will' provides a single clear answer.").

[20] Among Judge Kaye's famous decisions departing from strict text was one giving a gay parent the right to adopt without terminating the biological parent's rights, notwithstanding some difficult language in the state's adoption statute that pushed in a different direction. *See In re* Jacob, 660 N.E.2d 397 (N.Y. 1995).

Before New York's eighteen consecutive years of Democratic governors, there were twelve years of the George Pataki administration—from 1995 to 2006—which led to the appointment of a somewhat more conservative court.[21] Yet whatever other effects the Pataki appointments had on the court, they did not fundamentally change the course of statutory interpretation in New York. To wit, the weight of the evidence since Lane's study was published continues to reaffirm the Court of Appeals' abiding commitment to legislative intent and purpose as the touchstones of statutory interpretation in New York[22]—over and above a narrow and formal textual approach.[23] Extrinsic evidence outside the text is routinely admissible in statutory cases under New York law.[24]

Consider a recent illustrative case from 2021 at the New York Court of Appeals, *Adar Bays, LLC v. GeneSYS ID, Inc.*[25] The case came to the court through certified questions from the federal circuit court, which asked how to interpret New York's statutory usury law.[26] The state's highest court was asked to decide whether the value of future, contingent payments count as "interest" in a usury defense to a loan and whether loans made to corporations—even if determined to be criminally usurious—should be considered void *ab initio*. For both questions, the New York Court of Appeals answered the federal court in the affirmative. In doing so, the court did a deep dive on the usury laws' history and context, starting with New York's earliest acts against usury from the colonial period in 1717,[27] its

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[21] *See* Benjamin Pomerance, *What "Tough on Crime" Looks Like: How George Pataki Transformed the New York Court of Appeals*, 78 ALB. L. REV. 187, 192 (2015) (highlighting that Pataki was able to appoint six of seven judges on the Court during his governorship). Governors appoint Court of Appeals judges from a list of nominees generated by a Commission on Judicial Nomination, with the advice and consent of the state senate. *See* N.Y. CONST. art VI § 2(e).

[22] *See, e.g.*, People v. Schneider, 173 N.E.3d 61 (N.Y. 2021); Peyton v. N.Y.C. Bd. of Standards and Appeals, 164 N.E.3d 253 (N.Y. 2020); People *ex rel.* Negron v. Superintendent, Woodbourne Corr. Facility, 160 N.E.3d 1266 (N.Y. 2020); People v. Andujar, 88 N.E.3d 309 (N.Y. 2017); Makinen v. City of New York, 86 N.E.3d 514 (N.Y. 2017); Riley v. County of Broome, 742 N.E.2d 98 (N.Y. 2000); People v. Badji, 165 N.E.3d 1068 (N.Y. 2021); *In re* Mestecky v. City of New York, 88 N.E.3d 365 (N.Y. 2017); Lubonty v. U.S. Bank N.A., 139 N.E.3d 1222 (N.Y. 2019); People v. Santi, 818 N.E.2d 1146 (N.Y. 2004); People v. Garson, 848 N.E.2d 1264 (N.Y. 2006); *In re* N.Y. State Ass'n of Crim. Def. Laws v. Kaye, 755 N.E.2d 837 (N.Y. 2001).

[23] *See* People v. Silburn, 98 N.E.3d 696, 704 (N.Y. 2018) (quoting People v. White, 539 N.E.2d 577, 579–80 (N.Y. 1989) ("[W]e may not stop [with 'the words the Legislature has used']; the spirit and purpose of the [statute] and the objects to be accomplished must also be considered.").

[24] The New York legislature appears to endorse this form of statutory interpretation. *See* N.Y. STAT. LAW § 124 (McKinney 2023) ("In ascertaining the purpose and applicability of a statute, it is proper to consider the legislative history of the act, the circumstances surrounding the statute's passage, and the history of the times.").

[25] 179 N.E.3d 612 (N.Y. 2021).

[26] *Id.* at 614. As the court explained, "New York usury law is composed of General Obligations Law §§ 5-501, 5-511, 5-521; Banking Law § 14-a(1); and Penal Law § 190.40." *Id.* at 616.

[27] *Id.* at 616–17 (citing 1 Colonial Laws of N.Y. at 909–10, 980, 1004); *see also id.* at 620.

first law as a state in 1787,[28] its legislative revisions in 1837[29] and 1850[30] as a reaction to an earlier Court of Appeals decision,[31] and its more modern incarnation in laws from 1965[32] and 1980.[33] Not only did it tell a narrative about this "statutory history,"[34] but it also considered statutory proposals that were rejected during a proposed revision of the usury laws in 1827,[35] a form of "legislative history" that is especially controversial among textualists.[36] Even more anathema to textualists, the court considered failed lobbying efforts after 1850 by "the New York Chamber of Commerce, commercial groups, special legislative committees, and . . . the Governor . . . to repeal or amend the usury laws."[37] This is in addition to more traditional legislative history evidence about the relevant statutes (which would also be disfavored by textualists, of course).[38] And all this contextual material—along with basic statements of policy and purpose[39]—preceded any real effort to parse the language of the statutory text in the court's opinion.

Even when it finally turned to the text more directly, the court opted to de-emphasize the text's failure explicitly to void a loan charging a criminally usurious interest rate (more than twenty-five percent).[40] Instead, it emphasized the legislature's general intent and its refusal to provide clear exceptions to the

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[28] *Id.* at 617 (citing Act of Feb. 8, 1787, ch. 13, 1787 N.Y. Laws 365, 365–67).

[29] *Id.* at 617 (citing Act of May 15, 1837, ch. 430, 1837 N.Y. Laws 486, 486–88); *see also id.* at 623 (citing Act of May 15, 1837, ch. 430, 1837 N.Y. Laws 486, 486–88).

[30] *Id.* at 618 (citing Act of Apr. 6, 1850, ch. 172, 1850 N.Y. Laws 334, 334).

[31] Dry Dock Bank v. Am. Life Ins. & Tr. Co., 3 N.Y. 344 (1850).

[32] *Adar Bays*, 179 N.E.3d at 619 (citing Act of June 7, 1965, ch. 328, 1965 N.Y. Laws 1068, 1068–70).

[33] *Id.* at 619 (citing Act of June 23, 1980, ch. 369, 1980 N.Y. Laws 1339, 1339).

[34] On the distinction between "legislative history" (understood as specific evidence of an enactor's intent within the legislature) and "statutory history" (understood as the trajectory and shape of a statutory scheme over time), see Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 270 (2022).

[35] *Adar Bays*, 179 N.E.3d at 617 (citing Curtiss v. Teller, 143 N.Y.S. 188, 193 (N.Y. App. Div. 1913) for an 1827 legislative inaction).

[36] For more on legislative inaction as a form of legislative history, see William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988). For some criticism about how failed legislative proposals are "a particularly dangerous ground" to make statutory interpretation decisions, see Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) and Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 187 (1994), *superseded by statute*, 15 U.S.C. § 78t(e), *as recognized in* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008). For Justice Scalia's famous jeremiad against legislative inaction as a "canard," see Johnson v. Transp. Agency, 480 U.S. 616, 671–72 (1989) (Scalia, J., dissenting).

[37] *Adar Bays*, 179 N.E.3d at 618.

[38] *Id.* at 619 (considering a report issued by a New York State Commission on Investigation that was sent to the legislature with a bill to explain the need to fill a gap in the law that as of 1965 carved-out corporations from the protections of the usury laws).

[39] *Id.* at 620 ("Although the ancient laws relating to usury had religious and moral underpinnings, some of which may have carried into New York's original usury law, the modern conception of our usury laws focuses on the protection of persons in weak bargaining positions from being taken advantage of by those in much stronger bargaining positions. . . . The forfeiture of interest and capital serves a strong deterrent effect—one the legislature has repeatedly affirmed.").

[40] *Id.* ("The fact that Penal Law § 190.40 itself does not void a loan charging more than 25% interest is irrelevant.").

consequences of criminal usury (that such loans are void) for corporations, which are prevented from raising civil usury defenses (for interest rates over sixteen percent).[41] It further supported its conclusion with an *expressio unius* type of argument,[42] highlighting that the legislature knows how to create exclusions from voiding loans when it wants to.[43] And although the partial dissent by Judge Garcia (a Republican appointed by Andrew Cuomo who served as an AUSA, INS Commissioner, and Assistant Secretary for Homeland Security in ICE under President George W. Bush)[44] agreed, in part, with the majority's decision about corporations voiding loans that charge criminally usurious interest rates, he noted that the court "need not go back 300 years to perform what is, in [his] view, a matter of straightforward [textual] statutory interpretation."[45] Yet even about the portion of the opinion to which Garcia dissents—how to think about stock conversion options at discounted rates as "interest"—Garcia adopts a purposive and policy-oriented approach rather than purely textual one.[46]

In short, New York's law of interpretation as applied to legislative work product is thoroughly non-textualist, both historically and as a matter of modern practice at the New York Court of Appeals. As I will show in a moment, New York's approach to contract interpretation is much more formalist and textual.

B. New York Contract Interpretation[47]

Scholars of contract law disagree about which law of interpretation would make for the best kind of contract regime. Some favor formalist rules that could be seen to maximize predictability in adjudication and others prefer more contextual standards that could welcome more implied terms and extensive study of pre-

[41] *Id.* at 621 ("The statutory authority, coupled with the legislative intent behind the 1965 amendment, requires the conclusion that the legislature intended for criminally usurious loans made to corporate borrowers to be void when a successful usury defense, based on the criminal usury rate, is raised. Particularly given the legislature's intention to deter loansharking by allowing corporations to raise a criminal usury defense, it would be incongruous to deviate from that rule and conclude that the legislature intended a more forgiving remedy against those who lend at or above the criminal usury rate than those who violate only the civil usury standard.").

[42] This canon holds that "the inclusion of one term or concept [or exclusion] in text suggests the exclusion of opposite or alternative terms and concepts not mentioned." James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 13 (2005). It is the statutory law of New York. *See* N.Y. STAT. LAW § 240 (McKinney 2023) (codifying "*expressio unius est exclusio alterius*").

[43] *Adar Bays*, 179 N.E.3d at 621 ("Our conclusion is also supported by the legislature's enactment of express exceptions where it has found complete invalidity of an otherwise usurious instrument counterproductive.").

[44] Honorable Michael J. Garcia, CT. OF APPEALS: STATE OF N.Y., https://www.nycourts.gov/ctapps/jgarcia.htm (last visited Apr. 13, 2024).

[45] *Id.* at 629 (Garcia, J., dissenting in part).

[46] *Id.* at 630–31 (Garcia, J., dissenting in part).

[47] As I have been called as an expert witness on New York contract interpretation principles in several cases in several jurisdictions around the world, some of my findings here draw from prior written opinions and briefs about New York law filed with various tribunals.

and post-contract negotiations along with other forms of extrinsic evidence.[48] However, all students of New York contract law agree—and there is much more study of New York contract interpretation principles than there is of New York statutory interpretation principles—that the New York Court of Appeals has chosen formalist and exclusionary rules of interpretation because it thinks this law of interpretation is good for certainty, predictability, and finality for commercial parties in particular.[49] So although at the meta-level New York is picking its law of interpretation for contract cases for "policy" reasons,[50] the law it chooses for contract interpretation is heavily formalist, emphasizing text over context.[51] New York is widely known to "follow the traditional Willistonian approach to interpretation, which embodies a hard parol evidence rule[,] . . . gives presumptively conclusive effect to merger clauses, and, in general, permits the resolution of many interpretation disputes by summary judgment."[52] Canonical cases from New York routinely reaffirm New York's commitment to formal rules that tend to exclude the consideration of extrinsic evidence[53] and focus on "plain meaning."[54] Although one might think New York is just giving commercial parties what they presumptively want —commercial parties may *intend* textualism to resolve their disputes about contractual meaning, so perhaps the court can be reduced to a kind of intentionalism (as on the statutory side)—the policy choice to be formalist

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[48] *See generally* Ronald J. Gilson et al., *Text* and *Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23 (2014) (arguing that context should be considered in contract interpretation depending on the environment in which the contract was created); Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926 (2010) (arguing that courts should apply rules of interpretation consistent with the expressed preference of the parties).

[49] *See* Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475 (2009); Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073 (2009); WILLIAM E. NELSON, THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920–1980, at 80–92 (2001).

[50] IRB-Brasil Resseguros, S.A. v. Inepar Invs., 982 N.E.2d 609, 612 (N.Y. 2012) (highlighting that New York law seeks "to promote and preserve New York's status as a commercial center and to maintain predictability for the parties" to contracts).

[51] *See, e.g.*, 159 MP Corp. v. Redbridge Bedford, LLC, 128 N.E.3d 128, 130 (N.Y. 2019) ("In New York, agreements negotiated at arm's length by sophisticated, counseled parties are generally enforced according to their plain language pursuant to our strong public policy favoring freedom of contract."); Oxford Com. Corp. v. Landau, 190 N.E.2d 230, 231 (N.Y. 1963) ("It is too well settled for citation that, if a written agreement contains no obvious or latent ambiguities, . . . the parties . . . may [not] testify to what the parties meant but failed to state.").

[52] Schwartz & Scott, *supra* note 48, at 932.

[53] *See* W.W.W. Assocs. v. Giancontieri, 566 N.E.2d 639, 642 (N.Y. 1990) ("Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing."); Jarecki v. Shung Moo Louie, 745 N.E.2d 1006, 1009 (N.Y. 2001); Primex Int'l Corp. v. Wal-Mart Stores, Inc., 679 N.E.2d 624, 627 (N.Y. 1997).

[54] *See* Greenfield v. Philles Recs., Inc., 780 N.E.2d 166, 170 (N.Y. 2002) ("[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms."); Laba v. Carey, 277 N.E.2d 641, 644 (N.Y. 1971) (emphasizing that New York law requires that courts "must give the words and phrases employed [in contracts] their plain meaning"); Golden Gate Yacht Club v. Société Nautique De Genève, 907 N.E.2d 276, 281–82 (N.Y. 2009) (reversing the lower court because it used evidence outside the four corners of the contract when the contract had a plain meaning).

seems, in New York, not solely to be an approximation of what sophisticated parties want but also an effort to get parties to choose New York law for their disputes prospectively.[55]

After systematic study of the New York law of interpretation in contract cases and comparing it to other interpretive regimes, Geoff Miller explained as follows:

> The differences between New York and California contract law turn out to align with the formalist-contextualist distinction in contract theory. New York judges are formalists. Especially in commercial cases, they have little tolerance for attempts to re-write contracts to make them fairer or more equitable, and they look to the written agreement as the definitive source of interpretation. California judges, on the other hand, more willingly reform or reject contracts in the service of morality or public policy; they place less emphasis on the written agreement of the parties and seek instead to identify the contours of their commercial relationship within a broader context framed by principles of reason, equity, and substantial justice.[56]

Thus, in some very real sense, New York's law of interpretation for contract cases is the mirror image of its interpretive regime for statutes: in statutory cases, context, history, policy, and extrinsic evidence often trumps text; in contract cases, the jurisprudence is "formalistic, literalistic, nonjudgmental, and deferential" to text.[57] In a recent case, the New York Court of Appeals put it thusly: "Historically, we have been 'extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include.'"[58] And dealing with parties who sought to undermine the plain textual reading of a contract in another recent case, the Court was dismissive: "Here, we again conclude that the parties' contract, as written, means what it says."[59]

So what should we think about the fact that the same court in New York approaches its law of interpretation in such different ways, depending on whether the legal instrument it is interpreting is a statute or a contract? To be fair, cont-

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55 *See* IRB-Brasil Resseguros, S.A. v. Inepar Invs., 982 N.E.2d 609, 612 (N.Y. 2012) (focusing on New York's desire to "promote . . . New York's status as a commercial center" for contract litigation).

56 Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 CARDOZO L. REV. 1475, 1478 (2010); *see also id.* at 1522 ("New York courts place a high value on clarity and predictability, especially in commercial contracts: Courts enforce contracts as written . . . .").

57 *Id.*

58 ACE Sec. Corp. v. DB Structured Prods., Inc., 36 N.E.3d 623, 630 (N.Y. 2015) (quoting Vermont Teddy Bear Co. v. 538 Madison Realty Co., 807 N.E.2d 876, 879 (N.Y. 2004)).

59 Part 60 Put-Back Litig. v. Morgan Stanley Mortg. Cap. Holdings LLC, 165 N.E.3d 180, 183 (N.Y. 2020). In both this case and *ACE*, 36 N.E.3d 623, I filed an amicus brief laying out what I took to be New York's law of interpretation and in both cases the court agreed with me. *See* Brief for Amici Curiae New York Contract Law Professors and Scholars in Support of Defendants-Appellants, Part 60 Put-Back Litig. v. Morgan Stanley Mortg. Cap. Holdings LLC, 165 N.E.3d 180 (2019) (No. APL-2019-00127); Brief of New York Law Professors as Amici Curiae, ACE Sec. Corp. v. DB Structured Prods., Inc., 36 N.E.3d 623 (2015) (No. APL-2014-00156).

ractual formalism is not identical to what passes for textualism in federal courts' statutory interpretation: one does not see excessive reliance on linguistic canons, nor are dictionaries or *corpus linguistics* resolving many contract cases in New York.[60] But based on the kind of evidence New York courts want to exclude from consideration in contract interpretation cases, it approximates a more textualist orientation. Some ideas follow in Part II for what to make of the interpretive divergence at the New York Court of Appeals for jurisprudential and legisprudential thinking more broadly.

II. INTERPRETIVE DIVERGENCES BETWEEN STATUTORY AND CONTRACT CASES

Perhaps there is nothing noteworthy here. Some policy reasons that purport to support formalism for contract interpretation—certainty and predictability for commercial parties, for example[61]—do not obviously apply in cases about the meaning of public laws.[62] And some policy reasons that might support a thorough-going intentionalism or contextualism for statutory interpretation—an ideal of collaborative governance between the legislature and the judiciary, for example[63]—does not obviously produce an interpretive regime for private contracting parties, who do not need a complex process of bicameralism and presentment to modify, repeal, amend, or renew their legal commitments. There is, relatedly, more of a timelessness to legislation that has few corollaries in the mostly time-bounded contractual sphere.[64] When words in a legal code have to

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[60] *See Textual Canons in Contract Cases*, *supra* note 6 (exploring contract cases in New York).

[61] *See* Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 508–09 (2004).

[62] At a cocktail party with Judge Kaye before her death, Steve Thel and I made some inquiries of her about why the New York Court of Appeals was so formalistic in its interpretation (and whether it would apply *contra proferentem* itself or have juries apply it, a point a then-recent article of ours was puzzling through, *see* Leib & Thel, *supra* note 4). She was honest in reply, as I recall it: "we really don't want contract cases to go to juries." If that is the reason for contract formalism, it has no corollary in statutory cases, which are questions of law for the court regardless of any statutory ambiguity.

[63] *See* James J. Brudney & Ethan J. Leib, *Statutory Interpretation as "Interbranch Dialogue"?*, 66 UCLA L. REV. 346, 351, 393 (2019); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541 (1988).

[64] Thanks to Jim Brudney for this way to put it. That "surviving over time" can support interpretive divergence is a theme in GREENAWALT, LEGAL INTERPRETATION, *supra* note 1, at 330 (arguing that "the extent to which interpretation should respond to developments after an authoritative text is enacted is especially important when texts survive over time"); and GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION, *supra* note 1, at 291 ("Because many statutes last over time . . . the issues raised by novel applications and by changing social conditions are much more acute than with wills and most contracts.").

Of course, there are long-term so-called "relational" contracts that surely do extend over time. And, maybe appropriately, many call for specialized interpretive regimes that are very much non-textualist for such transactional environments. *See, e.g.*, David Campbell & Donald Harris, *Flexibility in Long-Term Contractual Relationships: The Role of Co-Operation*, 20 J.L. & SOC'Y 166 (1993); Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1; Ian. R. Macneil, *Contracts: Adjustment of Long-Term Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854 (1978); Richard E. Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U.L. REV. 369 (1981).

stay relevant for fifty years, it is not all that odd, perhaps, to see judges helping policy evolution along, contouring it as the consequences of legislative decisions from many years previous feel ill-suited to more contemporary societal developments. The "contracting parties" in a statutory context (a legislature, an interest group, an executive official) may be practically unreachable or may have dissolved over time.

Yet it does not seem especially difficult to reconfigure the interpretive rationales in one domain and translate them, however imperfectly, for another: just like a formalistic textualism might lead to predictability for private parties in their private ordering (though that is a contested proposition among theorists of private law),[65] so might textualism for public laws lead to predictability for citizens trying to follow the laws as written rather than guessing what a court might do with extrinsic evidence the average citizen could not find or reasonably digest (also contestable, obviously).[66] And just as a partnership between governmental branches might be thought to underwrite more purposivist modalities of statutory interpretation, so could a conception of "contract as collaboration"[67] or "relational contracting"[68] support more room for implicit understandings in contract interpretation, allowing for more extrinsic evidence about what the parties to a contract may have really intended. That the intent of the parties ought to be a significant benchmark in contract interpretation is not exactly a radical idea, even in the jurisdictions that want to use objective text as the best evidence of such intent.

For more on relational contract theory and concomitant calls for specialized interpretive regimes for relational contracts, see Ethan J. Leib, *Contracts and Friendships*, 59 EMORY L.J. 649 (2010). For the argument against any specialized interpretive regime for relational contracts, see Melvin A. Eisenberg, *Why There Is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 820 (2000).

[65] For the argument that contextualism rather than formalism or textualism gives the parties the "real deal" they were anticipating, see Hugh Collins, *The Research Agenda of Implicit Dimensions of Contracts*, *in* IMPLICIT DIMENSIONS OF CONTRACT: DISCRETE, RELATIONAL, AND NETWORK CONTRACTS 10 (David Campbell et al. eds., 2003); Leib, *supra* note 64, at 673.

[66] This "rule of law" benefit for textualism in statutory interpretation is explained (though rejected) in William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1514, 1551 (1998) (reviewing and attributing the argument to ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) before rejecting it). Of course, one could push back here, too: the private intent of parties in, say, a long email chain between two bit players in a negotiation might be harder to isolate and decode than a public process of deliberation that is a matter of public record—so intentionalism just is more predictable in the statutory domain. And ordinary meaning might not be what ordinary people actually expect of their statutes, either. *See* Kevin Tobia et al., *Ordinary Meaning and Ordinary People*, 171 U. PA. L. REV. 365 (2023).

