CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC

†

DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM

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WHAT IS THE MYSTERY?

It is one of the great ironies of American history that the states commonly thought of today as "redneck country" (areas where gun ownership, hunting, and rifle racks in pickup trucks are unremarkable) were in the forefront of laws regulating the concealed carrying of deadly weapons. Another common characteristic is that all were slave states when they first passed these laws. Seven of the fifteen slave states (Kentucky, Tennessee, Georgia, Alabama, Arkansas, Louisiana, and Virginia) adopted statutes before the Mexican War that regulated concealed carrying of arms.[1] Even Indiana, nominally a free state because of the Northwest Ordinance of 1787, still held slaves in 1820 when it adopted its first concealed weapon law.[2]

Why did the slave states take an early lead in regulating the carrying of concealed weapons, and why is this question interesting today? In the last few years, in response to rising public anxiety about crime, more than twenty states have liberalized their con-

1. Clayton E. Cramer, *For the Defense of Themselves and the State: The Original Intent and Judicial Interpretation of the Right to Keep and Bear Arms* (Westport, Conn.: Praeger, 1994), 69-96; George D. Newton, Jr., and Franklin E. Zimring, *Firearms and Violence in American Life* (Washington, D.C.: Government Printing Office, 1969), 87; Stephen P. Halbrook, "Rationing Firearms Purchases and the Right to Keep Arms: Reflections on the Bills of Rights of Virginia, West Virginia, and the United States," *West Virginia Law Review* 96:1 [Fall 1993]:27-28.

2. Clayton E. Cramer, *Black Demographic Data, 1790-1860: A Sourcebook* (Westport, Conn.: Greenwood Press, 1997), 12-16.

cealed handgun statutes. These states had previously either completely prohibited concealed carrying of handguns by civilians, or arbitrarily licensed concealed handgun carrying permits. These new laws clearly define who is eligible for a license– and the vast majority of adults qualify, or can qualify with a little training.[3] In the course of political debate about these changes, opponents of liberalization have argued that the existing restrictive laws regulating concealed carrying of handguns were in place for good reason. But why *are* the existing state laws in place?

Answering this question is not easy. Unlike many other areas of criminal legal history, few scholars have published work examining the history of concealed weapon laws. Those who have researched this topic are like spelunkers entering an unexplored cave of immense proportions, armed only with a candle. The size of the cave is unknown, because the candle fails to illuminate the far walls. Every explorer makes new discoveries, because there is so much that remains unexplored.

In the same way, each new work published about concealed weapon law history can dramatically expand our body of knowledge, because the existing base is so small. Even such fundamental facts as the date that each state adopted its first concealed weapon law remain uncertain. The adoption date for the state laws prohibiting or regulating the concealed carrying of deadly weapons in the early Republic would appear to be: Kentucky, February 3, 1813[4]; Louisiana, March 25, 1813[5]; Indiana, January 14, 1820[6]; Georgia,

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3. Clayton E. Cramer and David B. Kopel, "'Shall Issue': The New Wave of Concealed Handgun Permit Laws," *Tennessee Law Review* 62:3 [Spring 1995]:679-757.

4. *Acts Passed at the First Session of the Twenty First General Assembly for the Commonwealth of Kentucky* (Frankfort: Gerard & Berry, 1813), 100-101; Stephen P. Halbrook, "Our First Gun Law," *Gun Digest*, 41st ed. (1997), 52.

5. Meinrad Greiner, ed., *Louisiana Digest: Embracing the Laws of the Legislature of a General Nature Enacted from the Year 1804 to 1841, Inclusive, and in Force at This Last Period* (New Orleans: Benjamin Levy, 1841), 130-131; *Journal de la Chambre des Representans Pendant la Seconde Session de la Premiere Legislature de l'Etat de la Louisiane* (New Orleans: P. K. Wagner, 1813), 131; *Acts Passed at the Second Session of the First Legislature of the State of Louisiana* (New Orleans: Baird and Wagner, 1813), 172-175.

6. *Laws of the State of Indiana, Passed at the Fourth Session of the General Assembly* (Jeffersonville: Isaac Cox, 1820), 39.

December 25, 1837[7]; Tennessee, January 27, 1838[8]; Virginia, February 2, 1838[9]; Alabama, February 1, 1839.[10]

Arkansas remains somewhat mysterious, but its legislature definitely banned the carrying of concealed weapons sometime during the 1837-38 legislative session, though this may have been simply a restatement of a preexisting territorial statute.[11]

As an example of the considerable uncertainty on this subject, George D. Newton, Jr., and Franklin E. Zimring claim that Massachusetts had antebellum restrictions on the carrying of handguns.[12] A more recent detailed history of Boston's police department indicates that there were no laws prohibiting the carrying of firearms, openly or otherwise, at least through the Civil War, except while committing an arrestable offense. Massachusetts did prohibit any possession of a slungshot or brass knuckles from 1850 onward,[13] but does not appear to have prohibited concealed carrying of a deadly weapon.

