ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
5829 HOUSE JUDICIARY

We appreciate your consideration of our comments, and trust that we can work together to accomplish your goals in a way that does not detrimentally affect our ability to prosecute activities that we all agree should be against the law.

Respectfully submitted,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: _____
Laurie H. Otto
Assistant Attorney General

cc: The Honorable Pat Rodey
The Honorable Peter Goll
The Honorable Max Gruenberg
The Honorable Dave Donley
Grace Berg Schaible
Bob Evans

Alaska Association Chiefs of Police
MICHAEL L. DAUGHERTY, PRESIDENT
4060 HEATH STREET, HOMER, ALASKA 99603

January 16, 1989



Senator Jan Faiks, Chairman
Senate Judiciary Committee
PO Box V, Mail Stop 3100
Juneau, AK 99811

RE: S.J.R. #4

Dear Senator Faiks;

The Alaska Association of Chiefs of Police is opposed to Senate Joint Resolution #4. We are concerned that shifting the existing constitutional collective right to bear arms to an undeniable, uninfringable individual right will place our existing weapon laws in jeopardy. This amendment could ultimately extend an individual constitutional guarantee to convicted felons, the mentally deranged or otherwise incompetent persons to possess firearms.

The issues of concealed weapons and prohibited weapons has not been adequately addressed. It is virtually impossible to accurately predict how the courts will interpret the intent of this amendment when these issues are raised, and we can rest assured they will be. We simply do not need more litigation in this area.

By no means is our association an anti-gun group, but we believe in and advocate responsible use, possession, and ownership of firearms. The existing law adequately protects the good citizens of Alaska.

We request that this position be made part of the record in front of your committee.

Respectfully,

Michael L. Daugherty

Michael L. Daugherty
President

MLD/dla


ALASKA CHAPTER
NATIONAL ASSOCIATION OF
SOCIAL WORKERS

8923 Tanis Drive
Juneau, Alaska 99801
(907) 789-7099

Executive Director
William Diebels, ACSW

January 31, 1989

The Honorable Jan Faiks, Chair
Senate Judiciary Committee
P. O. Box Y
Juneau, AK 99811

Re. S.J.R. 4

Dear Senator Faiks:

The Alaska Chapter of the National Association of Social Workers is opposed to Senate Joint Resolution 4. We believe that to delete the provisions in the existing constitution that give the state the right to regulate the use and possession of firearms would create serious problems in a state that already has such high rates of violent deaths and accidents which are caused by firearms.

The National Association of Social Workers represents more than 300 professional social workers throughout the state. As a group working daily with a wide range of social problems, we urge you to consider the potential negative effects of this proposed Constitutional amendment.

Our organization is not opposed to the responsible use of firearms for hunting or sport. However, we believe that it is in the best interests of all the citizens of Alaska that the state retain the power to regulate the purchase and possession of weapons. If this amendment were to pass, the state could not prohibit convicted felons and mentally deranged individuals from purchasing and possessing weapons.

We do not believe there is a need to change the existing provision in the Constitution. However, if S. J. R. 4 is adopted, we strongly urge that you add a clause to the amendment that will allow the state to continue to regulate the use of firearms, such as "except that this right may be regulated by state law or municipal ordinance".

Sincerely,

William Diebels
by mc.

Alaska Chapter
National Association of Social Workers

# Nebraskans Vot For Firearm Right

A state question to amend Nebraska's constitution to include the guaranteed right to keep and bear arms gained voter approval by a margin of 65 to 35%. Nebraska is the 43rd state to adopt such a measure. Six others have done so this decade.

The week before the vote, members of Nebraska Sportsmen's Rights Committee (NSRC), headed by NRA Director Dr. James Carlson, and NRA officials toured the state, speaking to hunting and shooting clubs, along with the news media. As on previous visits, the warm reception told organizers to expect the best on election day. But they weren't sure the strong support in the western two-thirds of the state would carry over into the east, especially in Omaha.