[67] *See* Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004). This is not the direction Markovits himself is eager to go, but it is one pathway one might entertain from a robust conception of collaborative governance within contractual relations. Of course, many go in the opposite direction and argue for a type of formalism as the correct interpretive posture within collaborative contractual enterprises. *See, e.g.*, Ronald J. Gilson et al., *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377 (2010).

[68] *See, e.g.*, Richard E. Speidel, *Article 2 and Relational Contracts*, 26 LOY. L.A. L. REV. 789 (1993); Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, *in* IMPLICIT DIMENSIONS OF CONTRACT 51 (David Campbell et al. eds., 2003).

To the extent that interpretation has grown somewhat politicized, one might have also expected bleeding from one type of case to the other. For example, if one tends to believe in the fixity of word meaning and is particularly worried about judicial discretion and judicial error—as is sometimes at the center of normative arguments for contract formalism[69] and statutory textualism[70]—an interpreter might find herself treating contract cases and statutory cases somewhat similarly, drawing upon plain meaning often and potentially using linguistic canons and dictionaries to help avoid extrinsic evidence of any form. By contrast, were one more confident that common-sense, common-law decision-making by judges is not especially error-prone and that word-meaning is somewhat less determinate,[71] forms of interpretation that more easily admit extrinsic evidence to appreciate context seem sensible and attractive, even if there are ways to identify more and less reliable forms of extrinsic evidence.

Two other dynamics might nudge high courts towards harmonization, too. One possible mechanism might be the application of codified principles of statutory interpretation that find their way into contract interpretation cases: this very dynamic is apparent in the New York courts, which cite public laws on statutory interpretation to justify the application of linguistic canons in contract cases.[72] Over time, such cross-fertilization could lead to more harmonization.[73] Second, in some class of "hybrid" cases—say, contract cases that involve statutes like the Uniform Commercial Code (UCC) or statutory cases that affect contract rights

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[69] The worry about judicial error is central to the contract formalism of Eric Posner. *See* Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749, 754 (2000). Anxiety about judicial competence is also at the center of Bob Scott's formalism. *See* Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 858–59, 861 (2000).

[70] The preoccupation about the evils of judicial discretion as a justification for textualist methodologies is apparent in SCALIA, *supra* note 66, at 17–18.

[71] Consider here then-Chief Judge Breitel: "words men use are never absolutely certain in meaning; the limitations of finite man and the even greater limitations of his language see to that." N.Y. State Bankers Ass'n v. Albright, 343 N.E.2d 735, 738 (N.Y. 1975). This led him to a willingness to embrace "aid to construction of the meaning of words" in statutes, "however clear the words may appear on 'superficial examination.'" *Id.* at 739. That view did not carry over to the contract docket, apparently.

[72] *E.g.*, Uribe v. Merchs. Bank of N.Y., 693 N.E.2d 740, 742–43 (N.Y. 1998) (citing N.Y. STAT. LAW § 239(b) (McKinney 1998) to justify an application of *ejusdem generis* to a contract and N.Y. STAT. LAW § 240 (McKinney 1998) in connection with an *inclusio unius* reading); Dimino v. Dimino, 459 N.Y.S.2d 164, 168 (1983) (appealing to the two statutes to apply *expressio unius* and *ejusdem generis* to provisions of a separation agreement) (Hancock, J., joined by Doerr, J., dissenting); Bd. of Educ., Lakeland Cent. Sch. Dist. of Shrub Oak v. Barni, 412 N.Y.S.2d 908, 910 (1979) (invoking N.Y. STAT. LAW § 239 to justify an application of *noscitur a sociis* to a contract), *rev'd*, 401 N.E.2d 912 (N.Y. 1980); 242–44 East 77th Street, LLC v. Greater N.Y. Mut. Ins. Co., 815 N.Y.S.2d 507, 510 (2006) (citing N.Y. STAT. LAW § 239 (McKinney 2006) to justify an application of *ejusdem generis* to a contract). Many states have codified laws of statutory interpretation which could migrate into contract cases. *See generally* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010). For some discussion, see *Textual Canons in Contract Cases*, *supra* note 6, at 1112–13.

[73] Although the codified textual canons get cited in both statutory and contract cases notwithstanding that they formally apply only to statutory cases, the codified rule to look at context. N.Y. STAT. § 124 (McKinney 2023), appears only in statutory cases.

(like usury statutes!), perhaps courts end up mixing and matching their interpretive regimes, leading to some conciliation.

Yet, in the usury case discussed in Part I, the Court of Appeals in New York very much stuck with its statutory contextualism[74] and did not use the implications of the usury laws for loan agreements (as was at issue in that case) to edge more formalist in its statutory interpretation. In the UCC environment in New York law also, the New York Court of Appeals has sided with its contract formalism, occasionally sidelining the application of what is conventionally seen as a more contextualist regime from the UCC.[75] For example, in *Fischer v. Zepa Consulting AG* in 2000,[76] the court decided not to apply the UCC's provision on goods to be severed from realty (that by its terms includes "timber to be cut") in a contract about logging rights, refusing to add an implied term from the UCC that would have limited the exercise of the logging rights to a "reasonable time."[77] And in a case from 2014 that sought to assess whether "lost profits" needed always to be seen as "consequential damages" or could also be treated as "general damages" that were not subjected to a limitation of remedies provision in an agreement,[78] the court decided both to read the UCC intentionally and purposively—citing official comments[79]—but stuck with a formal set of distinctions about types of damages and did not look to extrinsic evidence from the parties.[80] Similarly, in a case about whether a lessee of a vehicle could appeal to the UCC and the federal Warranty Act, the court concluded that the statutes could not protect the plaintiff based on contextualist readings of those statutes.[81] Thus, New York has been relatively successful in not allowing "creep" from one set of cases to the other, sustaining its divergent interpretive approaches to statutes on the one hand and contracts on the other.[82]

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[74] *See* Adar Bays, LLC v. GeneSYS ID, Inc., 179 N.E.3d 612 (N.Y. 2021).

[75] *See generally* Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999) (criticizing the UCC's interpretive regime for contracts for sales of goods for being largely contextualist rather than textualist).

[76] 732 N.E.2d 937 (N.Y. 2000).

[77] N.Y. U.C.C. LAW § 2-309 (McKinney 2000).

[78] *See* Biotronik AG v. Conor Medsystems Ir., Ltd., 11 N.E.3d 676 (N.Y. 2014).

[79] *Id.* at 682–83 (citing N.Y. U.C.C. LAW § 2-715 cmt. 2, 6 (McKinney 2014).

[80] Admittedly, the dissent probably offered a more formalistic and textual reading of the broad-ranging disclaimer provision in the contract—but also offered a more cramped reading of the relevant section of the UCC. *Id.* at 683–92 (Read, J., dissenting). It was the dissent that invoked the "commercial" New York values of "reliance, definiteness and predictability." *Id.* at 692 (citing *In re* Southeast Banking Corp., 710 N.E.2d 1083, 1086 (N.Y. 1999)).

[81] *See* DiCintio v. DaimlerChrysler Corp., 768 N.E.2d 1121, 1124 (N.Y. 2002) (emphasizing H.R. REP. NO. 93-1107 (1974), which presumed the UCC's requirement that it applies only when title passes); *id.* at 1125–26 (exploring the "history of a precursor bill to the Warranty Act" to delimit its coverage only to buyers in sales rather than leases). Apparently, even when the New York Court of Appeals is interpreting a federal statute, it uses its state method of interpretation. For some discussion of these "reverse *Erie*" issues, see Bruhl & Leib, *supra* note 6, at 1272–74.

[82] *See also* U.S. Bank Nat'l Ass'n v. Nelson, 163 N.E.3d 49, 49–58 (N.Y. 2020) (Wilson, J., concurring) (drawing upon Official Comments and legislative history of the UCC to highlight that promissory notes count as contracts under New York law and that suits to recover on notes or to foreclose on mortgages securing notes are contract actions). For reasons to think that courts over time will have difficulty—at least within the internal world of contract cases—of sustaining

To be fair, these realms of interpretation are not perfectly sealed off from each other. Given the emphasis of New York's contract formalism in serving sophisticated parties especially, sometimes textualism can give way to more public-policy oriented contract interpretation in consumer contracting environments,[83] a kind of regime the New York courts apply in public law statutory interpretation cases. So although interpretive divergence mostly maps in the ways Part I spotlights, private law cases can occasionally get sufficiently suffused with public law considerations because of their systemic effect on many citizens that some harmonization can occur. Nevertheless, the exceptions do not disrupt what is otherwise a fairly robust set of commitments to interpretive divergence over a broad range of case types.

* * *

This case study from New York's Court of Appeals, then, invites us to see how and why a state high court can sustain one interpretive regime for one domain and a diametrically opposed interpretive regime for the other. Although New York's interpretive divergence is not carefully theorized in a self-conscious way, it is easy enough to see why the domains of private law and public law do not produce identical interpretive regimes in New York; New York just prioritizes what it thinks conduces to sophisticated party predictability, finality, and certainty through its contract formalism and it centers promoting more collaborative public policymaking through its statutory contextualism. Although some states may opt for more harmonization for one reason or another, nothing requires just one law of interpretation for legal instruments.

It may be tempting after observing this case study to presume that an internal logic to private law or to public law could *necessitate* interpretive divergence, pushing apart the interpretive regimes that are appropriate to private legal instruments on the one hand and public legal instruments on the other. The better conclusion, instead, is probably that there is some contingency at work: one might have assumed private instruments—especially those that do not have substantial effects on third parties—ought to rely more heavily on private intentions for interpretation, whereas public law instruments, so obviously impacting third parties over time, should be much less controlled by the historical intentions of drafters, which might be hard to discover in a reliable way. Yet New York chooses just the opposite approach: it is in cases of private instruments that courts suppress the importance of intent and in cases of public instruments in which interrogation of intent dominates the interpretive landscape. That is likely owing to a focus on

separate tracks of interpretive methods, see Tal Kastner & Ethan J. Leib, *Contract Creep*, 107 GEO. L.J. 1277 (2019). I have to concede that over many decades, the New York Court of Appeals has used differentiated laws of interpretation as between statutory cases and contract cases. As I have recently discussed in another paper, different canons of interpretation dominate in contract cases (*ejusdem generis*) than dominate in non-contract cases (*expressio unius*). *See Textual Canons in Contract Cases*, *supra* note 6.

[83] *E.g.*, Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569 (N.Y. App. Div. 1998) (finding that substantive unconscionability was enough to invalidate a consumer arbitration clause even though New York law traditionally requires both procedural and substantive unconscionability to invalidate a provision of a contract).

sophisticated parties in its contract law and a specific objective of trying to get parties to choose its jurisdiction's contract law, as well as views about legislative practice that might not be perfectly portable in other jurisdictions that have more formalistic understandings of their separation of powers and different role conceptions of high court judges, based in how judges get and retain office. In short, one ought to be cautious in transplanting the divergent choices New York makes into a different legal ecosystem. Still, knowing that interpretive divergence can be mostly stable over generations invites jurists and scholars to be more willing to advocate for a more fragmented law of interpretation, calibrated to local legal cultures and their overarching policy objectives and constitutional structure-es.

CONCLUSION

For those who have generally found it eminently sensible that different kinds of cases will generate different kinds of interpretive priorities,[84] they should not be terribly surprised that New York has charted a course of divergence. Knowing this is possible should help other courts and scholars see that the law of interpretation is a variegated enterprise and that one should not be too quick to assimilate one set of cases to another. More than that—and this might be more surprising in light of work on doctrinal porousness within classes of contract cases[85]—the divergence at the New York Court of Appeals is mostly stable over time and intra-domain, notwithstanding the ascendancy and retreat of different schools of thought about the kinds of rules of interpretation that ought to govern, in the academy, in politics, and elsewhere. Although a recent study has found a modest uptick in the use of linguistic canons in contract cases in New York during the years when statutory formalism has come into vogue nationwide,[86] New York has always been mostly formalistic in its contract interpretation; even the pragm-atic Court of Appeals Judge Benjamin Cardozo stuck with formalism for New York's canonically exclusionary parol evidence rule.[87] Whatever the ultimate m-erits of New York's choices—which are beyond the scope of this Article—it has been able to sustain at least two laws of interpretation, differentiated by case type. This finding should stimulate more thinking about how to reinforce, develop, and theorize interpretive regime distinctiveness.

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[84] *See generally* Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47 (2010) (arguing that dissensus in interpretation is more beneficial than a regime seeking full conciliation between textualists and purposivists).

[85] *See* Kastner & Leib, *supra* note 82.

[86] *See Textual Canons in Contract Cases*, *supra* note 6.

[87] *See* Mitchill v. Lath, 160 N.E 646 (N.Y. 1928). Cardozo concurred in the majority opinion written by Judge Andrews.

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NOTES

THERE IS NO MORE NEW FRONTIER: ANALYZING WILDFIRE MANAGEMENT EFFORTS IN THE UNITED STATES

Morgan D. Gafford[*]

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INTRODUCTION

The United States is waging a war against itself and losing.[1] For the last several years, the western United States has seen an increase in the number of severe wildfires that ravage through its forests and prairies.[2] Wildfires can begin naturally (for example, with a lightning strike), but unlike what their name implies, wildfires are often triggered by human activity.[3] The increase in wildfires has prompted a great deal of research aimed at understanding why this is happening. Many scholars have attributed this to changes in climate, vegetation, and increasing population rates.[4]

Severe wildfires raise not only environmental problems but questions of federalism. Because wildfires do not and cannot abide by political boundaries or state lines, they raise major issues that spark sharp political debates. This sometimes causes state governments and the federal government to grapple with whose responsibility it is to suppress the fires, depending on where the fires roam.[5] It is not like the federal government is ignoring the existence of this problem–in fact, Congress itself is very aware of the issue.[6] But as the fires continue to spread and rage on, as the firefighters—local, state, and federal—risk their lives to control them, Congress still has yet to pass adequate legislation beyond that of piecemeal measures introduced related to fire suppression, containment, and evacuation measures.[7]

Arguably, high-intensity wildfires are not just an issue for the American West; they are an issue for the United States as a whole. Clearer reform in the realm of wildfire legislation is needed to effectively fight these increasingly disastrous fires. Although land management has been traditionally delegated to the states,[8] more cooperation, support, and resources are all necessary in order for the local, state, and federal governments to contain and/or extinguish them.

This Note addresses the issue of federalism surrounding high-intensity wildfires in the United States and ultimately proposes potential legislative solutions Congress could enact to help manage the situation more effectively. Part I provides an overview about wildfires in the United States, both past and present, and their environmental, human, and economic impacts. Part II discusses past and present legislative efforts to reduce the impact of wildfires in the United States–from state and local governments to the federal government. Part II also ad-

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1 *See, e.g.*, 16 U.S.C. § 6701(5) (2018).

2 *Id.*

3 *See Wildfire Causes and Evaluations*, NAT'L PARK SERV. (Mar. 8, 2022), https://www.nps.gov/articles/wildfire-causes-and-evaluation.htm [https://perma.cc/DK3B-QKQU].

4 *See* Fresh Air, *Extreme Heat, Flooding and Wildfires: How Climate Change Supercharged the Weather*, NPR (Sept. 22, 2022, 1:22 PM), https://www.npr.org/2022/09/22/1124491807/extreme-heat-flooding-and-wildfires-how-climate-change-supercharged-the-weather [https://perma.cc/WER9-LHRU]; *see also* 16 U.S.C. § 6701(7).

5 *See Wildland Fire Management*, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/wildland-fire-management [https://perma.cc/U8XZ-BCYE] (last visited Sept. 18, 2022).

6 *See* 16 U.S.C. § 6701(5).

7 *See, e.g.*, Southwest Forest Health and Wildfire Prevention Act of 2004, Pub. L. No. 108-317, 118 Stat. 1204 (codified at 16 U.S.C. §§ 6701–6707).

8 *See* U.S. CONST. amend. X.

dresses issues that arise when fires cross state lines, which triggers cooperative efforts from both state and federal governments. Part III discusses how and why the current legislative efforts surrounding wildfires are ineffective at reducing the major impacts wildfires have on the United States. Part III also details fire regulations in other countries and poses possible legislative solutions. The struggle between authorities is a federalism issue that could be suppressed, just like the wildfires, through clear and adequate legislation.

I propose, therefore, that Congress needs to address the major wildfire problem by enacting more legislation that works alongside state governments and their own fire management goals. It is time for Congress to take wildfire suppression legislation more seriously and move it beyond the introductory phase. It is time for Congress and the other branches of the federal government to work together. It is time for everyone—but especially Congress—to fully comprehend the detrimental effects the most severe fires have on the environment, society, and the economy.

I. WILDFIRES IN THE UNITED STATES: A RAGING PROBLEM

A. The Fiery Impacts of Wildfires in the United States

The impacts that wildfires have on the environment and thus on humans are substantial. On one hand, wildfires are a natural part of life and help shape ecosystems through its processes of renewal and change.[9] On the other, regardless of how they begin, a wildfire can be extremely destructive. There are (and will continue to be) more than just environmental, human, and economic effects high-intensity wildfires have on the United States.

Wildfires *do* have positive impacts on the environment. Just as a heavy thunderstorm in August quenches parched Midwest cornfields, wildfires have a cleansing effect on the earth.[10] Not all wildfires are devastating, and there is an interesting dichotomy between fires and the ecosystem. Periodic forest fires help naturally clear away old brush, making room for new growth.[11] When allowed to burn naturally, forest fires also provide nutrients to the soil; some types of trees and plants even require occasional burnings to release seeds and reproduce.[12] Unfortunately, in part because of past efforts to suppress and completely eradicate fires, natural processes have been disturbed and research indicates that this fuels highly intense and severe fires while increasing the likelihood they occur.[13]

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[9] *Pacific Northwest Research Station: Fire*, U.S. FOREST SERV., https://www.fs.usda.gov/research/pnw/fire [https://perma.cc/N8WN-VX2B] (last visited Dec. 28, 2023).

[10] See *The Ecological Benefits of Fire*, NAT'L GEOGRAPHIC, https://education.nationalgeographic.org/resource/ecological-benefits-fire [https://perma.cc/6RKE-N4JD] (last visited July 15, 2022) for a brief and easy-to-understand discussion indicating this is highly dependent on the cause, severity, and location of the fire.

[11] Shandra Furtado, *The Important Relationship between Forests and Fire*, AM. FORESTS (Apr. 5, 2016), https://www.americanforests.org/article/the-important-relationship-between-forests-and-fire/ [https://perma.cc/VLQ3-QN8V].

[12] *Id.*

[13] *Id.*

Wildfires are a natural part of life and help shape ecosystems through its processes of renewal and change.[14] With the increasing number of fires each year, however, the effects can quickly turn more negative than positive.

Severe wildfires in areas most prone to them are expected to increase exponentially by 2050, due to worsening droughts and other conditions caused by climate change.[15] In these situations, the intense fires run rampant and can be highly destructive to wildlife habitats, timber, and air quality.[16] The dense, lush forests of the Pacific Northwest are typically known for wet conditions and fewer wildfires, but as the climate becomes warmer and drier, those states are experiencing "longer fire seasons, larger burns, and increased wildfire risk."[17] Even more concerning to scientists is the way wildfires and climate change form a constant "feedback loop."[18] When wildfires burn, "they release CO_2 and other greenhouse gases stored in soil and organic matter into the atmosphere. This in [turn] contributes to further climate change, which increases wildfire activity."[19] This cyclical relationship threatens the health and survival of important ecosystems throughout the western region of the United States, since there is often little time for them to recover between fires.[20]

The impacts of wildfires on human health are extreme and can cause death, sickness, and mental health disorders.[21] Wildfires affect society in plentiful ways, impacting those who live and work in the areas most prone to fires the greatest. Specifically, in the western United States, extensive wildfire smoke constitutes a great public health concern.[22] The high intensity wildfires are drastically affecting the air quality in the states affected but also throughout the United States, as nearly a quarter of Americans' total exposure to PM2.5—a harmful air particle is caused by wildfires.[23] The poor air quality can both cause and exacerbate health problems, indirectly resulting in death, particularly for children and the elderly.[24] Additionally, direct exposure to wildfires has been found to significantly increase the risk for mental health disorders and psychological stress.[25] This affects both

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14 *Pacific Northwest Research Station: Fire*, *supra* note 9.

15 *The Effects of Climate Change*, NASA SCI., https://science.nasa.gov/climate-change/effects/ [https://perma.cc/KHT3-KURS] (last visited Mar. 24, 2024).

16 *Id.*

17 *Story Map Tells of New Normal for West-Side Fire in Oregon, Washington*, U.S. FOREST SERV. (June 16, 2021), https://www.fs.usda.gov/inside-fs/delivering-mission/sustain/story-map-tells-new-normal-west-side-fire-oregon-washington [https://perma.cc/2JQJ-VXSJ] [hereinafter *Story Map*].

18 *See* Matthew Wibbenmeyer & Anne McDarris, *Wildfires in the United States 101: Context and Consequences*, RES. FOR FUTURE (July 30, 2021), https://www.rff.org/publications/explainers/wildfires-in-the-united-states-101-context-and-consequences/ [https://perma.cc/T66J-SBSN].

19 *Id.*

20 *Id.*

21 *Id.* (describing how "[w]ildfires cause human fatalities both *directly* (when people are unable to escape a blaze, or when firefighters are killed while containing a fire) and *indirectly* (particularly due to the health effects of smoke inhalation)") (emphasis added).