While many historical issues about concealed weapon laws remain uncertain and unresearched, most scholars (even those who

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7. *Acts of the General Assembly of the State of Georgia Passed in Milledgeville at an Annual Session in November and December, 1837* (Milledgeville: P. L. Robinson, 1838), 90-91; *Nunn* v. *State of Georgia*, 1 Ga. 243 (1846).

8. *Acts Passed at the First Session of the Twenty Second General Assembly of the State of Tennessee: 1837-8* (Nashville: S. Nye & Co., 1838), 200-201; Newton and Zimring, *Firearms and Violence*, 87; *Aymette* v. *State*, 2 Hump. (21 Tenn.) 154, 155 (1840); William R. Williamson, "Bowie Knives," in Hans Tanner, ed., *Guns of the World* (New York: Bonanza Books, 1977), 42.

9. *Acts of the General Assembly of Virginia, Passed at the Session of 1838* (Richmond: Thomas Ritchie, 1838), 76-77; Halbrook, "Rationing Firearms Purchases," 27-28.

10. *Acts Passed at the Annual Session of the General Assembly of the State of Alabama* (Tuscaloosa: Hale & Eaton, 1838 [1839]), ch. 77; *State* v. *Reid*, 1 Ala. 612 (1840).

11. Raymond W. Thorp, *Bowie Knife* (Albuquerque: University of New Mexico Press, 1948), 69-74; *Revised Statutes of the State of Arkansas, Adopted at the October Session of the General Assembly of Said State, A.D. 1837* (Boston: Weeks, Jordan and Co., 1838), Div. VIII, Art. I, § 13, p. 280.

12. Newton and Zimring, *Firearms and Violence*, 87.

13. Roger Lane, *Policing the City: Boston 1822-1885* (Cambridge, Mass.: Harvard University Press, 1967), 104; *Commonwealth* v. *O'Connor*, 7 Allen 583, 584 (Mass. 1863).

agree on little else in this politically sensitive area) accept the following facts. The courts have generally recognized concealed weapon laws as legitimate uses of the police power of the state.[14] While acknowledging the legitimacy of this form of regulation, the courts have sometimes struck down particular concealed weapon licensing strategies because they violated the equal protection or due process guarantees of the Fourteenth Amendment, adopted after the period under examination.[15]

Still, the decisions of the courts have not been unanimous about the constitutionality of laws regulating the carrying of concealed weapons. A few state supreme courts have struck down such laws as incompatible with the right to keep and bear arms provision of their particular state's constitution.[16] Other state supreme courts have implied that their state constitution's arms provision protected the concealed carrying of deadly weapons.[17] As recently as 1950, the Illinois Supreme Court suggested that a concealed weapon statute that was not narrowly "aimed at persons of criminal instincts, and for the prevention of crime" might be a violation of the Second Amendment.[18]

Why have all states except Vermont adopted concealed weapon laws? To many readers, this seems like an absurd question, rather akin to asking why all states have prohibited drunk driving. The answer would seem self-evident– yet laws regulating the carrying of concealed weapons are surprisingly recent in the United States. Many northern states passed no laws regulating concealed carrying of weapons until the 1920s.[19]

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14. Cramer, *For the Defense of Themselves and the State*, 72*ff*.

15. *Kellogg* v. *City of Gary*, 462 N.E.2d 685 (Ind. 1990); *Rabbitt* v. *Leonard*, 36 Conn. Sup. 108 (1979); *City of Princeton* v. *Buckner*, 377 S.E.2d 139 (W.Va. 1988); *Application of Metheney*, 391 S.E.2d 635 (W.Va. 1990). The list of decisions recognizing a right to *open* carrying of deadly weapons (especially firearms) for self-defense is considerably larger and beyond the scope of this work. See Cramer, *For the Defense of Themselves and the State* for a general examination of judicial interpretation of the right to keep and bear arms provisions.

16. *Bliss* v. *Commonwealth*, 2 Littell 90, 13 Am. Dec. 251 (Ky. 1822); *State* v. *Rosenthal*, 75 Vt. 295, 55 Atl. 610 (1903).

17. *State* v. *Huntly*, 3 Iredell 418 (N.C. 1843); *Wright* v. *Commonwealth*, 77 Pa. St. 470 (1875).

18. *People* v. *Liss*, 406 Ill. 419, 94 N.E.2d 320, 322, 323 (1950).