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

the residents of regions prone to wildfires as well as those fighting to contain the fires. The following is a critical and emotionally charged first-hand take from sociologist and former wildland firefighter Matthew Desmond on the lack of recognition the rugged profession often gets:

> Wildland firefighters do not enjoy the cultural prestige that structural firefighters do. They do not wax their fire engines and cruise down the local parade route, lights flashing; they are not the subject of countless popular books and movies; major politicians do not honor their sacrifices on the Senate floor or from the Rose Garden; they do not have bagpipe bands, fancy equipment, enduring icons, or other signifiers of honor verifying the importance of their activity.[26]

While Desmond's account evokes a great deal of sympathy for those on the frontlines, the "cultural prestige" he describes as lacking is actively changing since his book was published at the start of the century. As more people become aware of the severe wildfire situation in the United States (most likely in part due to the constant media updates we receive), greater attention and support are given to those who are on the frontlines. For example, National Wildland Firefighter Day was first declared and established on July 2, 2022.[27] Set aside by the National Interagency Fire Center, this day seeks to "recognize all federal, state, local, Tribal, contract, and international firefighters, along with support staff, spotlighting their dedication and hard work."[28] This day provides many the national recognition that has been lacking and encourages the United States to honor those involved with the often-difficult task of wildland firefighting and management. The National Park Service describes National Wildland Firefighter Day as also providing "an opportunity to unify the wildland fire community and showcase interagency cooperation and collaboration."[29] High-intensity wildfires have the ability to literally tear apart communities; nevertheless, through initiatives like this encouraged by the federal government, even disasters can have a remarkable way of bringing out the best of society.

Finally, wildfires affect and threaten the US economy in many ways. In 2020 alone, wildfires "caused approximately $16.5 billion in damages to structures and management costs."[30] Researchers are concerned this will only worsen with time. Environmental commentator and educator Edward Struzik notes that "[i]n 1995, the budget for fighting fire made up [sixteen] percent of the [US] Forest Service's budget. It rose to the [fifty] percent level in 2015 and could reach close

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[26] MATTHEW DESMOND, ON THE FIRELINE: LIVING AND DYING WITH WILDLAND FIREFIGHTERS 130 (University of Chicago Press, 2007).

[27] *Interactive Wildfire History Timeline*, NAT'L PARK SERV., https://www.nps.gov/subjects/fire/wildfire-history-timeline.htm [https://perma.cc/DD9P-DZQP] (last visited July 6, 2022).

[28] *Id.*

[29] *Id.*

[30] Wibbenmeyer & McDarris, *supra* note 18.

to [seventy] percent by 2025."[31] Surprisingly enough, even smoke from wildfires has also led to annual declines in productivity throughout the United States.[32] As the fires turn more severe and intense each year, more money and economic resources are needed to mitigate the damaging; in fact, "[f]ire suppression costs have almost quadrupled since 1985."[33] For example, in 2020, when a town in California hired a professional fire chief, officials doubled the annual fire department fee that residents pay to fund the position and upgrade services.[34] Though the reaction from residents was initially negative, when a wildfire started a few months later on the far side of town, the "newly professionalized Dammeron Valley Fire Department set up a line between the hill and the town and stopped the fire from reaching homes."[35] Needless to say, complaints lessened from the residents after that, as it dawned on them that the extra amount each year likely outweighed the risk of personal and property destruction.[36]

B. Where the Wildfires Roam: Then and Now

Efforts to control wildfires in the United States can be organized into two distinct periods: fire suppression (beginning as early as the late nineteenth century) and fire acceptance (from the mid-twentieth century to present day).[37]

In 1905, the Forest Service was established; its main goal was suppressing fires in their entirety.[38] Complete fire abolishment then became the only fire policy in place for decades.[39] This was solidified in 1910, when the largest wildfire in US history devastated the Northern Rockies; from then on, land managers sought to extinguish any and all flames, no matter how they began, believing (at the time) they were making the best decision for the situation.[40] Following this and the passing of the Forest Fires Emergency Act in 1908,[41] the Forest Service ensured that no wildfire would be allowed to burn. With the creation of the National Park Service in 1916, the federal government became responsible for the

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[31] *See* EDWARD STRUZIK, FIRESTORM: HOW WILDFIRE WILL SHAPE OUR FUTURE 238 (Island Press, 2017).

[32] Wibbenmeyer & McDarris, *supra* note 18.

[33] *Id.*

[34] Christopher Flavelle & Nadja Popovich, *Here Are the Wildfire Risks to Homes Across the Lower 48 States*, N.Y. TIMES (May 16, 2022), https://www.nytimes.com/interactive/2022/05/16/climate/wildfire-risk-map-properties.html [https://perma.cc/EBG2-UXQQ].

[35] *Id.*

[36] *Id.*

[37] NAT'L PARK SERV., NO. CA 8034-2-9003, A TEST OF ADVERSITY AND STRENGTH: WILDLAND FIRE IN THE NATIONAL PARK SYSTEM, at iii (2006) [hereinafter ADVERSITY AND STRENGTH].

[38] Jan W. van Wagtendonk, *The History and Evolution of Wildland Fire Use*, 3 FIRE ECOLOGY 3, 4 (2007).

[39] *Id.*

[40] *See Fighting Wildfires*, PBS, https://www.pbs.org/wgbh/americanexperience/features/burn-fighting-wildfires/ [https://perma.cc/Y8US-FVSL] (last visited Nov. 3, 2022).

[41] *See* Forest Fires Emergency Act of 1908, ch. 192, 35 Stat. 259 (codified as amended at 16 U.S.C. § 556(d)) (authorizing unlimited spending on fire suppression at the time of its passage).

protection of current and future national parks and monuments.[42] In the coming years, they continued to work closely with the Department of the Interior and the Forest Service, conducting fire damage studies and working to put out all fires, regardless of origin, by no later than 10 a.m. the morning after initial reports.[43]

The Forest Service began keeping data and detailed records of wildfires in the early 1960s,[44] a period where environmental and preservation movements to protect federal public lands began to grow. Beginning in 1967, the National Park Service realized that fires are an important ecological process and suppressing them entirely is nearly impossible.[45] Thus, wildfire management efforts shifted from suppression to a strategy deftly described by fire historian Stephen J. Pyne as "resource management."[46]

For the next few decades, the Forest Service focused on battling and suppressing only those fires that "threatened human life and property while permitting naturally occurring fires deep in the wilderness to burn."[47] After reviewing fire data and statistics from 1973, Congress passed the Federal Fire Prevention and Control Act of 1974.[48] This Act sought to reimburse state and local fire departments for any costs they incur while firefighting on federal land.[49] Fire management reverted back to early twentieth-century approach in June of 1989 when the Bush administration directed the Department of the Interior to fight and extinguish *all* fires, regardless of origin.[50] Yet by the 1990s, federal agencies were actively developing plans for controlled burnings and implementing more "ecosystem-based fire management programs,"[51] particularly in the most-affected states. Since then, there have been more legislative measures (to be discussed subsequently), though they have been subject to sharp disputes. For example, there continues to be polarizing opinions as to whether controlled, or "prescribed," burns should be allowed as a fire management technique. Regardless, it still remains an option for Congress and state legislatures to explore and consider.

Wildfires are either caused naturally or by humans.[52] Those that occur naturally are most frequently caused by lightning strikes; depending on the circumstances, however, wildfires can also occur naturally through volcanic matter,

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42 *Interactive Wildfire History Timeline*, *supra* note 27.

43 *Id.*; see also *U.S. Forest Service Fire Suppression*, FOREST HIST. SOC., https://foresthistory.org/research-explore/us-forest-service-history/policy-and-law/fire-u-s-forest-service/u-s-forest-service-fire-suppression/ [https://perma.cc/GPF9-KZXD] (last visited Oct. 14, 2022) for an interesting and brief description of the "the so-called 10 a.m. policy."

44 *Fighting Wildfires*, *supra* note 40.

45 *Id.*; van Wagtendonk, *supra* note 38, at 4–5; ADVERSITY AND STRENGTH, *supra* note 37.

46 *See* STEPHEN J. PYNE, FIRE IN AMERICA: A CULTURAL HISTORY OF WILDLAND AND RURAL FIRE 301–02 (1982).

47 *Fighting Wildfires*, *supra* note 40.

48 Federal Fire Prevention and Control Act of 1974, Pub. L. No. 93-498, 88 Stat. 1535 (codified as amended at 15 U.S.C. § 2225).

49 *Id.*; *Interactive Wildfire History Timeline*, *supra* note 27.

50 *Interactive Wildfire History Timeline*, *supra* note 27.

51 van Wagtendonk, *supra* note 38, at 9.

52 *See* CONG. RSCH. SERV., IF10244, WILDFIRE STATISTICS (2023).

meteors, and coal matter.[53] Throughout the last two decades, nearly eighty-five percent of wildfires within the United States were caused—whether intentionally or unintentionally—by humans.[54] The causes for these fires range from intentional acts of arson to seemingly harmless campfires left unattended; burning debris, malfunctioning equipment, and negligently discarded cigarettes are also among the top reasons for human-caused fires.[55] It is important to note that while fires started by utilities (that is, sparked by generators or power lines) do not occur often, they can be disproportionately hazardous. For example, California's 2018 Camp Fire was ignited by electrical transmission lines and ended up becoming the state's deadliest and most destructive.[56] This ends up causing utility companies to be the most common defendants in both state and federal wildfire lawsuits.[57]

In the last decade, you may have noticed milder weather patterns in your state, or you have more than likely thought to yourself: *is it getting warmer?* If either of these situations are applicable, you are in tune with most of Earth's population. Climate change is literally turning up the heat, fueling more high intensity fires each year, and catalyzing a great deal of research on its causes and effects. Along with the fire suppression attempts of the past, climate change has also been directly attributed as a driving force behind the size and intensity of wildfires in the United States.[58] It has "intensified summertime droughts; reduced the mountaintop snowpack, making fire seasons longer; and even increased lightning strikes that can trigger big fires in tinder-dry forests."[59] Researchers examining data from the 1980s have remarked that climate change has "roughly doubled the area of wildfires in the western [United States]."[60]

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53 Division of Wildland Fire Management, *Wildfire Investigations*, U.S. DEP'T OF THE INTERIOR, https://www.bia.gov/service/wildfire-prevention/wildfire-investigations [https://perma.cc/88DY-59FP] (last visited Dec. 28, 2022).

54 *Wildfire Causes and Evaluations*, *supra* note 3.

55 *Id.*

56 *See* Wibbenmeyer & McDarris, *supra* note 18.

57 *See e.g.*, Alex Williams, *We're Falling into a Ring of Fire: Taking Stock of Wildfire Liability Regimes from Varying Perspectives in the United States*, GEO. ENV'T L. REV. ONLINE (Mar. 31, 2021), https://www.law.georgetown.edu/environmental-law-review/blog/were-falling-into-a-ring-of-fire-taking-stock-of-wildfire-liability-regimes-from-varying-perspectives-in-the-united-states/#_ftn49 [https://perma.cc/99SF-ZMUM]; Jeremy Gradwohl, *Electric Utility-Caused Wildfire Damages: Strict Liability Under Article I, Section 19 of the California Constitution*, 92 TEMP. L. REV. 595, 602-03 (2020) (discussing Cal. Const. art. I, §19); Jamie Burch, *Wildfire Lawsuits Centered Around Rotten Utility Pole Mounting Against Energy Provider*, ABC15 NEWS (Mar. 9, 2024 11:20AM), https://wpde.com/news/nation-world/wildfire-lawsuits-centered-around-rotten-utility-pole-mounting-against-energy-provider-xcel-energy-smokehouse-creek-fire-blaze-canadian-texas-stinnett-largest-wildfire-in-state-history-court-legal-battles [https://perma.cc/3GP4-DGMT]; Stewart Yerton, *'The Wildfire Litigation Industry' Takes on Hawaiian Electric*, HONOLULU CIV. BEAT (Sept. 20, 2023), https://www.civilbeat.org/2023/09/the-wildfire-litigation-industry-takes-on-hawaiian-electric/ [https://perma.cc/K4UB-RSXY].

58 *3 Reasons Wildfires are Getting More Dangerous—and 3 Ways to Make Things Better*, WILDERNESS SOC'Y (May 21, 2019), https://www.wilderness.org/articles/blog/3-reasons-wildfires-are-getting-more-dangerous-and-3-ways-make-things-better [https://perma.cc/5TZD-2EF6] [hereinafter *3 Reasons Wildfires are Getting More Dangerous*].

59 *Id.*

60 *Id.*

While wildfires can technically develop anywhere, high-intensity ones are more common in the western region of the United States, especially as climate change intensifies. Those areas already prone to extreme weather events are even further exposed to the danger wildfires cause.[61] Fires first need both fuel and a spark to ignite; in the western states, "fuel is plenty, with flammable pine needles, shrubs and grasses that can ignite easily."[62] Additionally, the region's naturally dry vegetation also makes it more prone to fires. Contrast the flammability of those pine needles, dry grasses, and shrubs to the moistness of the foliage found in the east coast's deciduous forests and it becomes clear how the western landscape of the United States creates suitable conditions for wildfires.[63] Not surprisingly, California leads with the most property facing a risk of being consumed by wildfire; however, data released in May of 2022 indicates that Florida has an exceptionally high risk of wildfires.[64] According to Michele Steinberg, wildfire division director at the National Fire Protection Association, "Florida has thick vegetation that can burn easily, including palmetto and pine trees, when dried out by increasingly hot temperatures tied to climate change."[65]

Additionally, because the temperature *is* getting warmer, the timing of the spring snowmelt is sooner than usual. This, along with the thinner air at higher altitudes explains why the Northern Rockies have seen the greatest increase in fires—sixty percent— over the last few decades.[66] Earlier snowmelt also signifies a prolonged summer. The wildfire season has increased by seventy-eight days since the 1980s and the average burn time of individual fires has gone from six days in the 1970s to fifty-two days between 2003 and 2012.[67]

In a span of nearly 40 years, from 1960 to 1999, wildfires in the United States ravaged nearly 141 million acres of land.[68] From 2000 to 2013, that number increased to nearly 161 million acres—indicating that there were more acres of land affected in only 13 years than in the prior 40 years combined.[69] In 2022, the wildfire season was extremely severe, culminating in over sixty-six thousand

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[61] *Id.*

[62] Winston Choi-Schagrin & Elena Shao, *Why Does the American West Have So Many Wildfires?*, N.Y. TIMES (Aug. 1, 2022), https://www.nytimes.com/2022/08/01/climate/wildfire-risk-california-west.html [https://perma.cc/2DS6-SVBA]; *see also* Flavelle & Popovich, *supra* note 34.

[63] Choi-Schagrin & Shao, *supra* note 62.

[64] James Tutten, *Forest Officials Warn Parts of U.S., Including Central Florida, at High Risk of Wildfires*, WFTV9, (Apr. 21, 2024 8:00 AM), https://www.wftv.com/news/local/forest-officials-warn-parts-us-including-central-florida-high-risk-wildfires/QO243VYRZFFGFKXGFXL3LIQ4LE/ [https://perma.cc/AA8V-EPTK]. *See also* Flavelle & Popovich, *supra* note 34.

[65] Flavelle & Popovich, *supra* note 34.

[66] A.L. Westerling et al., *Warming and Earlier Spring Increase Western U.S. Forest Wildfire Activity*, 313 SCI. 940, 942–43 (2006).

[67] *Wildfire*, U.S. DEP'T. AGRIC., https://www.climatehubs.usda.gov/taxonomy/term/398#:~:text=These%20extreme%20events%20are%20common,over%207%20months%20in%20length [https://perma.cc/YWN3-FTW9] (last visited Apr. 30, 2024).

[68] *Fighting Wildfires*, *supra* note 40.

[69] *Id.*

wildfires and burning more than 7.3 million acres.[70] The upward trend in wildfire frequency and severity has primarily been attributed to climate change,[71] though past wildfire management efforts as well as changes in wildfire policy and strategy have also affected the uptick in wildfire statistics.[72] Research has also indicated that the increasing number of American homes being built on or near land that is prone to wildfires adds fuel, causing fires to burn hotter and more severely.[73] Utah, for example, currently has one of the fastest-growing housing markets in the United States but its location in relation to wildfire-prone lands presents major issues, placing an increasing number of both people and properties at risk.[74] Wildfires can also effectuate ethical dilemmas in relation to booming housing markets; neither the states nor the federal government currently have any obligation to warn potentially unaware homebuyers of the risks associated with moving to regions prone to wildfires.

In August 2023, the United States experienced its deadliest wildfire in over a century when a series of wildfires burned through the island of Maui, destroying the historic town of Lahaina and killing over one-hundred people.[75] Fueled by environmental conditions such as extreme winds from Hurricane Dora, these wildfires presented another sobering reminder of the need for more adequate preparation, mitigation, evacuation, and response measures on both the state and federal level.

II. LEGISLATIVE EFFORTS REGARDING WILDFIRES FROM THE 1990S TO PRESENT DAY

Since the 1990s, legislative efforts to contain and suppress the devastating effects of wildfires have not been lacking at neither the local nor national level. Regardless, wildfires in the United States continue to burn hotter and longer each year, doing more harm than good. But when a fire is on federally designated public

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70 Dinah Voyles Pulver, *Another Above-Average Wildfire Season for 2022. How Climate Change is Making Fires Harder to Predict and Fight*, USA TODAY (Jan. 3, 2023, 1:37 PM), https://www.usatoday.com/story/news/2022/12/24/us-wildfire-season-2022-again-above-average-amid-climate-change/10811014002/ [https://perma.cc/WA2S-ST69]. *See also Statistics*, NAT'L INTERAGENCY FIRE CTR., https://www.nifc.gov/fire-information/statistics [https://perma.cc/5RVE-6NJU], (Apr. 5, 2024, 8:35 AM) (providing detailed information and statistics, including current years, regarding wildfires in the United States).

71 Pulver, *supra* note 70.

72 Jiaying Hai et al., *How Does Fire Suppression Alter the Wildfire Regime? A Systematic Review*, 6 FIRE 424 (2023).

73 *Wildfire Causes and Evaluations*, *supra* note 3.

74 Flavelle & Popovich, *supra* note 34.

75 STEVE KERBER & DEREK ALKONIS, LAHAINA FIRE COMPREHENSIVE TIMELINE REPORT, FIRE SAFETY RSCH. INST. (2013) https://s3.documentcloud.org/documents/24554404/fsri_lahaina_fire-comprehensive_timeline_report_04_17_2024_redacted_final_0.pdf [https://perma.cc/4THY-YS4C]; *see also* MAUI WILDFIRES OF AUGUST 8, 2023 PRELIMINARY AFTER-ACTION REPORT, MAUI POLICE DEP'T. (2023) https://www.mauipolice.com/uploads/1/3/1/2/131209824/pre_aar_master_copy_final_draft_1.23.24.pdf [https://perma.cc/54M3-7QDP] (detailing the Maui Police Department's preliminary yet comprehensive after-action report on the deadly fires).

lands, the question of whose job—state or federal agencies—it is to suppress it becomes complicated.[76]

For decades, the United States has long been aware of the detrimental effects that wildfires can have on society. Links to almost all state emergency management websites can be neatly found on a federal government website.[77] Nearly all state legislatures have also enacted disaster-prevention efforts and plans.[78] These kinds of programs and plans encourage cooperation with federal agencies.[79] Cooperation between the states and the federal government is present at times; but it is up to the federal government to lead wildfire management efforts in the United States.[80]

When wildfires occur, the wildfire investigators—both local and federal—sometimes work together to contain and manage the fires, though this is not mandated. They assess the threats to people and property within the areas affected by the fires and eventually determine whether it is appropriate to let certain fires burn their course.[81] Letting a wildfire burn is most often done if it is one that began naturally and is in a large remote area that poses no threat to people or their property, such as an unpopulated area within a National Park or mountainous region; however, "[w]here people and property are threatened, all efforts are made to extinguish the fire."[82]

Because wildfires are natural disasters that predominantly occur on both state and federal land, it difficult for states to use their police powers to legislate wildfire prevention and relief efforts because their laws may become preempted by outdated or inadequate federal legislation and policies.[83] It therefore remains up to the federal government to enact adequate legislation to combat this issue. In *Massachusetts v. EPA*, the Supreme Court emphasized preemption of state law as reason to allow states to challenge a federal agency's failure to regulate.[84] Even if states continue to lack power to compel federal enforcement, at the very least, fe-

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[76] For an extensive explanation of federal funding of wildfires, and agency effects on state governments, see ROSS W. GORTE, CONG. RSCH. SERV., RL33990, FEDERAL FUNDING FOR WILDFIRE CONTROL & MANAGEMENT 20 (2010).

[77] *See State Emergency Management Agencies*, USAGOV, https://www.usa.gov/state-emergency-management [https://perma.cc/T9S2-YG9P] (last visited Dec. 19, 2022).

[78] *Id.*; for more information regarding some of the states' individual plans, see also *Wildland Fire Management*, NEV. DIV. OF FORESTRY, https://forestry.nv.gov/wildland-fire-management [https://perma.cc/E9WL-Z7SQ] (last visited Dec. 28, 2022); *Wildland Fire Management*, COLO. DIV. OF FIRE PREVENTION & CONTROL, https://dfpc.colorado.gov/wildlandfire [https://perma.cc/WMR7-NWRB] (last visited Dec. 28, 2022); *Wildfire Protection*, OFFICE OF STATE FIRE MARSHALL, https://osfm.fire.ca.gov/divisions/code-development-and-analysis/wildfire-protection/ [https://perma.cc/3S23-F3PE] (last visited Dec. 28, 2022); and *Cal Fire*, CAL. DEPT. FORESTRY & FIRE PROTECTION, https://www.readyforwildfire.org/ [https://perma.cc/SQ97-N9TQ] (last visited Dec. 28, 2022).

[79] *See State Emergency Management Agencies*, *supra* note 77.

[80] *See Wildland Fire Management*, *supra* note 78.

[81] *Wildfire Causes and Evaluations*, *supra* note 3.

[82] *Id.*

[83] Reality Check, *US West Coast Fires: Is Trump Right to Blame Forest Management?*, BBC NEWS (Oct. 14, 2020), https://www.bbc.com/news/world-us-canada-46183690 [https://perma.cc/8SR8-TZBN].

[84] 549 U.S. 497, 519 (2007).

deral policy makers and Congress should recognize that state policies and enforcement of wildfire management methods may accomplish more than those allowed in federal plans.[85]

Almost fifty percent of all land area—the area most prone to wildfires—throughout the eleven western states is owned and managed by the federal government.[86] Because wildfires disproportionately burn on federal lands, the federal government has a significant role in managing them.[87] There are five primary federal agencies that are responsible for managing wildfires in the United States: the Department of Agriculture's Forest Service ("Forest Service"); the Department of the Interior's Bureaus of Indian Affairs (BIA) and Land Management (BLM), Fish and Wildlife Service (FWS), and National Park Service (NPS).[88] From 2011 to 2020, these federal agencies were collectively provided $5.5 billion dollars to help "reduce overgrown vegetation on public lands, which can fuel wildfires."[89] The problem remains that there are significant amounts of high-risk acres that the federal agencies are unable to tend to, exacerbating the situation.[90] These agencies have now started focusing more on using controlled wildfires to reduce excess vegetation which ultimately helps "improve the ecological health of forests and grasslands and . . . reduce the intensity of future wildland fires."[91]

While the risk of wildfires, despite disagreements in fire management approaches, is clearly a bipartisan concern, federalism issues have posed problems for years.[92] Since 1924, the federal government has been authorized to financially help states with wildfires. In 1995, the priority for private land over federal was altered to be equal.[93] In fact, throughout the 1980s up until the Clinton administration, the White House attempted to cut funding for states. Because there is an uncertainty about how much power their local governments have, citizens end up relying more on the federal government, which creates a dependency, and higher federal spending.[94]

A. Various Administrative Approaches to Wildfires

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[85] Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 719–21 (2011) ("Divergent approaches to the exercise of enforcement discretion are not just possible, they are likely. [S]tate enforcement tends to ramp up precisely when—and because—federal enforcers have determined to cut back on enforcement.").

[86] *See* Wibbenmeyer & McDarris, *supra* note 18.

[87] *Id.*

[88] *Wildland Fire Management*, *supra* note 5.

[89] *Id.*

[90] This is not only seen in areas of legislative action, but enforcement and judicial jurisdictional issues. Lemos, *supra* note 85, at 732–34. *See* Williams, supra note 57.

[91] *Id.*

[92] Interestingly, most of the affected timberland is owned by industrial entities that are neither private citizens nor government. Karen M. Bradshaw, *A Modern Overview of Wildfire Law*, 21 FORDHAM ENV'T L. REV. 455, 465 (2010).

[93] GORTE, *supra* note 76, at 20.

[94] GORTE, *supra* note 76, at 14.

In August of 2000, after a particularly devastating wildfire season, the National Fire Plan (NFP) was developed.[95] The NFP's intent was to analyze and actively respond to severe wildfires and their impacts as well as ensure sufficient firefighting resources for the future.[96] In response to the 2000 wildfire season, the NFP addressed five major points: Firefighting, Rehabilitation, Hazardous Fuels Reduction, Community Assistance, and Accountability.[97] The plan is still highly relevant today; it offers "invaluable technical, financial, and resource guidance and support for wildland fire management" throughout the United States.[98] In fact, the Forest Service and the Department of the Interior continue to work collaboratively by taking steps to ensure a successful National Fire Plan.[99] Once the NFP came into effect, federal funding for "wildfire costs" tripled to $91 million.[100]

In 2003, President Bush signed into law the Healthy Forests Restoration Act (HFRA).[101] It was Congress's first response to new data regarding the increasing size and intensity of wildfires occurring in the western United States. This Act sought to reduce the growing threat of wildfires by sustaining environmental standards and encouraging public input on possible solutions.[102] Joined by the support of various environmental conservation groups, the federal government also received bipartisan congressional support that enabled this legislation.[103]

Throughout President Obama's eight years as head of state, he supported many land protection initiatives and federal funding for public lands.[104] In 2016, he hosted a roundtable discussion that took place in collaboration with the Departments of the Interior, Homeland Security, and Agriculture, where "[s]enior Federal agency officials; State, local, and Tribal government leaders; and representatives of national organizations dedicated to firefighter safety and to community resilience" also participated.[105] At that meeting, President Obama signed an

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95 *Previous Wildland Fire Management Initiatives*, FORESTS & RANGELANDS, https://www.forestsandrangelands.gov/resources/overview [https://perma.cc/U32H-PLKA] (last visited Jan. 3, 2023).

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 GORTE, *supra* note 76, at 20.

101 Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, 117 Stat. 1887 (codified at 16 U.S.C. § 6501).

102 *Id.*; *see also President Bush Signs Healthy Forests Restoration Act into Law*, THE WHITE HOUSE, https://georgewbush-whitehouse.archives.gov/infocus/healthyforests/ [https://perma.cc/NRU5-LWZA] (last visited Oct. 27, 2022) (describing how then-President Bush was pushing for "common-sense forest legislation").

103 Healthy Forests Restoration Act of 2003.

104 *See, e.g.*, Department of the Interior, Environment, and Related Agencies Appropriations Act of 2009, Pub. L. No. 111-8, 123 Stat. 524, 701 (codified as amended in scattered sections of 30 U.S.C. and 43 U.S.C.) (increasing funding for public lands); Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991 (codified as amended in multiple sections throughout the U.S. Code) (designating millions of acres as "new wilderness areas" in order to be protected for future generations).

105 *See FACT SHEET: Mitigating the Risk of Wildfires in the Wildland-Urban Interface*, THE WHITE HOUSE (May 18, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/05

Executive Order on *Wildland-Urban Interface Federal Risk Mitigation*, directing federal agencies to mitigate wildfire risks to people and property as much as possible.[106] He then released a statement to the public concerning his actions and the data regarding the then-increasing threat and continuing risks of wildfires.[107]

In 2018, the Trump administration passed the Wildfire Suppression Funding and Forest Management Activities Act which created a multi-billion-dollar disaster fund for federal agencies to use exclusively for firefighting efforts.[108] This provided huge financial relief from the federal government to these agencies to use in addition to their annually allocated budgets.[109] During his term, President Trump was publicly and highly critical of federal land management efforts regarding wildfires. Despite research suggesting that rising global temperatures were affecting the frequency of fires, President Trump blamed "forest management rather than climate change" as being the key factor for wildfires burning across [the western states]."[110] He criticized California's approach to fighting the fires, pointing to Finland's approach, which clears forests with rakes to prevent fires.[111] Furthermore, in 2020, while the government and Congress were grappling with the COVID-19 pandemic, the wildfire situation worsened. During that year alone, over seventy percent of all area burned by wildfires was on federal land.[112]

After another egregiously devastating wildfire season in 2021, President Biden signed the Bipartisan Infrastructure Law (BIL) into law.[113] This Law allocated over three billion dollars to wildland fire management.[114] Most notably, it "appropriated funds… [for] the creation of a wildland firefighter occupational series" as well as "significant increase[s] in firefighter salaries."[115] It also "developed strategies to minimize wildland firefighter exposure to line-of-duty environ-

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/18/fact-sheet-mitigating-risk-wildfires-wildland-urban-interface [https://perma.cc/9L4C-X6WV] [hereinafter *FACT SHEET*].

[106] *Id.*

[107] *Id.*

[108] *See* Wildfire Suppression Funding and Forest Management Activities Act, Pub. L. No. 115-141, § 102, 132 Stat. 348, 1059 (2018) (codified as amended at 2 U.S.C. § 901(b)(2)) (enforcing discretionary spending limits).

[109] *Id.*

[110] Reality Check, *supra* note 83.

[111] *Id.* But—as the article points out—differences in climate, land use, and vegetation do not allow for a fair comparison of Finland and California's needs with regards to wildfire prevention efforts; thus, a directly comparable approach to Finland is more than likely not a viable solution for the US wildfire crisis. *See also* Kirk Siegler, *West Coast Fires: Climate, Forest Management, Lax Rules, Plenty of Blame to Go Around*, NPR (Sept. 15, 2020, 3:15 PM), https://www.npr.org/2020/09/15/913128020/west-coast-fires-climate-forest-management-lax-rules-plenty-of-blame-to-go-around [https://perma.cc/YPG3-YXQG].

[112] Wibbenmeyer & McDarris, *supra* note 18.

[113] *Interactive Wildfire History Timeline*, *supra* note 27. The Law is also known as the Infrastructure Investment and Jobs Act. *See* Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) (codified as amended at 23 U.S.C. § 117).

[114] *Interactive Wildfire History Timeline*, *supra* note 27.

[115] *Id.* The bill promises "significant increases" in that it ensures federal wildland firefighters receive a minimum $15 an hour and a base salary increase of up to $20,000 per year. *See* 135 Stat. at 1100–01. However, it is important to remember that this does not apply to public or local firefighters working (and often volunteering) to contain wildfires. Nevertheless, these reforms indicate great moves in the right direction for wildland management workers.

mental hazards, and [… sought] to recognize and address mental health needs."[116]

With the prospect of more funding from the BIL, some federal agents were eager to develop new approaches to deal with the wildfire situation. By the beginning of 2022—just months after the BIL was passed—Secretary of Agriculture Tom Vilsack announced a ten-year strategy for dealing with the country's wildfire crisis.[117] At the core of the new strategy is the need for the federal agencies to "[ramp] up fuels and forest health treatments to match the scale of wildfire risk."[118] The need for a cohesive strategy combined with collaborative approaches to wildland fire management is emphasized throughout the report.[119] Then, in July 2022, the Biden administration released a detailed statement regarding the entire federal government's goals and efforts in terms of the growing threat of wildfires.[120] Providing essential background information as clearly and directly as possible, it describes how "the Biden-Harris Administration has launched multiple simultaneous initiatives to enhance prevention, preparedness, and response by strengthening [the federal government's] wildfire response capabilities, increasing pay and support for [the] wildland firefighting workforce[,]" and more in order to "keep Americans safe."[121] Additionally, President Biden has directed federal government officials to build on these goals and strategies in order to ensure that "wildfire prevention, preparedness, and response" remains a top priority throughout the entire federal government.[122] While it can be lofty and idealistic in its tone at times, the statement does in fact provide a detailed summary of the administration's actions taken in 2022 as well as plans for the future.[123]

The BIL also promulgated the Wildland Fire Mitigation and Management Commission, which is comprised of fifty representatives from agencies, and state, local, and Tribal governments Commission is to recommend improved federal policies surrounding the mitigation, suppression, and management of wildfires, as well as the rehabilitation of effected lands.[124] The Commission meets monthly and is composed of fifty representatives from federal agencies as well as state, local,

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[116] *Interactive Wildfire History Timeline*, *supra* note 27.

[117] U.S. FOREST SERV., FS–1187C, CONFRONTING THE WILDFIRE CRISIS: A CHRONICLE FROM THE NATIONAL FIRE PLAN TO THE WILDFIRE CRISIS STRATEGY (2022), https://www.fs.usda.gov/sites/default/files/WCS-CommunicationAid.pdf [https://perma.cc/3GCW-QJP7] [hereinafter FS–1187C]; *see also Confronting the Wildfire Crisis*, U.S. FOREST SERV., https://www.fs.usda.gov/managing-land/wildfire-crisis [https://perma.cc/LZJ7-UEKC] (last visited Oct. 27, 2022).

[118] FS–1187C, *supra* note 117, at 2.

[119] *Id.*

[120] *See* THE WHITE HOUSE, FACT SHEET: THE BIDEN-HARRIS ADMINISTRATION CONTINUES EFFORTS TO ADDRESS GROWING WILDFIRE THREAT (2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/28/fact-sheet-the-biden-harris-administration-continues-efforts-to-address-growing-wildfire-threat/ [https://perma.cc/TYD4-DGMS].

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] Wildland Fire Mitigation and Management Commission Act of 2021, Pub. L. No. 117-58, 135 Stat. 429, 1250 (codified as amended at scattered sections of 42 U.S.C.).

and Tribal governments, indicating the importance of collaboration across political boundaries.[125]

One month after wildfires destroyed over 2,000 acres of land in Maui, the Commission released its report addressing Congress and outlining a more comprehensive set of recommendations on how to handle the US wildfire crisis.[126] These recommendations provide holistic strategies on how Congress can better implement both reactive and proactive, sustainable solutions that transcend jurisdictions. Seven key themes emerge from the recommendations:

> *Urgent New Approaches*: Historically and institutionally addressed as a land management problem, wildfire—and the crisis it has become—spans jurisdictions and ecosystems and threatens critical infrastructure, built environment, public health, and public safety. As such, collective, holistic, cross-boundary action is critical to address the present challenges. Some of the report's suggestions in this theme include: establishing a Community Wildfire Risk Reduction Program to proactively address risk, change financial incentives and change agency metrics to better focus on performance of ecological health over acres treated.
>
> *Supporting Collaboration*: Successfully meeting the challenge of wildfire mitigation and management requires approaches that better involve all relevant entities and every scale of society.
>
> *Shifting from Reactive to Proactive*: Only by putting significantly more focus and resources toward proactive pre-fire and post-fire planning and mitigation can we break the current cycle of increasingly severe wildfire risk, damages, and losses.
>
> *Enabling Beneficial Fire*: The need to expand beneficial fire, such as prescribed and cultural burning, must be balanced with the public health threats associated with smoke and reduced air quality produced through beneficial fire and implemented through pre-fire planning that helps share decision-making, enable mutual understanding, and facilitate the consideration of tradeoffs associated with various fire response and management decisions.
>
> *Supporting and Expanding the Workforce*: Federal investment is urgently needed to create a cross-trained year-round workforce that is focused on and tailored to mitigation, planning, and post-

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[125] Press Release, *Biden-Harris Administration's Wildland Fire Mitigation and Management Commission Releases Report Outlining Comprehensive Recommendations to Change the Nation's Relationship with Wildfire*, U.S. DEP'T. INTERIOR, https://www.doi.gov/pressreleases/biden-harris-administrations-wildland-fire-mitigation-and-management-commission [https://perma.cc/TFA7-DLTH] (Nov. 29, 2023).

[126] *Id.*

> fire response and recovery, with strategies in place for recruitment and retention.
>
> *Modernizing Tools for Informed Decision-making*: The Commission recommends a number of measures that would better coordinate, integrate, and strategically align fire-related science, data and technology.
>
> *Investing in Resilience*: There is a need for increased funding that is more sustained and predictable, keeps pace with the escalating crisis, and includes a focus on the mitigation of risk and impacts both before and after wildfire is critical and will reduce costs in the long run.[127]

While these recommendations are arguably the most comprehensive and cohesive in years, time will tell if Congress decides to heed the urgency in this report and take federal legislative action. The Biden-Harris administration has remarked that they will continue to pursue an "all-of-government approach" to mitigating the risks of wildfires.[128] Regardless, the landscape is changing—literally and figuratively— on how the federal, local, state, and Tribal governments seek to address the impact of wildfires on the United States. Recommendations like those outlined above address the urgent need for continuous, collaborative, and cohesive legislative efforts.

B. Cooperative Efforts Between the States and Federal Agencies

Though the Commission promotes joint efforts, exactly how does that work on the ground?

In 2022, some federal agencies assessed the benefits of working more closely with state and local communities. For example, the Forest Service released a new collaboration strategy to manage the fires, as "the scale, pace, and methods of work on the ground [has] not matched the need" for assistance.[129] The Forest Service began actively working together with the states, Tribal and local communities, as well as willing volunteers "to protect communities, critical infrastructure, watersheds, habitats, and recreational areas."[130] More specifically, one of the main goals of the Forest Service's 2022 strategy was to collaborate with those efforts above in order "to focus fuels and forest health treatments more strategically and at the scale of the problem, using the best available science as a guide."[131] This strategy is the result of years of research and collaboration. In 2021, the Forest Service and the National Forest Foundation held "roundtable events" in order to develop its 2022 wildfire strategy and figure out how to best implement

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[127] *Id.*

[128] *Id.*

[129] *Confronting the Wildfire Crisis*, U.S. FOREST SERV., https://www.fs.usda.gov/managing-land/wildfire-crisis [https://perma.cc/R7DB-R5E6] (last visited Oct. 27, 2022).

[130] *Id.*

[131] *Id.*

it.[132] These virtual roundtables were highly successful and fostered a great deal of conversation from both the public as well as federal employees. The Forest Service and the National Forest Foundation then expertly narrowed down thousands of recommendations from around the United States to the following ten centralized focus areas on how to best confront the wildfire crisis:

(1) Embrace changes to Forest Service business practices and shifts in agency culture
(2) Improve internal and external communication related to the [wildfire] crisis and what is necessary for success
(3) Recruit and maintain a workforce capable of meeting the necessary pace and scale of restoration
(4) Update partnership mechanisms and requirements for cross-boundary funding and implementation
(5) Honor Tribal sovereignty and history; leverage learning, priorities, and capacity; and incorporate indigenous traditional ecological knowledge
(6) Build equity and resilience into planning and implementation
(7) Expand markets and forest materials processing infrastructure
(8) Build shared understanding and support for the use of fire as an essential tool for ecosystem resilience
(9) Invest in open and transparent information sharing and use of shared data and models
(10) Help decision makers and [the public] understand tradeoffs and benefits of management for forest resiliency[133]

Assuming it is properly implemented by Congress, this highly collaborative plan between the federal agencies in charge of wildfire management could alleviate the stress on both federal and private wildland management officials as well as lessen the overall impacts wildfires have on the United States.

Additionally, as fire seasons intensify each year, more money is required to manage them, from both the state and federal levels.[134] For example, "[s]tates are responsible for managing and responding to fires that begin on state, local, and private lands," which amounted to about thirty percent of acres burned in 2020.[135] Conversely, the federal government is responsible "for wildfires that begin on federal lands," or approximately seventy percent of the affected areas.[136] The following data clearly indicates an ever-increasing upward trend in costs of fire suppression for both federal and state budgets: "U.S. Forest Service fire suppression expenditures had increased from about [fifteen] percent of the agen-

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[132] *See Confronting the Wildfire Crisis*, *supra* note 129.

[133] *Id.*

[134] Matthew Wibbenmeyer & Lauren Dunlap, *Wildfires in the United States 102: Policy and Solutions*, RES. FOR THE FUTURE, https://www.rff.org/publications/explainers/wildfires-in-the-united-states-102-policy-and-solutions/ [https://perma.cc/P4ND-LKC3] (Dec. 12, 2022); *see also* Wibbenmeyer & McDarris, *supra* note 18.

[135] Wibbenmeyer & Dunlap, *supra* note 134.

[136] *Id.*

cy's appropriated budget to more than [fifty] percent in 2017. Nationwide suppression costs in 2017 and 2018 ballooned to $2.9 billion and $3.1 billion respectively, while state wildfire expenditures have also increased substantially."[137]

While these costly conflagrations grow in severity and size each year, so too does the need for human resources.[138] The collaborative efforts of local and federal wildfire managers combine with willing volunteers from around the United States every year. Any federal government employee can also take on short-term assignments on wildfires "without abandoning their current job or career path."[139] As long as the employee undergoes proper training and receives the qualifications required, there are many opportunities for volunteering in key support roles within wildfire management.[140] However, even if people cannot commit to full-time career opportunities within wildland fire management, there remain ample ways to provide help and support to those dealing with the fires.[141]

III. LISTEN UP, CONGRESS: PROPOSING THE FUTURE OF WILDFIRE LEGISLATION

Although the federal government and past presidential administrations have literally shown decades of interest in better understanding how to handle wildfires, there are still gaps in federal actions and opportunities to lessen the impact of future fire seasons. Congress has proposed laws regarding high-intensity wildfires; however, they are nothing more than just piecemeal legislative efforts that have yet to pass the House and Senate after over a year.[142] It is time for Congress to work more urgently and more closely with the federal agencies as well as state and local governments to develop a coherent set of laws and regulations to help remedy this worsening situation.

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[137] *Wildfires and Climate Change*, CTR. FOR CLIMATE & ENERGY SOLS., https://www.c2es.org/content/wildfires-and-climate-change/ [https://perma.cc/22SW-2QKH] (last visited Sept. 23, 2022) (citing Press Release, *Forest Service Wildland Fire Suppression Costs Exceed $2 Billion*, U.S. DEP'T OF AGRIC. (Sept. 24, 2017) https://www.usda.gov/media/press-releases/2017/09/14/forest-service-wildland-fire-suppression-costs-exceed-2-billion#:~:text=WASHINGTON%2C%20D.C.%2C%20September%2014%2C,most%20expensive%20year%20on%20record [https://perma.cc/X6PJ-24MF]); *see also* Wibbenmeyer & Dunlap, *supra* note 134 (describing how the federal government allocated money to both fuel treatments for controlled burnings and fire suppression measures).

[138] Wibbenmeyer & Dunlap, *supra* note 134.

[139] *See Working in Wildland Fire*, U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/wildlandfire/working-in-wildland-fire [https://perma.cc/MJ28-QTUF] (last visited Jan. 3, 2023).

[140] *Id.*

[141] *See* Jena Casas, *How Can I Support Wildland Firefighters?*, NEV. TODAY (Sept. 16, 2021), https://www.unr.edu/nevada-today/news/2021/atp-support-firefighters [https://perma.cc/P3HP-HBTZ] (discussing various ways to help support the wildland firefighters such as writing thank you letters to firefighters; reaching out to local fire departments for volunteer or donation opportunities; and donating to organizations that directly help the individuals, lands, and animals impacted by fires).

[142] *See, e.g.*, Western Wildlife Support Act of 2023, H.R. 482, 118th Cong. (2023). It was introduced in January 2023, and in the span of one month, referred to five different committees. It went to the Senate in May 2023, where it has not been touched since. *See* S. 1764, 118th Cong. (2023).

A. Look to Wildfire Suppression Outside of the United States

Although the western states see some of the worst wildfires on earth each year, high-intensity fires are not uncommon in other parts of the world.[143] Despite slight variances in the contributing factors, in each example, the underlying theme remains the same: "[h]otter, drier seasons, driven by the burning of fossil fuels, have made the world more prone to erupt in flames."[144] For this reason, it could be possible to look to other countries that are affected to see how they approach the situation.

This is true in Spain, which boasts a Mediterranean climate perfect for wildfire conditions.[145] Just as the wildfires have worsened in the United States, southern European countries are also seeing a major increase in the frequency and impact; this has been attributed to both land-use and socio-economic changes.[146] Some argue that a return to more traditional rural activities—such as collecting firewood and allowing livestock to graze freely—would help remedy the current dry landscapes and accumulation of forest matter, greatly increasing the fire hazards.[147] A Spanish researcher and activist for "pastoralism" remarks:

> The management of fire breaks by grazing has been widely applied in south-eastern France over the past [twenty-five] years, providing the most important reference point for the region. Other Mediterranean countries have also run [similar] tests, but only a few of these have developed into permanent management programmes [*sic*]. . . . The usual pattern is that the farmers that take part in these programmes [*sic*] graze their livestock intensively in fire break areas defined by forest services, thereby reducing vegetation fuel loads. In exchange for this service, [the farmers] receive monetary and/or in-kind renumeration, for example, animal housing, fences, or water troughs.[148]

143 *See* Veronica Penney, *It's not Just the West. These Places Are Also on Fire.*, N.Y. TIMES (Sept. 16, 2020), https://www.nytimes.com/2020/09/16/climate/wildfires-globally.html [https://perma.cc/VP4Z-46T6] (citing Stephen J. Pyne, a fire historian and emeritus professor at Arizona State University, discussing the Earth's "many fire problems"); *see also* PYNE, *supra* note 46.