19. Don B. Kates, Jr., "Handgun Prohibition and the Original Meaning of the Second Amendment," *Michigan Law Review* 82 [November

This previously laissez-faire approach to concealed weapons was not peculiar to America. Great Britain, the primary source of the American legal tradition, did not license the carrying of concealed handguns until 1870. Even then, the licensing was purely a revenue measure, and any adult would receive a license upon payment of a fee.[20] Only the Firearms Act of 1920 restricted law-abiding adults from buying and carrying concealed handguns.[21]

Nor was this a peculiarity of Anglo-American law. A British Parliamentary report of 1889 found that a number of European countries had no restrictions on the carrying of concealed handguns. Even those nations that did have such laws seldom enforced them.[22] It is tempting to assume that the ethnic and cultural homogeneity of these societies played some part in the absence of such laws, especially since race has often played a part in the development of American gun control laws, as this work will discuss in the next chapter.

Why did most of western Europe and the United States have so few restrictions on the concealed carrying of deadly weapons so late into the modern period? Cesare Beccaria, the eighteenth-century father of Enlightenment criminology, explained classical liberalism's problem with laws regulating the carrying of arms in *On Crimes and Punishments* (1764):

> False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. *The laws that forbid the carrying of arms are laws of such a nature. They disarm only those who are neither inclined nor determined to commit crimes.* Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less

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1983]:209-210; Gregory J. Petesch, ed., *Montana Code Annotated* (Helena: Montana Legislative Council, 1990), 371; Assembly Office of Research, *Smoking Gun: The Case for Concealed Weapon Permit Reform* (Sacramento: State of California, 1986), 6-8.

20. Colin Greenwood, *Firearms Control: A Study of Armed Crime and Firearms Control in England and Wales* (London: Routledge & Kegan Paul, 1972), 17; *Parliamentary Debates*, House of Lords, new series, 39:1025.

21. Greenwood, *Firearms Control*, 7-26.

22. Greenwood, *Firearms Control*, 20-21.

> important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty– so dear to men, so dear to the enlightened legislator– and subject innocent persons to all the vexations that the guilty alone ought to suffer? *Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man* [emphasis added].[23]

Beccaria was a significant influence on the fledgling American Republic and its leading men, in his general view of criminology and specifically his notion of the counterproductive effects of laws regulating the carrying of arms.[24] Many aspects of modern America would surprise a traveler visiting us today from 1790. Our apparent return to medieval and Renaissance practice– where the law allowed only aristocrats, knights, and a few other privileged commoners to carry deadly weapons[25]– would be startling indeed.

This subject carries enormous public policy implications for today and, for that reason, carries considerable emotional baggage. Many interpretive hazards await the historian who studies the origin of laws regulating the concealed carrying of deadly weapons, but perhaps the most important risk is overgeneralization. Eight states passed concealed weapon laws in the early Republic (1776-1846), going upstream against the current of American tradition. There is no reason to presume that every state passed its law with

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23. Cesare Beccaria, *On Crimes And Punishments*, trans. by Henry Palolucci (New York: Bobbs-Merrill Co., 1963), 87-88.

24. Marcello Maestro, *Cesare Beccaria and the Origins of Penal Reform* (Philadelphia: Temple University Press, 1973), 3, 134-138, 141-142; John Adams, *Legal Papers of John Adams*, edited by L. Kinvin Wroth and Hiller B. Zobel (Cambridge, Mass.: Harvard University Press, 1965), 3:248; Stephen P. Halbrook, *That Every Man Be Armed* (Albuquerque: University of New Mexico Press, 1984; reprinted Oakland, Calif.: The Independent Institute, 1984), 35, 209.

25. Lee Kennett and James LaVerne Anderson, *The Gun in America: The Origins of a National Dilemma* (Westport, Conn.: Greenwood Press, 1975), 10-16; Richard W. Kaeuper, *War, Justice, and Public Order: England and France in the Later Middle Ages* (Oxford: Clarendon Press, 1988), 17, 244-245; John H. Mundy, *Europe in the High Middle Ages: 1150-1309*, 2nd ed. (New York: Longman Group, 1991), 94; James G. Leyburn, *The Scotch-Irish: A Social History* (Chapel Hill, N.C.: University of North Carolina Press, 1962), 10.

the same motivation. As is often the case when a state legislature passes a law, we may find a mixture of purposes within one state, or even within one statute. We must also accept the troubling possibility that because of a lack of records, we may not be able to determine *why* a particular state passed its first concealed weapon law.

Another hazard is that we must distinguish the proximate cause of these laws from the underlying cause. As we will see when we examine the statutes themselves and the newspaper coverage of their passage, the stated intent was always to reduce unnecessary bloodshed. But why did some states have enough deadly violence– or believe that they had enough deadly violence– to justify passing such laws, while other states did not? Why did some states pass laws banning concealed carrying of deadly weapons instead of some other strategy for dealing with their misuse? In the following chapters, we will explore why this culture of violence developed and why concealed weapon laws seemed like a solution to this problem– contrary to Beccaria's logic.

It would appear that the reason that Beccaria's powerful theory was ignored is that concealed weapon laws in the early Republic were not intended as a solution to a general problem of violence. Instead, concealed weapon laws were a solution to one very specific type of violence– and that category of violence was in turn a side effect of a well-intentioned effort at reforming American society.