144 *See* Penney, *supra* note 143. For a look at the devastating effects wildfires have had on the Brazilian Amazon in the last few years, see *2020 Amazon Fire Season*, RAINFOREST FOUND. U.S., https://rainforestfoundation.org/our-work/special-initiatives/2020-amazon-fires/ [https://perma.cc/82GL-TTMX] (last visited Jan. 3, 2023).

145 *See Wildfire Prevention: A Reason for Promoting Pastoralism in Spain*, EUR. F. ON NATURE CONSERVATION & PASTORALISM, https://www.efncp.org/projects/projects-spain-navarra/wildfire-prevention/ [https://perma.cc/Z79G-CVP4] (last visited Jan. 3, 2023) [hereinafter *Pastoralism in Spain*]; *see also* Gerry Hadden, *'Fire Flocks' of Sheep and Goats Get Deployed to Help Battle Forest Fires in Spain*, THE WORLD (June 14, 2022, 2:00 PM), https://theworld.org/stories/2022-06-14/fire-flocks-sheep-and-goats-get-deployed-help-battle-forest-fires-spain [https://perma.cc/2CUY-WFNV] (describing how shepherding is gaining in popularity as a profession to assist these out-of-control fires).

146 *See Pastoralism in Spain*, *supra* note 145.

147 *Id.*

148 *Id.*

Implementing something of this sort in the United States would undoubtedly be difficult—but not impossible. Examining this unique European solution to wildfire management provides a different perspective, but one that matters and could effectuate change all the same.

The pattern of high-intensity wildfires in the United States is also seen in the southern hemisphere. At the beginning of 2020, Australia's worst fire season on record finally subsided, leaving behind unimaginable destruction.[149] "Thousands of homes were lost and millions of acres burned. At least [thirty] people died. Estimates of the number of animals killed range between a few hundred million and a billion."[150] These staggering statistics have been studied by researchers, who found that one of the significant causes of these bushfires was human-caused climate change.[151] One way Australia now braces itself for more blazing fires is simply by having the homeowners clear away excess shrubs and weeds; fire management officials also complete prescribed burns.[152] Interestingly enough, the federal government has had a longstanding partnership with Australia (as well as New Zealand, Canada, and Mexico) regarding fire suppression efforts.[153] After a division of the Australian national government requested US support and manpower, firefighters and other personnel were deployed from multiple federal land management agencies in the United States.[154] "It was humbling to observe the Australians' resilience, the response in Australia, and level of support from our agency," remarked the United States Forest Service Director of Fire and Aviation Management, who further said "[w]e will continue to learn from each other in this complex fire environment."[155]

Fire knows no boundaries; it blazes on without regard to anything in its way, including jurisdictional lines denoting public or private land. It is thus important to help other countries and offer whatever support we can, in addition to understanding how other countries manage wildfires. Mutually beneficial relationships—like the one between Australia and the United States or between livestock farmers and the Mediterranean landscape—offer insight to federal agencies here within the United States. Looking to other wildland fire management approaches and comparing them to current ones in America would likely help the United States develop a more cohesive plan to adequately battle these blazes.

B. Utilize Prescribed Burns and Let Some Fires Burn Their Course

The phrase "fight fire with fire" is not just an old adage but, as research indicates, is clearly a highly relevant and helpful approach. While it is unfortuna-

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149 *See* Penney, *supra* note 143.

150 *Id.*

151 *Id.*

152 *Id.*

153 *See* Imani Lester, *Partnership Efforts to Address Australia Wildfires*, U.S. DEP'T OF AGRIC. (Feb. 4, 2020), https://www.usda.gov/media/blog/2020/02/04/partnership-efforts-address-australia-wildfires [https://perma.cc/8HDD-2BM7].

154 *Id.*

155 *Id.*

tely too late to go back in time and educate wildland managers about the benefits of letting some fires burn, we can use prescribed burns to help clear excess forest cover.[156] Of course, vigilance in monitoring each wildfire is needed, but there may be times where it is acceptable to let the fire continue to burn. "[M]anagement-ignited prescribed fires can be used to complement naturally occurring fires."[157] That said, great care must be taken by the federal and state agencies to ensure that the prescribed fires mimic naturally occurring fires as much as possible.[158] Regardless, this solution helps remedy the situation, and Congress should address it, for "[d]ecades of research show an intentionally set, carefully planned and managed prescribed fire can reduce the risk of catastrophic wildfires."[159] Allowing some fires to run their courses literally creates fire "speed bumps" that protect the most at-risk regions from devastation. These prescribed burns have a list of positive side effects for the environment in that they "reduce debris buildup in forests, add nutrients to the landscape, minimize pests, improve wildlife habitat and promote wildflower blooming."[160]

Controlled burns have been proven to help reduce the likelihood of severe and intense wildfires.[161] Although the National Park Service has been encouraging and using this approach for a few decades, it is just now nearing acceptance with the other federal agencies, like the Forest Service.[162] The Forest Service has indicated that 99.8% of all prescribed fires go according to plan,[163] thus reiterating that Congress should encourage these agencies to consider prescribing regular burns in order to mitigate the effects of naturally occurring wildfires. Furthermore, state representatives should be well-informed regarding the data on wildfires and how the federal agencies seek to handle them. This would allow them to persuade their state legislatures to consider these approaches. Before implementing prescribed burns, it is first necessary to have a "well-informed fire management plan . . . [that] carefully considers all the factors present in an area" to determine whether this approach is possible or desirable.[164] These factors include fire history, invasive plants, threatened and endangered species, human developments, cultural sites, and more.[165] Federal agencies are actively seeking to implement new fire management strategies;[166] the strategies have a lot of promise but require Congress's wholehearted support. Congress and the states need to work together in developing these kinds of fire management plans for each area within the United States. Thus, taking action to protect people and minimize

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[156] *See* Wibbenmeyer & Dunlap, *supra* note 134 (emphasizing that "[p]olicymakers can reduce the barriers to fuels management projects by educating the public about prescribed fire, allocating more funds for burns, and changing burn regulations and permit restrictions.").

[157] van Wagtendonk, *supra* note 38, at 15.

[158] *Id.*

[159] Pulver, *supra* note 70.

[160] *Id.*

[161] van Wagtendonk, *supra* note 38, at 15.

[162] *Id.*

[163] Pulver, *supra* note 70.

[164] van Wagtendonk, *supra* note 38, at 15.

[165] *Id.*

[166] *See FACT SHEET*, *supra* note 105 (indicating that support from policy and lawmakers is essential to handle this "forest health crisis").

danger while also "incorporating the knowledge that some fire is normal, healthy and necessary" can no longer be *just* a recommendation; it is essential and backed by decades of scientific data and research.[167]

C. Foster Greater Collaboration Between Federal and Nonfederal Authorities

Furthermore, Congress should continue to encourage collaboration between federal and nonfederal organizations (that is, local, state, and Tribal governments as well as nongovernmental partners and the public at large). This is important in educating everyone about the risks of wildfires and reducing their overall impact on the environment, society, and the economy.[168] If and when a particularly devastating wildfire occurs, Congress needs to be ready to authorize FEMA's disaster relief efforts and assistance, such as "ensuring that eligible survivors have access to recovery funds."[169] Firefighters—both state and federal—have a tremendous job managing and containing the fires each year. These firefighters are also often volunteers from all over the United States, reiterating that this is a nationwide issue (often on federal public land) that Congress needs to take charge of as soon as possible. Everyone is clearly doing the best they can; however, the western states and the men and women working on the frontlines to battle these fires clearly need additional resources each year to manage clean-up and prevention of disastrous fires.[170] "Wildland firefighters work long hours in stressful conditions, often for relatively little pay. Many federal firefighters are also considered 'temporary' workers and do not have access to federal employee health care and other benefits."[171] The interest in helping communities deal with these fires is undoubtedly there. However, a lack of dedicated funding from the federal government leads to local, state, and Tribal governments having to apply for competitive grants and budget themselves for each fire season without knowing exactly how intense it will be or what the federal government will provide.

Therefore, policy changes are necessary, especially those that provide more resources and support, including financial. If Congress implements these efforts, it would likely reduce turnover and improve the mental health of those working on the front lines.[172] Funding these efforts could come through federal budget allocations and—though not ideal—higher property taxes on lands that are more prone to wildfires. Of course, taxing public lands at increased rates affects all US taxpayers; and while this is also not a popular opinion, it remains a viable solution. Clear research indicates the devastating impacts of wildfires are not confined to one region of the United States.[173] At the very least, Congress can encourage communities, property developers, homeowners, and forest managers

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167 *3 Reasons Wildfires are Getting More Dangerous*, *supra* note 58.

168 *Wildland Fire Management*, *supra* note 5.

169 *Id.*

170 Wibbenmeyer & Dunlap, *supra* note 134.

171 *Id.*

172 *Id.* (describing that such policy changes could also increase the overall effectiveness of the wildland fire management teams).

173 *See supra* Section I.A.; *see also Story Map*, *supra* note 17.

to educate themselves in order to reduce the likelihood and impacts of wildfires. By understanding them more fully, Congress, the states, and land managers can plan more effectively for the potentially destructive effects of these higher-intensity fires.

D. *Update Short- and Long-Term Wildfire Management Plans Each Year*

Finally, it is critical that the local communities, states, land management agencies, and federal government maintain the dialogue and discussion surrounding wildfire management efforts. Although this has wavered in the past, it seems to be improving despite the worsening fires each year. Wildfires have been an issue in the United States for decades; it is clear that short-term plans to handle them—especially the disastrous ones—are inadequate. Instead, Congress should strive to sustain a commitment each year to evaluating and monitoring wildfire management plans. The following steps have been proposed by the Forest Service, and if successfully implemented by Congress, they would provide a great deal of resources and coherent guidance to wildfire management efforts:

> (1) [Assure] that necessary firefighting resources and personnel are available to respond to wildland fires that threaten lives and property
> (2) [Conduct] emergency stabilization and rehabilitation activities on landscapes and communities affected by wildland fire
> (3) [Reduce] hazardous fuels (dry brush and trees that have accumulated and increase the likelihood of unusually large fires) in the country's forests and rangelands
> (4) [Commit] to the Wildland Fire Leadership Council, an interagency team created to set and maintain high standards for wildland fire management on public lands[174]

Congress needs to provide more specific guidance to the federal agencies and states battling these high-intensity wildfires. They may not literally be on the frontlines fighting the flames, but Congress is arguably the one in charge of budgeting and planning for these types of national disasters. It has been proven through research that "[d]eveloping recovery plans before a fire hits, and implementing plans quickly after a fire [may] reduce erosion, limit flooding, and minimize habitat damage."[175] Implementing steps like these and working more closely with the federal agencies in charge of wildfire management would ensure it remains a priority.

E. *Take Charge of Climate Change*

The research and data on climate change are all available to Congress, but they have continued to cast it aside as a secondary issue. Perhaps it is too large an issue for them to address all at once; regardless, making excuses will not solve

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174 *Previous Wildland Fire Management Initiatives*, *supra* note 95.

175 *See Wildfires and Climate Change*, *supra* note 137.

anything. Climate change and its detrimental effects on the planet must be made a priority. Congress may begin by addressing the "unchecked use of fossil fuels like oil and coal"[176] by advocating for different sources of energy. Therefore, taking decisive steps to reduce the excessive reliance on fossil fuels as well as plan to transition to renewable energy should be of the utmost importance.[177] If Congress provides a cohesive plan, this will become more of a priority.

The increasing severity and frequency of wildfires is—without a doubt—a bipartisan issue that requires a coherent set of federal laws and regulations. It is time for Congress to take action. It is time for everyone in the United States to understand the gravity of the situation and work together in order to reduce the more devastating impacts of wildfires in the United States—especially those with the ability to enact laws and promote change. After all, as former Idaho Senator Frank Church correctly identified: without the presence of American wilderness and preservation of its resources, "this country will become a cage."[178]

CONCLUSION

The US war on high-intensity wildfires continues to this day, but it does not have to be like this. Through the examination of historical and modern accounts of wildfires, we are better equipped to understand the importance of adequate legislation and support for those directly affected by them. There is little to argue anymore about the causes of these fires; the effects of past fire suppression techniques in addition to rising global temperatures literally create the perfect firestorm. What needs to happen now is action by both the federal and state governments regardless of federalism concerns.

Time may be running out. Congress must act and push forward legislation before more irreparable harm is done due to mismanagement of wildland fires. We may not have started the fires, but through effective and adequate legislation as well as increased cooperative efforts between the states and federal government perhaps we can improve the situation—especially for future generations.

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[176] *3 Reasons Wildfires are Getting More Dangerous*, *supra* note 58 (offering three reasons and three possible solutions for the wildfire crisis in the West).

[177] *Id.*

[178] *See* 107 CONG. REC. 18365 (1961) (statement of Sen. Frank Church).

MORE THAN TROUBLING: THE ALARMING ABSENCE OF 'TROUBLED TEEN INDUSTRY' REGULATION AND PROPOSALS FOR REFORM

Morgan Rubino[*]

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INTRODUCTION

"Parent-approved kidnapping"[1]—what sounds like an unreal oxymoron, unfortunately, is not. Instead, it often plays out like this: at sixteen years old, you are abruptly awoken in the middle of the night by two men with handcuffs.[2] These men ask if you want to go "the easy way or the hard way" before restraining you and carrying you out of your home, as you scream for help.[3] They take you to the airport, eventually transporting you to an isolated facility for rebellious teenagers.[4] All of this occurs with the permission, and at the express request, of your parents.[5] Once at this facility, you are subject to a multitude of physical and mental abuse—you endure long hours of physical labor, are forced to take medication without a proper diagnosis, and get slapped, verbally assaulted, and locked in solitary confinement for misbehaving.[6]

This is the testimony of Paris Hilton, who, in 2020, spoke publicly for the first time about being sent to four different congregate treatment facilities as a child.[7] These residential treatment facilities make up what is referred to as the "troubled teen industry" (TTI)—"a network of private youth programs, therapeutic boarding schools, residential treatment centers, religious academies, wilderness programs, and drug rehabilitation centers" owned and operated by private companies, nonprofits, or faith-based groups.[8] While these programs are typically marketed to the parents of defiant children,[9] minors are also pipelined into the TTI system "through the child welfare and juvenile justice systems, school district's individualized education programs, by refugee resettlement agencies, [and] mental health providers."[10] These facilities purport to offer a variety of services to chi-

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1 Paris Hilton, Opinion, *America's 'Troubled Teen Industry' Needs Reform So Kids Can Avoid the Abuse I Endured*, WASH. POST (Oct. 18, 2021, 1:26 PM), https://www.washingtonpost.com/opinions/2021/10/18/paris-hilton-child-care-facilities-abuse-reform/ [https://perma.cc/D94K-YEY9].

2 *See id.*; *see also* Yasmin L. Younis, *Institutionalized Child Abuse: The Troubled Teen Industry*, 2021 ST. LOUIS U. L.J. ONLINE 1, 1 (opening with the story of Joe, a teenager sent to Élan School—a behavior modification program similar to that which Hilton endured).

3 Hilton, *supra* note 1.

4 *Id.*

5 *Id.*

6 *See* Paris Hilton, *The Real Story of Paris Hilton: This is Paris Official Documentary*, YOUTUBE, at 1:09:55–1:38:00 (Sept. 14, 2020), https://www.youtube.com/watch?v=wOg0TY1jG3w&t=4195s [https://perma.cc/QV2L-TS8V] (describing Paris Hilton's multi-year stay at residential treatment facilities).

7 *Id. See also* Anya Zoledziowski, *Paris Hilton Says She Was Sexually Abused in 'Troubled Teen' Industry*, VICE NEWS (Oct. 12, 2022, 3:34 PM), https://www.vice.com/en/article/5d3kad/paris-hilton-sexual-abuse-provo-canyon-school [https://perma.cc/N6AR-ARDA].

8 Catherine E. Krebs, *Five Facts About the Troubled Teen Industry*, AM. BAR ASS'N (Oct. 22, 2021), https://www.americanbar.org/groups/litigation/committees/childrens-rights/practice/2021/5-facts-about-the-troubled-teen-industry/ [https://perma.cc/89SR-GA58].

9 U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-713T, RESIDENTIAL PROGRAMS: SELECTED CASES OF DEATH, ABUSE, AND DECEPTIVE MARKETING 1 (2008) [hereinafter SELECTED CASES OF DEATH].

10 *Federal Legislative Change*, BREAKING CODE SILENCE, https://www.breakingcodesilence.org/acca/ [https://perma.cc/KD9J-SFT9] (last visited Mar. 26, 2024).

ldren including drug and alcohol rehabilitation, treatment for mental illnesses like anxiety and depression, and behavioral counseling.[11] While this type of programming seems beneficial for youth, in practice, congregate care facilities have historically become breeding grounds for sexual assault and physical and medical neglect.[12] Because of this, many of the juveniles that enter congregate care facilities, who already suffer from previous trauma, leave even further traumatized.

And other children do not get the chance to leave at all. Take, for instance, Cornelius Frederick, a 16-year-old who, in 2020, was a resident at Lakeside Academy in Kalamazoo, Michigan—a treatment center that housed 125 boys who had been abused and neglected.[13] After a lunchtime incident where Frederick threw a sandwich across the cafeteria, he was physically restrained by seven staffers who collectively placed their weight on Frederick until he muttered "I can't breathe."[14] Frederick tragically died as a result of that restraint, and three facility employees were ultimately charged with his homicide.[15] Frederick's death prompted the state to reexamine its congregate care facility policies, which led to a Michigan Health and Human Services investigation that uncovered ten discipline-related violations at Lakeside Academy.[16]

While Hilton and Frederick's stories may be two of the more well-known and widely publicized, they are, unfortunately, not an anomaly. In fact, there are currently an estimated 120,000 to 200,000 juveniles in congregate care institutions across the United States.[17] Thus, despite the TTI's national reputation of abuse, neglect, and deceptive marketing, the industry persists—in large part due to its severe under-regulation.

While a handful of states have passed laws to try and bolster protections for young people in congregate care over the past eight years,[18] that legislation does not reach far enough. Today, on the federal level, there is no legislation surrounding youth residential facilities.[19] In fact, "[e]fforts to pass federal legisla-

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[11] SELECTED CASES OF DEATH, *supra* note 9, at 1.

[12] *Federal Legislative Change*, *supra* note 10.

[13] Alice Hines, *Dangerous Restraints Were Routine at This Youth Home. Then a Black Teen Died.*, VICE (July 24, 2020, 12:05 PM), https://www.vice.com/en/article/n7w4pk/dangerous-restraints-were-routine-at-youth-home-where-7-staffers-fatally-held-down-a-black-teen [https://perma.cc/4NN3-QHGZ].

[14] *Id.*

[15] Christine Hauser & Michael Levenson, *Three Charged in Death of Michigan Teenager Restrained at Youth Academy*, N.Y. TIMES (June 24, 2020), https://www.nytimes.com/2020/06/24/us/cornelius-frederick-lawsuit-lakeside-academy.html [https://perma.cc/2UAK-6FXR].

[16] *See id.*

[17] BREAKING CODE SILENCE, https://www.breakingcodesilence.org/ [https://perma.cc/2E2N-VBSL] (last visited Mar. 26, 2024).

[18] Cameron Evans, *State Laws Aim to Regulate 'Troubled Teen Industry,' but Loopholes Remain*, KFF HEALTH NEWS (Jan. 21, 2022), https://kffhealthnews.org/news/article/state-laws-aim-to-regulate-troubled-teen-industry-but-loopholes-remain/ [https://perma.cc/NMU2-4LHU].

[19] *Id.*

tion that would regulate [youth residential facilities] failed every year for more than a decade."[20]

This Note will advocate for immediate and wide-reaching legislative action on juvenile residential treatment. Part I will provide a brief history of the origins of the TTI and the most common types of facilities operating today. Part II will analyze some of the limited state legislation on the TTI, along with the Stop Institutional Child Abuse Act pending before Congress. Finally, Part III will lay out the most pressing injustices and abuses that arise out of the TTI and argue that an integrated framework of local and federal legislation, including the adoption of state bills of rights for youth in residential treatment, is needed to begin combating this institutionalized child abuse.

I. FUNDAMENTALS OF THE TTI

A. Brief History: The TTI's Rise to Popularity

The origins of the TTI are often traced back to 1958 when Charles Dederich founded Synanon—a drug addiction rehabilitation program.[21] Synanon prided itself on a "tough love" treatment philosophy—using "attack therapy, isolation, and rigid restrictions" to force reform, and "gradually restoring limited freedom and positive affirmation to those who complied."[22] The program viewed drug dependance as an innate flaw, and thus believed that residents could "brutally confront" and "verbally humiliate" each other into recovery.[23] While the program began as a small community in California, over the years, it transformed into a multi-million dollar nonprofit with over 1,300 members.[24] Naturally, with such radical and restrictive practices at the core of its program, Synanon soon found itself the subject of numerous lawsuits and allegations of abuse.[25] The program ultimately shut down in 1991[26]—yet, not before copycat programs emerged that adopted Synanon's methods to specifically "treat" defiant children.

One such program was CEDU Educational Services, Inc., which formed in California in 1967.[27] Regarded as the first "therapeutic boarding school" in the

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[20] *Id.*; *see also* Search Results for "Stop Child Abuse in Residential Programs for Teens Act," U.S. CONG., https://www.congress.gov/search?q=%7B%22source%22%3A%22legislation%22%2C%22search%22%3A%22%5C%22Stop%20Child%20Abuse%20in%20Residential%20Programs%20for%20Teens%20Act%5C%22%22%7D [https://perma.cc/77K9-5LMA] (last visited Mar. 26, 2024).

[21] Lewis Yablonsky, *Whatever Happened to Synanon? The Birth of the Anticriminal Therapeutic Community Methodology*, 13 CRIM. JUST. POL'Y REV. 329, 329 (2002).

[22] MAIA SZALAVITZ, HELP AT ANY COST: HOW THE TROUBLED-TEEN INDUSTRY CONS PARENTS AND HURTS KIDS 7 (2006).

[23] *Id.*; Wanda K. Mohr, *Still Shackled in the Land of Liberty: Denying Children the Right to Be Safe from Abusive "Treatment"*, 32 ADVANCES IN NURSING SCI. 173, 175 (2009).

[24] *The Cult of Synanon*, WESTPORT HIST. SOC'Y, https://virtualhistorywestport.org/exhibits/cure/cult/ [https://perma.cc/G65Z-65XP] (last visited Jan. 2, 2024).

[25] Maia Szalavitz, *The Cult That Spawned the Tough-Love Teen Industry*, MOTHER JONES, Sept.–Oct. 2007.

[26] *Id.*

[27] *CEDU Educational Services, Inc.*, UNSILENCED, https://www.unsilenced.org/timeline/cedu-educational-services-inc/ [https://perma.cc/2K4G-J4GP] (last visited Jan. 2, 2024).

country,[28] CEDU targeted parents with their advertisements and used scare-tactics to garner enrollment.[29] Similar to Synanon, the schools relied on "hard labor, isolation, [and] attack group sessions" to reform noncompliant children.[30] In fact, CEDU condemned the use of medicine and traditional therapy and did not employ licensed clinicians until 1998.[31] Given the allure of this novel approach to treatment, CEDU schools were particularly attractive to high-income families "who either had an aversion to or didn't qualify for community-based services."[32] CEDU schools, thus, raked in substantial profits, charging anywhere from $30,000 to $80,000 for a year of treatment.[33] What was worse, the average child spent two-and-a-half years in CEDU custody.[34] Ultimately, CEDU faced a similar fate to Synanon, closing their doors in 2005[35] "amid lawsuits and state regulatory crackdowns."[36]

Two more of the most infamous troubled teen programs emerged in the 1970s and 1980s. In 1971, the federal government provided a grant to a Florida organization, The Seed, which alleged to treat teenagers involved with drugs.[37] Yet, years later, when Congress opened an investigation into behavior modification facilities, it found that The Seed "had used methods 'similar to the highly refined "brainwashing" techniques employed by the North Koreans.'"[38] With the rise of the Reagan administration's anti-drug platform, "tough love" and Alcoholics Anonymous practices became popular, and in 1981, a new juvenile drug reform program known as the "granddaddy" of the TTI—Straight, Inc.—opened numerous facilities across the United States.[39] Straight, Inc. acquired a great deal

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28 Olivia A. Stull, An Exploratory Study on Adult Survivors of the Troubled Teen Industry's Therapeutic Boarding Schools and Wilderness Programs (May 15, 2020) (Ph.D. dissertation, University of Kansas) (ProQuest).

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 Stull, *supra* note 28.

34 *CEDU Educational Services, Inc.*, *supra* note 27.

35 *Id.*

36 Erik Hawkins, *California School For 'Troubled Teens' Had Roots in A Notorious, Militant Cult*, OXYGEN (June 8, 2020, 4:19 PM), https://www.oxygen.com/crime-news/lost-kids-cedu-school-daniel-yuen-disappearance-synanon-cult [https://perma.cc/ZJU7-D7PM].

37 SZALAVITZ, *supra* note 25.

38 *Id.* (quoting STAFF OF S. SUBCOMM. ON CONST. RTS., 93D CONG., INDIVIDUAL RTS. & FED. ROLE BEHAV. MODIFICATION 15 (Comm. Print 1974)).

39 Mohr, *supra* note 23; SURVIVING STRAIGHT INC., http://survivingstraightinc.com/ [https://perma.cc/9VAX-5PU3] (last visited Mar. 27, 2024) (discussing "positive peer pressure" practices) ("[Straight Inc.] used coercive thought reform (aka mind control, brainwashing), public humiliation, sleep & food deprivation, extremely harsh confrontational tactics, kidnapping, isolation, and emotional, mental, psychological, verbal and physical abuse. . . ."); Cyndy Etler, *I Spent 16 Months Trapped in a Troubled Teen Program. Now I Help Kids Recover From Them*, TODAY (Mar. 15, 2024 1:44 PM), https://www.today.com/popculture/essay/troubled-teen-program-experience-rcna143623 [https://perma.cc/58SC-9398] ("What *was* Straight Inc.? Throughout my silent decades, I had no answer. I typed the words into a search bar and read an ACLU director's description of Straight Inc.: 'a concentration camp for throwaway kids.' That sounded right to me."). *See also* Michael McGrath, *Nancy Reagan and the Negative Impact of the 'Just Say No' Anti-drug Campaign*, THE GUARDIAN (Mar. 8, 2016, 2:23 PM), https://www.theguardian.com/soc

of publicity and enrollment with Nancy Reagan even publicly referring to it as her "favorite" program for teenagers.[40] Yet, after "facing seven-figure legal judgments" and allegations of human rights abuses, the program ultimately disbanded in 1993.[41]

B. TTI Rebrand: Today's Types of Facilities

As teenage drug and alcohol recovery programs started to shut down one-by-one, the TTI was forced to evolve and rebrand itself through new genres of residential treatment programs. Thus, today, the TTI persists through three main types of programs.

1. Juvenile Boot Camps

Juvenile boot camps are modeled after military basic training camps, centered around rigid discipline, physical conditioning, and strict schedules.[42] Some boot camp programs also prioritize uniformity and uncomfortable living conditions.[43] Boot camps were originally designed as an alternative to traditional correctional facilities for juvenile offenders.[44] Now, there also exist boot camps more akin to schools "designed for children who have broken school rules."[45] Juvenile boot camps claim to have two main goals: "provide cost-effective sentencing alternatives to incarceration" and "reduce recidivism by modifying participa-

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iety/2016/mar/08/nancy-reagan-drugs-just-say-no-dare-program-opioid-epidemic [https://perma.cc/FK8Q-4YDM] (describing the rise in popularity of Nancy Reagan's "Just Say No" anti-drug message).

[40] Stull, *supra* note 28, at 5 (quoting SZALAVITZ, *supra* note 25 ("Nancy Reagan declared [Straight Inc.] her favorite antidrug program.")).

[41] SZALAVITZ, *supra* note 25; *see also Straight, Inc. and Child Abuse in Residential Treatment Centers*, MED. WHISTLEBLOWER ADVOC. NETWORK, http://medicalwhistleblower.org/straight-inc-child-abuse-in-residential-treatment-#:~:text=teen%20rehabilitation%20centers%20found%20themselves,employment%20with%20their%20tarnished%20reputations [https://perma.cc/54CV-GK5W] (last visited Mar. 27, 2024) (discussing cases that survivors have brought against Straight Inc. and mentioning that even after the program's disbandment, spin-offs still continue to exist).

[42] *A Closer Look into Juvenile Boot Camp's Effectiveness*, TEEN BOOT CAMPS, https://teenbootcamps.org/boot-camps/a-closer-look-into-juvenile-boot-camps-effectiveness/ [https://perma.cc/M4JR-FHNX] (last visited Mar. 27, 2024); *Boot Camps & Military Schools in Indiana*, HELP YOUR TEEN NOW, https://helpyourteennow.com/boot-camps-military-schools-in-indiana/ [https://perma.cc/XMM8-Z794] (last visited Mar. 27, 2024).

[43] U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-146T, RESIDENTIAL TREATMENT PROGRAMS: CONCERNS REGARDING ABUSE AND DEATH IN CERTAIN PROGRAMS FOR TROUBLED YOUTH 8 (2007) [hereinafter CONCERNS REGARDING ABUSE AND DEATH].

[44] Mohr, *supra* note 23.

[45] *Practice Profile: Juvenile Boot Camps*, NAT'L INST. OF JUST.: CRIME SOLS. (Sept. 10, 2013), https://crimesolutions.ojp.gov/ratedpractices/6#ar [https://perma.cc/52DA-LM86].

nts' problem behaviors."[46] These camps, most of which are privately owned,[47] are primarily marketed to parents with children who have a history of bad behavior or delinquency. The average length of stay for a child is 90 days, and the average cost of a program is between $2,000 and $10,000.[48] While programs of this type may sound promising on their face to hopeless parents, the empirical literature on boot camps' effectiveness shows otherwise. Generally, studies reveal that "participants . . . have high rates of recidivism" after leaving boot camps and reoffend more quickly compared to those not subjected to boot camps.[49] And, beyond just the physical and psychological abuse from the rigid program structure, participant-on-participant violence is also frequent due to children as young as twelve being grouped with older juveniles.[50]

2. Wilderness Camps

Youth wilderness camps claim to "provide participants with a series of physically challenging outdoor activities designed to prevent or reduce delinquent behavior and recidivism."[51] These camps are marketed for children with "underlying emotional and behavioral problems" and are often viewed as a first step to "get a child ready" to be more receptive to a traditional residential program.[52] Wilderness therapy puts participants in survivalist mode while outdoors to detach them from distractions so that they can concentrate on behavioral reform.[53] The typical wilderness therapy program can last from thirty days to multiple months.[54] Further, from a survey of 28 different wilderness therapy programs, the average cost was found to be $558 per day, with an additional enrollment fee of approximately $3,100.[55] Yet, notably, experts claim that youth wilderness

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[46] *Id. See also Boot Camps & Military Schools in Indiana*, *supra* note 42 ("While boot camps are designed to scare kids into respecting authority, the long-term success rate has been very low.").

[47] *See, e.g.*, *Teen Wilderness Programs*, TEEN BOOT CAMPS, https://teenbootcamps.org/teen-wilderness-programs/#:~:text=How%20much%20does%20it%20cost,camps%20today%20are%20privately%20owned [https://perma.cc/QMU4-DJTT] (last visited Mar. 27, 2024).

[48] *Id.*

[49] Mohr, *supra* note 23.

[50] Jerry Tyler et al., *Juvenile Boot Camps: A Descriptive Analysis of Program Diversity and Effectiveness*, 38 SOC. SCI. J. 445, 456 (2001).

[51] *Wilderness Camps*, OFF. JUV. JUST. & DELINQUENCY PREVENTION 1 (Mar. 2011), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/Wilderness_Camp.pdf [https://perma.cc/F7P6-G5QH].

[52] Adiel Kaplan, *Does Science Support the 'Wilderness' in Wilderness Therapy?*, UNDARK (Jan. 29, 2020), https://undark.org/2020/01/29/does-science-support-the-wilderness-in-wilderness-therapy/ [https://perma.cc/536K-C8NC].

[53] *See id.*

[54] *The Truth About Teen Wilderness Therapy*, NEWPORT ACAD. (Jan. 10, 2024), https://www.newportacademy.com/resources/treatment/wilderness-therapy/ [https://perma.cc/26CF-NFLT].

[55] Jenney Wilder, *How Much Does Wilderness Therapy Cost?*, ALL KINDS OF THERAPY (Aug. 1, 2017), https://www.allkindsoftherapy.com/how-much-does-wilderness-therapy-cost [https://perma.cc/WMP9-SVMM].

camps "remain at best an unproven experiment."[56] While there is no strong evidence of substantial benefits of wilderness therapy,[57] there is evidence that these programs foster abuse, which likely leads to further harm and even death. For instance, in 2008, the US Government Accountability Office (GAO) released a report that "examin[ed] allegations of abuse, death, and deceptive marketing practices at residential programs nationwide."[58] The report disclosed several deaths that occurred at youth wilderness camps, including that of a fourteen-year-old who died from cardiopulmonary arrest after his hiking group got lost in severe heat.[59]

3. Therapeutic Boarding Schools

Therapeutic boarding schools are residential facilities that provide both "academic and clinical" services to juveniles.[60] "Young people may be sent to a therapeutic boarding school for a variety of reasons, some as a last resort intervention in a young person's life-threatening self-destructive behaviours, others due to transgressing parental expectations, such as having low grades, dressing in a subcultural style or having same-gender sexual attraction."[61] Participants at these schools are often under constant supervision.[62] Therapeutic boarding school "contracts can require stays of 21 months or more"[63] and usually cost between $30,000 and $100,000 annually.[64] Thus, these schools are particularly popular amongst wealthy families.[65] Further, some schools incorporate a faith-based curriculum and treatment philosophy while marketing themselves as religious

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56 Kaplan, *supra* note 52.

57 *Id.*

58 Sam Myers, *Dark Forest: A Look Inside Controversial Wilderness Therapy Camps*, THE DAILY YONDER (Aug. 1, 2023), https://dailyyonder.com/wilderness-therapy-camps-troubled-teens/2023/08/01/ [https://perma.cc/X4H2-4DBS]; *see* SELECTED CASES OF DEATH, *supra* note 9.

59 SELECTED CASES OF DEATH, *supra* note 9, at 8; *see also* Sara M. Moniuszko & Leora Arnowitz, *A 12-Year-Old-Boy Died at a Wilderness Therapy Program. He's Not the First.*, USA TODAY, https://www.usatoday.com/story/life/health-wellness/2024/02/20/north-carolina-wilderness-therapy-death-12-year-old-boy/72669232007/ [https://perma.cc/FV2X-L24M] (Feb. 20, 2024 12:47 PM) ("In 1990, 16-year old Kristen Chase died of heatstroke three days after arriving at her wilderness program. In 2000, 15-year-old William Edward Lee died from a head injury after being restrained by staff; [in 2002] 14-year-old Ian August died of hyperthermia at his wilderness therapy program . . . [and] Charles Moody, 17, died of asphyxiation after being restrained. In 2005, Anthony Haynes, 14, died while being punished at a wilderness boot camp. In 2007, Caleb Jensen, 15, died while at a wilderness camp, his body found bundled in a feces and urine-soaked sleeping bag. In 2011, Daniel Huerta, 17, died while being driven by a staff member. In 2016, 19-year-old Lane Lesko died during an escape attempt at a hybrid wilderness-residential treatment center.").

60 Wilder, *supra* note 55.

61 Sarah Golightley, *Troubling the 'Troubled Teen' Industry: Adult Reflections on Youth Experiences of Therapeutic Boarding Schools*, 10 GLOB. STUDS. CHILDHOOD 53, 54 (2020).

62 Christian Brancato, *When Private Industry Meets Public Policy: Navigating the Complexities of State and Federal Regulation Within the Troubled Teen Industry*, 2023 SETON HALL L. STUDENT WORKS 1, 12.

63 SELECTED CASES OF DEATH, *supra* note 9, at 6.

64 Golightley, *supra* note 61.

65 *Id.*

non-profits.[66] Anguish and abuse appears to fester in these facilities as a survey of adults who survived therapeutic boarding schools shows that ninety percent of those participants reported having either "negative" or "very negative" experiences.[67]

C. TTI Placements

Children can end up in these TTI programs through several avenues. As mentioned, parents often voluntarily elect to send their misbehaving child to a facility.[68] However, state authorities also play a hand in perpetuating the TTI, as state and local governments can pay TTI facilities to house children from the foster care and juvenile justice systems.[69] Additionally, school districts can refer children to TTI programs in certain scenarios, and refugee resettlement agencies and mental health providers also have the ability to route children into these programs.[70]

II. THE CURRENT REGULATORY LANDSCAPE

A. Federal Legislation (or the Lack Thereof)

For over a decade, Congress has ultimately been unsuccessful in passing any form of legislation aimed at regulating the TTI despite multiple attempts.[71] It all began in 2008, when the Stop Child Abuse in Residential Programs for Teens Act was first introduced in the House.[72] The bill required residential centers including wilderness programs, boot camps, and therapeutic boarding schools to meet a series of minimum standards.[73] It prohibited child abuse and neglect; certain disciplinary practices such as withholding food, water, or shelter; the use of certain restraints and seclusion practices; and acts of humiliation and degradation.[74] The bill also required that children at residential treatment facilities have telephone access and mandated facility employees to undergo intensive training and background checks.[75] Additionally, the bill enforced measures through the threat of monitoring the TTI by publicly disseminating facility violations through a public website that reported the names, locations, and violation history of residential care facilities.[76] It required that facilities be

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[66] *Id.*; *see, e.g.*, *Timothy Hill Academy*, THERAPEUTIC BOARDING SCHS., https://therapeuticboardingschools.org/new-york/timothy-hill-academy/ [https://perma.cc/HZG2-FCL4] (last visited Mar. 27, 2024).

[67] Golightley, *supra* note 61, at 56.

[68] Krebs, *supra* note 8.

[69] *Id.*

[70] *Id.*

[71] *See Search results for "Stop Child Abuse in Residential Programs for Teens Act"*, *supra* note 18.

[72] H.R. 6358, 110th Cong. (2008).

[73] *Id.* § 3.

[74] *Id.* §§ 3(a)(1)(A)–(D).

[75] *Id.* §§ 3(a)(1)(E)–(K).

[76] *Id.* § 3(c)(1).

monitored for any violations of the minimum standards to impose civil penalties for failure to conform.[77] While the bill eventually passed in the House with 318 votes, it ultimately died at the close of the 110th Session of Congress when no further action was taken.[78]

An identical bill was reintroduced in the House in 2009, where it, again, passed the House before dying at the end of session in the Senate.[79] In 2011, 2013, and 2015, the bill was reintroduced again in both the House and the Senate, where it continued to die each time.[80] Then, in 2017, this bill was introduced in the House for the final time, dying after being referred to the House Committee on Education and the Workforce.[81]

While a variety of individuals and organizations have been calling for increased TTI regulation for years,[82] perhaps the movement's strongest push for action and mainstream visibility came from Paris Hilton.[83] Beginning in 2020 with the release of the documentary *This is Paris*, where Hilton spoke out about her experience in congregate care,[84] and continuing through 2022, when she released the *Trapped in Treatment* podcast which examines and exposes the TTI,[85] Hilton has become an outspoken advocate for TTI legislation, even appearing on Capitol Hill with lawmakers to garner attention and petition for change.[86]

In April 2023, a new attempt at reforming the TTI, the Stop Institutional Child Abuse Act, was introduced in both the House and the Senate.[87] This bill, which—as of a year later at the publication of this Note—is still pending before Congress, takes a more analytical approach in attempting to legislate the TTI. If enacted, it would first establish a Federal Work Group on Youth Residential Programs consisting of nine representatives from relevant agencies such as the Administration for Children and Families, the Substance Abuse and Mental

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77 *Id.* §§ 3(b)(1)(2).

78 *H.R. 6358 - Stop Child Abuse in Residential Programs for Teens Act of 2008: Actions*, CONGRESS.GOV, https://www.congress.gov/bill/110th-congress/house-bill/6358/all-actions [https://perma.cc/3GU4-4ZG6] (last visited Mar. 28, 2024) (showing that House passed this bill but no further action was taken after the House sent it to the Committee on Health, Education, Labor, and Pensions on June 26, 2008).

79 H.R. 911, 111th Cong. (2009).

80 H.R. 3126, 112th Cong. (2011); S. 1667, 112th Cong. (2011); H.R. 1981, 113th Cong. (2013); S. 2054, 113th Cong. (2014); H.R. 3060, 114th Cong. (2015); S. 3031, 114th Cong. (2016).

81 H.R. 3024, 115th Cong. (2017).

82 *See, e.g.*, *About Us*, BREAKING CODE SILENCE, https://www.breakingcodesilence.org/about-us/ [https://perma.cc/MJF8-WJ9J] (last visited Mar. 28, 2024). Cited many times in this Note, Breaking Code Silence is a California-based nonprofit that works to investigate wrongdoing, educate and provide research, promote and track legislation, and advocate for victims of the TTI.

83 *See Paris' Impact Work*, PARIS HILTON, https://parishilton.com/paris-impact-work/ [https://perma.cc/C65W-6JWX] (last visited Mar. 28, 2024) (sharing a timeline of Hilton's philanthropic work regarding the TTI).

84 Hilton, *supra* note 6.

85 *Episodes*, TRAPPED IN TREATMENT, https://www.trappedintreatment.co/ [https://perma.cc/URN7-WQU7] (last visited Apr. 12, 2024).

86 *See* The Hill, *Paris Hilton Takes to Capitol Hill to Advocate for Troubled Teen Care Reform*, YOUTUBE (Oct. 20, 2021), https://www.youtube.com/watch?v=6eqcxSbLCXY [https://perma.cc/3LHS-DQQL].

87 H.R. 2955, 118th Cong. (2023); S. 1351, 118th Cong. (2023).

Health Services Administration, and the Department of Education.[88] This group would work to "develop and publish recommendations regarding a national database" that aggregates data on children in residential treatment facilities including the length of their stays, any use of restraints and seclusion, and "outcome-orientated data" like whether they have reintegrated safely into their school and community at least six months after discharge.[89] Additionally, this group would be required to submit a report every two years containing policy recommendations designed to improve the conditions inside these facilities and implement best practices regarding their licensing, accreditation, and monitoring.[90] Further, if enacted, this bill would instruct the Secretary of Health and Human Services to enter a contract with the National Academies of Sciences, Engineering, and Medicine "to conduct a study to examine the state of youth in youth residential programs and make recommendations."[91] In particular, this study must indicate the federal and state funding sources for youth residential programs, identify all existing federal and state regulation of youth residential programs, and notate the existing standards of care that national accreditation entities use in certifying youth residential programs.[92]

B. A Sampling of State Legislation

While the Stop Institutional Child Abuse Act would be a good first step in cracking down on the TTI, we must not forget that it remains pending. Thus, with no currently enacted federal legislation regulating the TTI, states have largely been left to their own devices. Generally, states have only begun placing regulations on residential facilities within the last decade, and even then, state legislation is fairly limited and varies greatly.

1. California

On September 30, 2016, California passed S.B. 524 into law.[93] Under this legislation, all congregate care facilities in the state must be licensed as group homes operating on a non-profit basis. Therefore, these facilities are now required to comply with a variety of regulations—including maintaining a written plan of operation, providing each prospective youth and their guardian with an accurate written description of the services to be provided, prohibiting restraints, and submitting detailed staff training plans.[94]

2. Montana

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[88] S. 1351 § 596.

[89] *Id.* § 596(d)(1).

[90] *Id.* § 596(d)(2).

[91] *Id.* § 3(a).

[92] *Id.* § 3(b).

[93] S.B. 524, 2015–2016 Leg., Reg. Sess. (Cal. 2016).

[94] CAL. HEALTH & SAFETY CODE §§ 1502.2(a), (b)(5) (West 2024).

On April 18, 2019, Montana passed H.B. 282 into law.[95] In outlining what constitutes sexual assault in the state, this law makes explicit that individuals cannot consent when they are participants in any form of private residential treatment program and the perpetrator is a worker affiliated with the program.[96] Thus, this law works to protect the vulnerable populations within residential treatment programs from being abused.

On May 3, 2019, Montana passed S.B. 267 into law.[97] From 2007 to 2019, there had been fifty-eight unaddressed complaints against residential care facilities.[98] As a response, this law transferred regulating and licensing of residential care facilities to the Department of Public Health and Human Services with the goal of increasing oversight.[99]

Further, on May 17, 2023, Montana amended this law with the passage of H.B. 218.[100] This amendment was influential in limiting inappropriate discipline methods in licensed facilities, as it both banned the threat or use of physical discipline as a "punishment, deterrent, or incentive" and required programs to report the use of any restraints within one business day.[101] In an attempt to make submitting complaints against infracting facilities more accessible, and perhaps to encourage it, this amendment also required that "each licensed program publicly post information" on how to submit a report to law enforcement or the Department of Public Health and Human Services.[102] And, finally, this amendment both increased the frequency and modified the procedure for licensed facility inspections, now requiring semiannual, unannounced government inspections, where at least fifty percent of the youth enrolled at each facility be interviewed outside the presence of facility staff.[103]

3. Utah

On March 21, 2021, Utah passed S.B. 127 into law.[104] This piece of legislation marked the first time in fifteen years that the state increased oversight on its nearly hundred youth residential treatment centers.[105] Under this law, residential treatment centers in the state may no longer engage in any "cruel, severe, unusual, or unnecessary" practices including strip searches, discipline designed to frighten or humiliate, physical restraints, or seclusion, without a

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[95] H.B. 282, 66th Leg., Reg. Sess. (Mont. 2019).

[96] MONT. CODE. ANN. § 45-5-501(1)(b)(vi) (West 2023).

[97] S.B. 267, 66th Leg., Reg. Sess. (Mont. 2019).

[98] *Timeline: S.B. 267 in Montana*, UNSILENCED, https://www.unsilenced.org/timeline/sb-267-in-montana/ [https://perma.cc/SL8J-PLXM] (last visited Jan. 3, 2024).

[99] MONT. CODE. ANN. § 52-2-803 (West 2023).

[100] H.B. 218, 68th Leg., Reg. Sess. (Mont. 2023).

[101] MONT. CODE. ANN. § 52-2-805(3).

[102] § 52-2-805(2)(d).

[103] § 52-2-810.

[104] S.B. 127, 2021 Gen. Sess. (Utah 2021).

[105] Jessica Miller, *Effort to Stop Abuse at Utah's 'Troubled-Teen' Centers is Sailing Through the Legislature*, THE SALT LAKE TRIB. (Feb. 23, 2021, 7:51 PM), https://www.sltrib.com/news/politics/2021/02/24/effort-stop-abuse-utahs/ [https://perma.cc/GG6U-X4WW].

showing of absolute necessity or direct authorization.[106] Further, the law requires residential youth facilities to report to the Utah Office of Licensing the use "of a restraint or seclusion within one business day after the day on which the use of the restraint or seclusion occurs," as well as "a critical incident within one business day after the day on which the incident occurs."[107] The law also mandates quarterly inspections of all youth residential facilities by the Office of Licensing, with two of those inspections being unannounced.[108] Finally, while children in congregate care are often times prohibited from having any contact with the outside world, S.B. 127 requires programs to "facilitate weekly confidential voice-to-voice communication between a child and the child's parents, guardian, foster parents, and siblings as applicable."[109]

4. Missouri

On July 14, 2021, Missouri passed two bills into law.[110] This law was written after "women who had been placed at the Circle of Hope Girls' Ranch in rural Missouri came forward with allegations that they'd been hit, restrained, starved, and sexually abused at the unregulated facility."[111] Under this legislation, though private congregate care facilities in the state can continue to operate without a license, they must now inform the Missouri Department of Social Services of their existence.[112] Additionally, all employees of these facilities must submit fingerprints and undergo stringent background checks.[113] Further, the law allows a number of individuals and agencies to petition the court to remove a child they believe to have been abused or neglected inside a residential care facility.[114]

5. Oregon

On July 14, 2021, Oregon passed S.B. 749 into law.[115] Under this legislation, "referral agents" who work with parents or schools to match children into residential facilities must now disclose the types of licenses a program holds; "[t]he number of substantiated allegations of abuse, deaths and serious injuries at the program in the prior [twenty-four] months"; and what they are receiving in

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[106] UTAH CODE ANN. § 26B-2-123 (West 2023).

[107] § 26B-2-104(1)(1)(x).

[108] § 26B-2-107(1).

[109] § 26B-2-123(6)(a).

[110] H.B. 557 & 560, 101st Gen. Assem., 1st Reg. Sess. (Mo. 2021) (both bills passed as one act).

[111] *Timeline: H.Bs. 557, 560 in Missouri*, UNSILENCED, https://www.unsilenced.org/timeline/hbs-557-560-in-missouri/ [https://perma.cc/VR4B-DHLX] (last visited Jan. 3, 2024).

[112] MO. ANN. STAT. § 210.1262 (West 2024).

[113] § 210.493(4).

[114] § 210.143.

[115] S.B. 749, 81st Leg., Reg. Sess. (Or. 2021).

exchange for their referral.[116] With this enactment, Oregon became the first state to regulate the "education consultant" industry.[117]

Further, on August 5, 2021, Oregon passed S.B. 710 into law.[118] This law outlines new regulations regarding what types of restraint and seclusion are permitted in licensed child-care agencies.[119] Specifically, a residential treatment facility is only permitted to restrain or seclude a child if their behavior "poses a reasonable risk of imminent serious bodily injury" to themselves or others and "less restrictive interventions" would not suffice.[120] In that case, the agency is further required to give immediate notice to the child's guardian.[121] Facilities are also required to submit to the Department of Human Services (DHS) a quarterly report detailing any use of restraint and involuntary seclusion for that quarter.[122] In addition, the law mandates that any secured transportation service that transports children to or from a residential center along a route that begins or ends in Oregon must be licensed by the DHS.[123]

While these state laws are steps in the right direction toward reforming the TTI, together, they make up a rather messy patchwork of regulation. This lack of standardization and uniformity is concerning as it only widens the gaps for potential oversight.[124]

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[116] OR. REV. STAT. § 418.353(1)(a)(C) (West 2022).

[117] *Timeline: S.B. 749 in Oregon*, UNSILENCED, https://www.unsilenced.org/timeline/sb-749-in-oregon/ [https://perma.cc/MP7K-J4TK] (last visited Mar. 30, 2024).

[118] S.B. 710, 81st Leg., Reg. Sess. (Or. 2021).

[119] OR. REV. STAT. § 418.523.

[120] § 418.523(1).

[121] § 418.526(3).

[122] § 418.528 (outlining the minimum required details including the total number of incidents involving both restraint and involuntary seclusion, the dimensions within and number of rooms in which seclusion takes place, and the number of individual children restrained or secluded with their demographic characteristics).

[123] § 418.215.

[124] For example, Utah declined to renew Diamond Ranch Academy's license in July 2023 after teenager Taylor Goodridge died in their care in December 2022. A new treatment center called Hope Circle seeks to take its spot. Though they attempt to be seen as different, the website is the same as Diamond Ranch's, the location is the same (though they renamed the street) and they share some of the same directors. Because their former license was not renewed, it was also technically not revoked, thus the state law does not prevent them from obtaining licensure again. Jessica Miller, *After a Girl's Death, Utah Closed Diamond Ranch Academy. A New Program May Open in the Same Spot with Some of the Same Employees*, THE SALT LAKE TRIB. (Mar. 12, 2024 8:00 AM), https://www.sltrib.com/news/2024/03/12/after-girls-death-utah-closed/ [https://perma.cc/QR46-H6XY]. Relatedly, "rebranding" for facilities that get into too much trouble is a common practice for TTI facilities. Sam Myers, *Survivors of Wilderness Therapy Camps Describe Trauma, Efforts to End Abuses*, ARK. ADVOC. (Aug 7, 2023 5:55 AM), https://arkansasadvocate.com/2023/08/07/dark-forest-a-look-inside-controversial-wilderness-therapy-camps/ [https://perma.cc/H3RQ-L3CL] ("'[W]hat they usually do is rebrand under a new LLC–even if they're in the same building and do the exact same things.'").

III. WHERE DO WE GO FROM HERE? A NEW APPROACH TO TTI REGULATION

A. A Note on the Lack of Data on the TTI

After conducting just minimal research on youth residential facilities, perhaps the most frustrating problems surrounding the TTI become clear: the overwhelming lack of research on the number of residential treatment centers, their location, the number of children currently in congregate care, and how these centers are run. This lapse in research is likely due to a lack of federal mandatory reporting for residential treatment facilities.[125] Further, as explained, most states have their own distinct set of licensing requirements that facilities must follow to operate.[126] In some states, certain facilities including privately-run institutions[127] and religious boarding schools,[128] are exempt from having to obtain a license all together. Without any standardization of licensing, accreditation, or identification, advocates and governmental bodies are largely left in the dark about what really happens inside the TTI and what might demand regulation.

There are truly only two reliable sources of information on the TTI. The first is a series of reports on residential treatment facilities created in 2007 and 2008 by the United States Government Accountability Office (GAO)—an independent, non-partisan government agency.[129] The GAO was commissioned by Congress to investigate residential treatment facilities after allegations of maltreatment, abuse, and death of youth emerged.[130] In one study, the GAO surveyed state child welfare, health and mental health, and juvenile justice agencies regarding maltreatment at both public and private residential facilities.[131] It also visited California, Florida, Maryland, and Utah—states selected because of their diverse "licensing and monitoring policies for residential programs, reports of child maltreatment, and geographic location[s]"—to interview relevant officials.[132] In a second study, the GAO was once again commissioned by Congress to specifically examine the circumstances surrounding cases of death or abuse in private residential programs, along with cases of deceptive marketing.[133]

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125 Evelyn Tsisin, *The Troubled Teen Industry's Troubling Lack of Oversight*, THE REGUL. REV. (June 27, 2023), https://www.theregreview.org/2023/06/27/tsisin-the-troubled-teen-industrys-troubling-lack-of-oversight/#:~:text=In%202007%2C%20the%20Government%20Accountability,This%20remains%20true%20today [https://perma.cc/8ZNN-8HD6] (noting the GAO "lamented that exact figures were impossible to ascertain because no comprehensive, national data existed").

126 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-696T, RESIDENTIAL FACILITIES: STATE AND FEDERAL OVERSIGHT GAPS MAY INCREASE RISK TO YOUTH WELL-BEING 3 (2008) [hereinafter STATE AND FEDERAL OVERSIGHT GAP].

127 *Id.*

128 Krebs, *supra* note 8.

129 *See* CONCERNS REGARDING ABUSE AND DEATH, *supra* note 43; STATE AND FEDERAL OVERSIGHT GAP, *supra* note 126; SELECTED CASES OF DEATH, *supra* note 9. *About*, U.S. GOV'T ACCOUNTABILITY OFF., https://www.gao.gov/about [https://perma.cc/VE3V-Z4PS] (last visited Mar. 30, 2024).

130 CONCERNS REGARDING ABUSE AND DEATH, *supra* note 43.

131 STATE AND FEDERAL OVERSIGHT GAP, *supra* note 126.

132 *Id.* at 2.

133 *See* SELECTED CASES OF DEATH, *supra* note 9.

While various empirical findings of these reports are discussed here, it is important to highlight that as of 2024, these studies are between fifteen and sixteen years old. Thus, one can only imagine how the conditions of the TTI have worsened and the rates of neglect, abuse, and death have changed, and likely increased, as more children enter the system.

The second source of information on the TTI consists of the testimony and anecdotes of individuals who were previously enrolled in congregate care. As mentioned, most famously is Paris Hilton, who has published op-eds, testified in front of state legislatures, campaigned on Capitol Hill, and spoken with advocacy groups regarding their time inside the TTI.[134] She has inspired others—celebrities and non—to come out with their stories against the TTI.[135]

B. The Most Pressing Issues Within the TTI to Tackle

Before formulating an effective legislative framework for regulating the TTI, it is necessary to synthesize the GAO reports and survivors' stories to identify what aspects of residential treatment centers turn them into environments of abuse.

1. Staffing Concerns

First, regardless if individuals are enrolled in the TTI by their parents or placed there by the state, there is, or should be, an expectation that these residents—all *children* eighteen or under—will be looked after by trustworthy adults. However, that is often not the case. It has been reported that many program officials do not have the credentials to operate youth residential programs.[136] In fact, there are no national standards for training or background checks for TTI

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[134] *See* Hilton, *supra* note 1; Jessica Miller, *"This Ain't Utah": Advocates Led by Paris Hilton Urge Lawmakers to Pass Reforms for "Troubled-Teen" Treatment Centers*, THE SALT LAKE TRIB., https://www.sltrib.com/news/politics/2021/02/08/new-rules-utahs-troubled/ [https://perma.cc/F6U9-CDEB] (Sept. 1, 2021, 6:22 PM) (testifying at a Utah senate hearing, Hilton inspires other victims of the TTI to come forward and give their accounts in support of legislation); IV Hendrix, *Paris Hilton Takes to Capitol Hill to Advocate for Troubled Teen Care Reform*, THE HILL (Oct. 20, 2021, 12:51 PM), https://thehill.com/blogs/in-the-know/in-the-know/577596-paris-hilton-takes-to-capitol-hill-to-advocate-for-troubled/ [https://perma.cc/HXR6-KDUK] (detailing Hilton's experience in the TTI, which she discusses on the steps of the Capitol to rally support for reform); Alyssa Newcomb, *Paris Jackson Speaks Out in Support of Paris Hilton, Opens Up About PTSD Diagnosis*, TODAY (Oct. 4, 2020, 6:36 PM), https://www.today.com/popculture/paris-jackson-supports-paris-hilton-opens-about-ptsd-diagnosis-t193239 [https://perma.cc/C8J5-VGH4] ("As a girl who also went to a behavior modification 'boarding school' for almost two years as a teenager, and has since been diagnosed with PTSD because of it, and continue to have nightmares and trust issues, I stand with Paris Hilton and the other survivors.");

[135] Etler, *supra* note 39; Alyssa Newcomb, *Paris Jackson Speaks Out in Support of Paris Hilton, Opens Up About PTSD Diagnosis*, TODAY (Oct. 4, 2020, 6:36 PM), https://www.today.com/popculture/paris-jackson-supports-paris-hilton-opens-about-ptsd-diagnosis-t193239 [https://perma.cc/C8J5-VGH4].

[136] Catherine Kushan, The Troubled Teen Industry: Commodifying Disability and Capitalizi ng on Fear (May 21, 2017) (B.A. thesis, George Washington University) (on file with George Was hington University).

employees.[137] Thus, while some programs might require a certain degree or certifications, others simply require employees to be over eighteen years old.[138]

Because many youth facilities market themselves as "treatment" programs, it is especially concerning that these facilities often do not employ staff with the appropriate medical credentials. Staff are likely not trained on how to recognize signs of serious illness or injury in youth that might occur during more physical programs like wilderness or boot camps. In fact, this lack of qualifications for staff has directly led to a number of deaths within the industry. In one case, "[a] 16-year-old male who suffered from asthma and chronic bronchitis complained of chest pain and had difficulty breathing for several weeks."[139] However, a program nurse at the Arizona boot camp he was enrolled at told him these breathing problems were all "in [his] head," and the staff required him to do push-ups and carry cinder blocks as punishment.[140] This child tragically ended up dying from an infection in his chest.[141] In another instance, "a 16-year-old male with a history of asthma became unresponsive while being restrained at a Pennsylvania treatment facility."[142] Even though the facility had records that this child suffered from asthma, the staff claimed that they were unaware of his medical condition.[143] This child, too, tragically died as a result of this neglect.[144]

Beyond this lack of training, the staff at residential treatment facilities are also often the ones effectuating abuse. Survivors have stated that TTI employees have verbally ridiculed them or blatantly discriminated against them due to their sexuality or race.[145] Others have highlighted the physical abuse that staff invoke, including various physical restraints, "being 'sat on[,]' and being 'chased' by[ ]staff member[s]."[146]

Ultimately, this abuse can fester due to a severe lack of oversight.[147] That is why it is essential for legislation to lay out strict hiring criteria for TTI staff and a more in-depth screening process for those who will work with residents in a medical or counseling capacity. Additionally, to account for the cases where distrustful staff slip through the cracks and ultimately get hired, there must be

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137 Nicolle Okoren, *The Wilderness 'Therapy' That Teens Say Feels Like Abuse: 'You Are On Guard At All Times'*, GUARDIAN (Nov. 14, 2022, 3:00 PM), https://www.theguardian.com/us-news/2022/nov/14/us-wilderness-therapy-camps-troubled-teen-industry-abuse [https://perma.cc/X88L-ZLCE].

138 *Id.*

139 SELECTED CASES OF DEATH, *supra* note 9.

140 *Id.*

141 *Id.*

142 *Id.* at 4.

143 *Id.*

144 *Id.*

145 *See* C. Jamie Mater, *The Troubled Teen Industry and its Effects: An Oral History*, 2022 U. N.H. INQUIRY J. https://www.unh.edu/inquiryjournal/blog/2022/04/troubled-teen-industry-its-effects-oral-history [https://perma.cc/BL7X-W7AR].

146 *Id.*

147 *See* Myers, *supra* note 124 ("'Let's say a case of sexual abuse happens. What they'll do is just fire that person and then tell the authorities they took care of it…but that facility isn't held accountable for having had that person there. So, that person will go and work at a different facility.'").

more frequent, intensive, and unannounced government inspections of facilities and a standardized process for residents to report abusive employees.

2. Deceptive Marketing Practices

Parents who enroll defiant children in residential programs often do so as a last resort. Many state that they feel frustrated, fearful, and exhausted[148]—willing to do anything to get treatment for their children. However, it is important not to forget the fact that a large number of residential treatment facilities operate for-profit and are run by large corporations.[149] Thus, these facilities are equipped with marketing teams who know exactly how to profit off desperate parents by selling the promise of modifying troubling behavior. As the co-founder and CEO of advocacy group Unsilenced said, "[y]ou look at [TTI program] websites, you see horses and animals, and you get to go hiking, boating, skiing, rock climbing, and all this stuff. And they really make it look amazing. [Yet], what you think is going on really isn't."[150]

For instance, many parents who seek to enroll their child into a residential treatment facility take advantage of the help of an "educational consultant"—tasked with assisting families with finding the best program for their child and providing references.[151] However, these consultants are usually under no duty to disclose any financial relationships they may have with residential centers to prospective families.[152] Underneath the façade, consultants are often receiving cash or other non-monetary bonuses for securing a new placement in specific programs.[153] Thus, there is no incentive for a consultant to actually listen to the specific needs of a family and recommend the most suitable program for a child facing specific challenges. In fact, in one GAO study, individuals posing as interested parents contacted a referral service that promised to "look at [the family's] special situation and help [them] select the best school for [their] teen with individual attention."[154] However, the posing parents called the same service three separate times inquiring about three very different fictious children, and each time, were recommended the same Missouri boot camp.[155] It was later uncovered that the owner of this referral service was married to the owner of that boot camp.[156]

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148 *See Deceptive Marketing in the "Troubled Teen" Business*, ALL. FOR THE SAFE, THERAPEUTIC, & APPROPRIATE USE OF RESIDENTIAL TREATMENT, Oct. 2011, at 2, http://astartforteens.org/assets/files/ASTART-Deceptive-Marketing-Oct-2011.pdf [https://perma.cc/95CJ-ZU66].

149 *See id.* at 1.

150 Myers, *supra* note 58.

151 *Deceptive Marketing in the "Troubled Teen" Business*, *supra* note 148, at 3.

152 *See id.*

153 *Id.*; *What Professionals Need to Know About an Independent Educational Consultant*, MORGAN GUIDANCE (May 7, 2022), https://morganguidance.com/what-professionals-need-to-know-about-an-independent-educational-consultant/#:~:text=There%20are%20consultants%20who%20are,a%20client%20to%20the%20program [https://perma.cc/XAE8-7Q9U].

154 SELECTED CASES OF DEATH, *supra* note 9, at 4.

155 *Id.*

156 *Id.* at 5.

Additionally, it has been discovered that TTI facilities often misrepresent critical information to prospective families. First, residential programs are often not staffed as advertised. For example, one program advertised that it had a licensed psychiatrist "on staff."[157] In reality, the psychiatrist only worked on site once a month for four hours, during which they needed to see over fifty children.[158] Second, generally, residential treatment programs are not tax deductible or reimbursable under major insurance plans.[159] However, parents have reported being told differently by program representatives, at times even being prompted to engage in fraudulent behavior to make the required payments.[160] And, finally, residential programs often advertise short-term stays as the norm. This timeline likely makes families feel more comfortable sending their children away from home. Yet, the reality is that once a child is in a program, that program retains a great deal of control over them. Inquiring parents have reported being told that they just "need to be patient," as effective treatment will take a few more months—which can turn into a year or more.[161]

It is crucial to crackdown on these misleading marketing practices so parents and guardians who still choose to send their children to residential treatment facilities will be fully informed about that facility's practices and the risks of behavior modification treatment. Further, the education consultant and referral agency industry must be investigated more thoroughly to ensure that those who are meant to serve as guides to prospective parents are not doing so under nefarious means.

3. Methods of Discipline

Residential programs are also sharply criticized for their disciplinary practices, including improper use of restraints and seclusion. Federal regulations define three main types of restraints in residential treatment facilities: personal restraints, mechanical restraints, and drugs used as a restraint.[162] Critically, while federal regulations state that restraints are meant to only be used as a last resort, and, even then, only in an emergency to prevent a resident from harming themselves or another,[163] that evidently does not hold true in practice.

Personal restraints are defined as "the application of physical force without the use of any device, for the purposes of restraining the free movement of a resident's body,"[164] yet it was a personal restraint that ultimately led to Cornelius Frederick's death at a Michigan residential facility in 2021.[165] Ultimately, this

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[157] *Deceptive Marketing in the "Troubled Teen" Business*, *supra* note 148, at 4.

[158] *Id.*

[159] *Id.*

[160] *Id.* at 5.

[161] *Id.* at 6.

[162] 42 C.F.R. § 483.352 (2023).

[163] § 483.356.

[164] § 483.352.

[165] Hannah Rappleye, *Michigan to Ban Restraints in Youth Facilities After Cornelius Frederick's Death*, NBC NEWS (Apr. 2, 2021, 4:30 AM), https://www.nbcnews.com/news/us-news/michigan-

devastating incident led to a total ban on the use of restraints against youth in Michigan group homes, except in the most extreme circumstances.[166] Further, mechanical restraints are defined as "any device attached or adjacent to the resident's body that he or she cannot easily remove that restricts freedom of movement or normal access to his or her body."[167] Yet, there are numerous reports that mechanical restraints including handcuffs, blindfolds, and hoods, have been used when transporting youth to residential facilities during their forced kidnappings.[168] Drugs are also administered as a restraint to manage behavior and temporarily restrict freedom of movement.[169] Reports indicate that residential facilities severely overmedicate residents, often with antipsychotics and sedatives and even when not prescribed by a facility physician.[170]

Relatedly, federal regulations define seclusion as "the involuntary confinement of a resident alone in a room or an area from which the resident is physically prevented from leaving."[171] Seclusion, too, is meant to only be utilized in extreme and emergency circumstances.[172] However, like the use of restraints, a number of past TTI participants have alleged staff placing them in solitary confinement for long periods of time, ranging from days to weeks, as punishment for bad behavior.[173]

The use of restraints and seclusion can cause serious physical and psychological trauma to minors, and there is "no evidence that using restraint or seclusion is effective in reducing the occurrence of the problem behaviors that frequently precipitate the use of such techniques."[174] That is why, as some states have started doing, the use of restraints and seclusion as discipline should have to be reported and documented, and eventually outlawed.

C. *An Integrated Federal and State Framework to Combat Institutionalized Child Abuse*

As previously explored, today's TTI regulatory framework is solely composed of patchwork legislation from a number of states. This comes with some obvious drawbacks. First, with different states having their own sets of rules, there is a lack of consistency and uniformity in standards across the TTI.

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ban-restraints-youth-facilities-after-cornelius-frederick-s-death-n1262756 [https://perma.cc/W6UH-SKTD].

166 *Id.*

167 42 C.F.R. § 483.352.

168 Jessica Miller et al., *'Blindfolds, Hoods, and Handcuffs': How Some Teenagers Come to Utah Youth Treatment Programs*, THE SALT LAKE TRIB. (Mar. 8, 2022, 8:00 AM), https://www.sltrib.com/news/2022/03/08/blindfolds-hoods/ [https://perma.cc/NZA7-9VFN].

169 42 C.F.R. § 483.352.

170 Jessica Miller, *Utah 'Troubled Teen' Centers Have Used 'Booty Juice' to Sedate Kids, a Practice Outlawed in Other States*, SALT LAKE TRIB., https://www.sltrib.com/news/2021/02/04/utah-troubled-teen/ [https://perma.cc/56QD-7WTL] (Sept. 1, 2021, 6:22 PM).

171 42 C.F.R. § 483.352.

172 *Id.*

173 *See* Brancato, *supra* note 62, at 25.

174 U.S. DEP'T OF EDUC., RESTRAINT AND SECLUSION: RES. DOCUMENT 2 (2012), https://sites.ed.gov/idea/files/restraints-and-seclusion-resources.pdf [https://perma.cc/RG28-XR6Z].

This can create gaps and loopholes, where certain facilities in certain jurisdictions can operate differently and possibly escape regulation altogether. This leads to forum shopping of sorts,[175] where TTI facilities actively seek out states with lax regulations and operate more abusive, unwieldy facilities there to make a greater profit.

Additionally, it is important to note that the United States is the only UN Member State that has failed to ratify the Convention on the Rights of the Child (CRC)—"an international treaty that aims to protect the rights of children worldwide."[176] First introduced over thirty years ago,[177] the CRC calls on countries to ensure that children's rights, including freedom of speech and thought, access to healthcare and education, and freedom from exploitation, torture, and abuse, are uniformly upheld.[178] Despite general support for the CRC's mission and goals, policymakers have "raised concerns as to whether it is an effective mechanism for protecting children's rights."[179] For instance, some critics argue that the CRC would "undermine U.S. sovereignty by giving the United Nations authority to determine the best interests of U.S. children."[180] Further, critics allege that ratifying the CRC "could interfere in the private lives of families, particularly the rights of parents to educate or discipline their children."[181] However, as supporters counter, the CRC aims not to displace the role of parents in childrearing as they so choose, but instead to protect children against governmental and institutional abuse—which the TTI has promulgated for years and will continue to promulgate as we sit in a state of complacency and under-regulation.

1. Federal Reform

The first step necessary in regulating the TTI is ensuring that Congress does not stall and let the Stop Institutional Child Abuse Act die at the end of this term, as has occurred for over a decade. While even the bill's House sponsor, Rep. Ro Khanna, admits that the bill is just a "first step"[182] to begin resolving the problems that arise from the lack of data on the TTI, Congress must step up, act in a bipartisan fashion, and guarantee its passage. It is both a practical route and an essential one.

By establishing the Federal Work Group on Youth Residential Programs,[183] Congress can finally compile a database detailing the number of

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[175] *See* Brancato, *supra* note 62, at 29.

[176] CONG. RSCH. SERV., R40484, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (2015) [hereinafter UNCRC].

[177] Sarah Mehta, *There's Only One Country That Hasn't Ratified the Convention on Children's Rights: US*, ACLU (Nov. 20, 2015), https://www.aclu.org/news/human-rights/theres-only-one-country-hasnt-ratified-convention-childrens [https://perma.cc/ZDT3-3EPQ].

[178] UNCRC, *supra* note 176.

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] Maia Szalavitz, Opinion, *The Troubled-Teen Industry Offers Trauma, Not Therapy*, N.Y. TIMES (Oct. 19, 2023), https://www.nytimes.com/2023/10/19/opinion/troubled-teens-industry-regulation.html [https://perma.cc/75CN-PA7N].

[183] H.R. 2955, 118th Cong. § 2 (2023); S. 1351, 118th Cong. § 2 (2023).

participants in TTI programs, the length of these programs, the location of TTI facilities, and TTI program operations. This is critical for a few reasons. A comprehensive database would increase transparency for the congregate care industry because making this data publicly accessible will hold these institutions accountable to actually provide treatment-based practices and sustainable outcomes. Additionally, a routinely-updated database would aid local policymakers and researchers in crafting local legislation apt at tackling TTI issues in their states. And finally, because voluntary enrollment by parents is one of the main ways children enter the TTI,[184] a national database would equip parents to make more informed, health- and safety-first choices regarding the best treatment options for their children.

The Stop Institutional Child Abuse Act also proposes that the Work Group shall consult with individuals and organizations most well-situated to offer insight into the realities of the TTI—including survivors, juvenile justice legal professionals, health professionals, and parents.[185] This ensures that a more direct voice will finally be given to those with first-hand knowledge about actions that need to be taken.

Perhaps most importantly, the Stop Institutional Child Abuse Act proposes that the Work Group shall "improve accessibility and development of community-based alternatives to youth residential programs" and provide resources that "assist in preventing the need for out-of-home placement of youth in youth residential programs."[186] Research indicates that institutionalization like that of the TTI can have negative consequences on mental health and physical well-being[187] and increase recidivism rates by up to eight percent.[188] Thus, investing in other forms of behavioral intervention keeps the hope alive that the United States can eventually work to fully dismantle the TTI as it exists today.

However, even with these benefits, it is clear that the Stop Institutional Child Abuse Act would not provide adequate regulation of the TTI in and of itself. As author and advocate Maia Szalavitz puts it, "[t]he Stop Institutional Child Abuse Act is far from enough to corral a billion-dollar industry that profits from harming kids."[189] Fortunately, Congress likely *has* the constitutional authority to do *more*.[190]

2. Constitutional Basis for Federal Reform

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184 *See* Krebs, *supra* note 8.

185 *See* H.R. 2955 § 2; S. 1351 § 2.

186 H.R. 2955 § 2; S. 1351 § 2.

187 *See* Heather E. Mooney, *Why It's Unclear Whether Private Programs For 'Troubled Teens' Are Working*, THE CONVERSATION (Jan. 27, 2020, 7:19 AM), https://theconversation.com/why-its-unclear-whether-private-programs-for-troubled-teens-are-working-128612 [https://perma.cc/SN5J-NKFM].

188 *The "Troubled Teen" Industry*, NAT'L YOUTH RTS. ASS'N, https://www.youthrights.org/issues/medical-autonomy/the-troubled-teen-industry/#:~:text=Discipline%20interventions%20like%20these%20programs,decreases%20recidivism%20by%20approximately%2013%25 [https://perma.cc/2YWE-SCBW] (last visited Apr. 1, 2024).

189 Szalavitz, *supra* note 182.

190 See Brancato, *supra* note 62, at 31–33.

The Commerce Clause, a key constitutional provision guiding federal action, grants Congress the power to regulate commerce among the several states.[191] Congress may regulate three broad categories of commerce under this power; channels of interstate commerce, instrumentalities of interstate commerce, and activities having a substantial relation to interstate commerce.[192] As any further regulation of the TTI under the Commerce Clause would clearly fall under the third category, it is important to note that to be regulated, the interstate activity must be *economic* in nature.[193]

The Supreme Court has upheld a variety of regulated activity as interstate and thus, under congressional authority including coal mining,[194] extortionate credit transactions,[195] restaurants using interstate supplies,[196] inns and hotels,[197] and (in)famously, growing wheat.[198] When it comes to criminal activity, however, the Court has shown more restraint. For example, in *United States v. Lopez* the Court held that the regulation of gun possession within a school zone did not adequately involve economic activity for purposes of the Commerce Clause due to lack of legislative intent to regulate an economic activity but rather, a crime.[199] Similarly, in *United States v. Morrison*,[200] the Court held that gender-based violent crimes are not "in any sense of the phrase, economic activity" and thus too attenuated for Commerce Clause congressional authority.[201]

The TTI, however, has risen to become a multi-billion industry in this country,[202] and seems to fit squarely into the confines of an interstate, economic activity that Congress has the power to regulate.

For starters, youth are often transported across state lines to residential treatment facilities in other jurisdictions,[203] perhaps for price reasons or simply because different states have more lax regulations regarding the operation of TTI facilities in the first place. The most popular state to send children to for treatment is Utah. In part, this is because of its religious reputation, ideal vistas for wilderness retreats.[204] From 2015 to 2020, thirty-four percent of all US teens

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191 U.S. CONST. art. I, § 8, cl. 2.

192 United States v. Lopez, 514 U.S. 549, 558 (1995).

193 *Id.* at 559.

194 Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 (1981).

195 Perez v. United States, 402 U.S. 146 (1971).

196 Katzenbach v. McClung, 379 U.S. 294 (1964).

197 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

198 Wickard v. Filburn, 317 U.S. 111, 128 (1942).

199 United States v. Lopez, 514 U.S. 549, 560–62 (1995) ("Even *Wickard*, which is perhaps the most far-reaching example of Commerce Clause authority . . . involved economic activity in a way that the possession of a gun in a school does not. The act [prohibiting guns in school zones], is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms.").

200 529 U.S. 598 (2000).

201 *Id.* at 613–15.

202 *See* Krebs, *supra* note 8.

203 *See, e.g.*, Miller et al., *supra* note 168.

204 Jessica Miller, *Inside Utah's Troubled Teen Industry: How it Started, Why Kids are Sent Here and What Happens to Them*, THE SALT LAKE TRIB. https://www.sltrib.com/news/2020/08/30/inside-utahs-troubled/ [https://perma.cc/6SEB-G9V3] (Sept. 1, 2021 6:21 PM); *see also* Kate

who went out of state for a residential treatment facility, ended up in Utah.[205] In fact, in 2015, over 50 residential treatment facilities in Utah brought in 6,400 jobs and $269 million in earnings into the state.[206] Utah's lack of effective oversight has allowed its facilities to prosper financially, with the bigger entities that own many of the centers having out-of-state contracts.[207]

Similarly, in 2017, Sequel Youth & Family Services, a popular US chain of residential treatment facilities, operated thirty-five facilities in over fifteen different states.[208] It, too, generated unthinkable profits and was, at one point, valued by investors to be worth more than $400 million.[209] These numbers make clear that the TTI is surely an economic activity that has a substantial relation under the Commerce Clause. The 2007 and 2008 GAO reports resulted in government commissioned findings that further substantiate the applicability of the Commerce Clause.[210]

With this authority under the Commerce Clause, Congress could regulate several aspects of the TTI. First, Congress could regulate the licensing and accreditation of residential treatment facilities on a national level, ensuring a set of minimum standards for a program to continue to operate. Next, Congress could establish federal standards for TTI staff, helping to ensure that the personnel tasked with caring for these youth meet the requisite professional qualifications and training to actually help treat them. Additionally, Congress could enact legislation to protect parents and guardians, the main consumers who seek out the

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Rodriguez, *From Tough Love to Torture: Wilderness Therapy Rehabilitation Programs Leave Teenagers Traumatized*, THEBLACK&WHITE (Oct. 4, 2023), https://theblackandwhite.net/76071/feature/from-tough-love-to-torture-wilderness-therapy-rehabilitation-programs-leave-teenagers-traumatized/ [https://perma.cc/R87V-3EDV] ("Utah's status as the epicenter of the industry is also due to the specific state-level laws that dictate the way such programs can operate. In Utah, the age of medical consent is 18. Minors do not have control over what medical treatments they're subjected to.") Other states have lower consent ages, which would restrict these facilities from forcing drugs upon teenagers. California's age of consent is twelve. Washington's is thirteen. *Id.*

[205] Jessica Miller, *How Utah Became the Leading Place to Send the Nation's Troubled Teens*, THE SALT LAKE TRIB. (Apr. 5, 2022, 8:00 AM), https://www.sltrib.com/news/2022/04/05/how-utah-became-leading/ [https://perma.cc/6VEU-79N4]. It is unknown how many facilities there are in Utah. One source has been diligently crowdsourcing information from the state government, in order to put a record of abuses at each facility on their website. *Read the Violation Reports and Inspections for Utah's Troubled Teen Treatment Centers*, KUER (Mar. 4, 2021 8:32 AM), https://www.kuer.org/news/2021-03-04/read-the-violation-reports-and-inspections-for-utahs-troubled-teen-treatment-centers [https://perma.cc/22JM-CF8S].

[206] Juliette Tennert, Economic Impact of Utah's Family Choice Behavioral Healthcare Interventions Industry (May 2016) (unpublished research brief) (on file with author).

[207] Miller, *supra* note 204; Will Craft & Jessica Miller, *New Data Underscores Utah's Lax Oversight of Youth Treatment Programs*, APM REPS. (Mar. 10, 2021), https://www.apmreports.org/story/2021/03/10/new-data-underscores-utahs-lax-oversight-of-youth-treatment-programs [https://perma.cc/737H-6AF7].

[208] Curtis Gilbert, *Under Scrutiny, Company That Claimed to Help Troubled Youth Closes Many Operations and Sells Others*, APM REPS. (Apr. 26, 2022), https://www.apmreports.org/story/2022/04/26/sequel-closes-sells-youth-treatment-centers [https://perma.cc/RF3S-VYDT] (explaining these numbers, but also further revealing that the chain has since languished due to deaths of teenagers, some of which were described *supra* Part III.B.)

[209] *Id.*

[210] *See* CONCERNS REGARDING ABUSE AND DEATH, *supra* note 43; STATE AND FEDERAL OVERSIGHT GAP, *supra* note 126; SELECTED CASES OF DEATH, *supra* note 9.

services of residential treatment facilities, from fraudulent or deceptive marketing practices. This legislation could require facilities to make mandatory reports to a national database regarding both the fees charged for program services and any financial relationships with third-party referral agents or education consultants, but also the criteria for admission and discharge from a program. Finally, Congress could enact national safety protocols that residential treatment facilities must follow in terms of banning the use of restraints and seclusion, requirements for emergency preparedness, reporting on critical incidents, and measures to prevent abuse by staff or other residents.

3. State Reform

There may be federalist critics who will counter this proposed constitutional authority to regulate the TTI.[211] The argument is likely that because there is no explicit power granted to the federal government to regulate residential programs, this instead falls within the reserve powers of the states. Further, because residential programs purport to treat child welfare, historically speaking, state police powers have "long been recognized to include the authority to make laws for public health and safety."[212]

Therefore, to be prepared for any obstacles of the sort being raised against federal TTI regulation, it is also necessary for state legislatures to devise a plan to regulate the TTI more uniformly.[213] One such proposal is to create a state-based bill of rights for children in residential treatment programs, using the Foster Children's Bill of Rights—which has been enacted, thus far, in fifteen states and Puerto Rico—as a guide.[214] Working as a coalition, many of these state-enacted bills of rights mandate that the bill of rights "must be posted in a place where children will see [it] and include provisions requiring foster children to be informed about why they are in foster care and how the process will proceed."[215] Further, many of these state statutes include shared provisions for "participation in extracurricular or community activities, efforts to maintain educational stability, access to guardians ad litem, access to mental, behavioral and physical health care, [and] access to or communication with siblings and family members."[216]

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[211] *See* U.S. CONST. amend. X.

[212] Ilya Shapiro, *State Police Powers and the Constitution*, CATO INST. (Sept. 15, 2020), https://www.cato.org/pandemics-policy/state-police-powers-constitution [https://perma.cc/AGD9-V298]. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding state authority to enforce vaccine mandates); Hillsborough Cnty. v. Automated Med. Lab'ys, Inc., 471 U.S. 707 (1985) (upholding local authority to control plasma donation practices as a matter of health and safety). Note, however, that by virtue of constitutional federal supremacy, the federal government's authority to regulate interstate commerce may be a key into preempting state law governing the TTI.

[213] *See, e.g.*, Chaim Steinberger, *Collecting Child Support: The Uniform Interstate Family Support Act and How It Helps Parents*, AM. BAR ASS'N (Aug. 10, 2022) (illustrating the idea that the adoption of more uniform laws across different states on a single issue can help avoid inconsistency, contradiction, and the need for federal intervention).

[214] *Foster Care Bill of Rights*, NAT'L CONF. OF STATE LEGIS., https://www.ncsl.org/human-services/-foster-care-bill-of-rights [https://perma.cc/46HG-A8VD] (Oct. 29, 2019).

[215] *Id.*

[216] *Id.*

Likewise, a states' rights framework for children in residential treatment programs would spell out a minimum set of assurances for these youth, along with parents or guardians looking into residential facility options.

While we must continue to listen to survivors, advocates, and health professionals to formulate this framework most effectively, it seems necessary to include a few key provisions. First, every child in a residential program should be entitled to dignity, respect, and an environment free from abuse and harm of any sort. Next, every child in a residential program should have a right to adequate care and supervision, manifested through trained and qualified staff, medical treatment, and mental health care. Similarly, every child in a residential program must be provided an education adequately tailored to their individualized needs. Additionally, every child in a residential program should have the right to an avenue to express their grievances without fear of retribution and access to legal services and proceedings in the case that their rights are violated. Lastly, every program must undergo multiple strict, mandatory reviews every year to ensure that they are following all applicable rules and regulations or else face the appropriate investigations and sanctions.

However, unlike the way that states ultimately handpicked which specific provisions of the Foster Children's Bill of Rights to adopt, here, it would be essential to advocate that the states adopt *all* recommended provisions in full.[217] That seems like an increasingly likely possibility the broader and more bipartisan this framework remains. Otherwise, the United States will, once again, just be stuck with a fragmented framework of TTI laws that allow for gaps, loopholes, and lack of oversight from jurisdiction to jurisdiction.

CONCLUSION

Ultimately, there has never been a more opportune (and critical) time to regulate and reform the troubled teen industry. The concerning number of abuse and neglect allegations and rising reports of injury and death occurring at residential treatment facilities reflect the sheer urgency.[218] Thus, by establishing a comprehensive legislative framework, beginning with the passage of the Stop Institutional Child Abuse Act, continuing with further federal legislation under the Commerce Clause and the implementation of a uniform states' rights framework for children in residential treatment programs, we have the opportunity to finally protect some of the most vulnerable youth.

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[217] *See* Jill Reyes, *Child Welfare Bills of Rights for Foster Children*, AM. BAR ASS'N (Dec. 1, 2012), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practice online/child_law_practice/vol_31/december_2012/child_welfare_billsofrightsforfosterchildren0 / [https://perma.cc/K6EZ-9J5J].

[218] *See, e.g.*, Dominic Yeatman, *'They Ruined my Life': Inside America's Harrowing 'Wilderness Therapy' Camps for 'Troubled Teens' Where Over a Dozen Kids Have DIED and Survivors are Left Traumatized from 'Torturous Abuse in Filthy, Freezing Conditions'*, DAILY MAIL, https://www.dailymail.co.uk/news/article-13110721/troubled-teen-camps-wilderness-therapy-death-abuse.html [https://perma.cc/PM7C-ABD8] (Feb. 25, 2024 2:17 PM); Sara Tiano, *Federal Watchdogs Find Abuse at For-Profit Youth Residential Programs in 18 States*, THE IMPRINT (Nov. 2, 2021, 6:56 PM), https://imprintnews.org/top-stories/federal-watchdogs-find-widespread-abuse-at-youth-residential-programs/60071 [https://perma.cc/B9YG-VFZR].

Troubled teen programs have not just popped up overnight. We must recognize the decades of allowing and even empowering these treatment program corporations to evade even the most minimal regulations, shuffle to states with more gaps in oversight, and continue preying on desperate families and juveniles to rake in substantial profits. Fortunately, momentum and mainstream publicity revolving around the injustices of TTI appear to be at an all-time high, thanks to the many survivors who have bravely shared their stories of abuse. Therefore, complacency is no longer an option. With every passing day, more and more children are stripped from their homes and placed against their will into residential facilities—left to be maltreated, exploited, and profited off of. It is now up to all of us to advocate for them.