NSRC Chairman Carlson said the question carried in all 93 counties in the state. He is not surprised by the firearms mandate from citizens.

The Nebraska vote means local ordinances, more restrictive than the state law, will be preempted. ■

# Financial Supporters Of The Maryland Handgun Ban

National gun prohibition groups, Maryland businesses and political organizations put their financial muscle against Maryland firearms owners who sought to overturn the Maryland handgun ban by referendum in the November election. According to the October 1988 filing to the Maryland State Administrative Board of Elections, the "Citizens for Eliminating Saturday Night Specials," which opposed the private ownership of handguns in Maryland, listed the following businesses and groups as donors to their anti-gun campaign:

## SERVICE CONTRIBUTORS:

Baltimore's Child Magazine
Baltimore ($160.00)

Ed Early Printing Co.
Baltimore ($120.00)

Farrar Network
Baltimore ($1,250.00)

National Coalition To Ban Handguns
Washington, D.C. ($4,375.00)

The Commercial Refinery
Baltimore ($78.75)

Producer's Video Corp.
Baltimore ($1,026.50)

Winston Network, Inc.
Baltimore $10,640.00)
Donation made at request of the Maryland Transit Authority)

## FINANCIAL CONTRIBUTORS:

Adell Plastics, Inc.
Baltimore ($500.00)

American Ambulance & Oxygen Service
Baltimore ($5,000.00)

American Bank Stationery Co.
Baltimore ($1,000.00)

American Trading & Production Corp.
Baltimore ($5,000.00)

Americans for Democratic Action
Washington, D.C. ($100.00)

Automatic Rolls, Inc.
Baltimore ($2,500.00)

Baltimore Annual Conference United Methodist Church
Baltimore ($1,800.00)

Baltimore Equitable Society
Baltimore ($5,000.00)

Baltimore Gas & Electric
Baltimore ($15,000.00)

Barnes & Resnick, P.A. (Law Offices)
Annapolis ($9,000.00)

Briam Development Group, Inc.
Columbia ($100.00)

Broadway-Payne, Inc.
Baltimore ($1,000.00)

Chase Bank of Maryland
Baltimore ($1,000.00)

Cohen's Clothiers
Cockeysville ($25.00)

Coles Colonial Limited Partners
Baltimore ($250.00)

Concord Associates, Inc.
Baltimore [illegible]00.00)

Crown Central Petroleum
Baltimore ($10,000.00)

DeChiaro Limited Partnership
Towson ($1,000.00)

Dryden Oil Co.
Baltimore ($300.00)

Eisner Associates, Inc.
Baltimore ($50.00)

Eleanor & Franklin Roosevelt Democratic Club
Bowie ($200.00)

Environmental Elements Corp.
Baltimore $100.00)

Equitable Bank National Ass'n
Baltimore $10,000.00)

Fairbrook Park Apartments
Baltimore ($100.00)

Fidelity & Deposit Co.
Baltimore $1,000.00)

First National Bank of Maryland
Baltimore ($10,000.00)

Genstar Stone Products Co.
Hunt Valley ($5,000.00)

Group Dental Service
North Bethesda ($300.00)

Handgun Control, Inc.
Washington, D.C. ($30,000.00)

Hechinger
Landover ($3,000.00)

Hittman Materials & Medical Components, Inc.
Columbia ($250.00)

Hylton & Gonzales
Baltimore ($400.00)

H&S Bakery, Inc.
Baltimore ($2,500.00)

Inner City Realty Co. II
Baltimore ($150.00)

Jonathan Melnick Auctioneers, Inc.
Baltimore ($1,000.00)

Kamanitz, Uhlfelder & Permiso
Pikesville ($500.00)

Koren Furniture, Inc.
Baltimore ($15.00)

Lakein Jewelry Co., Inc.
Baltimore ($50.00)

Landow & Co.
Bethesda ($5,000.00)

Langenfelder & Son, Inc. Contractors
Baltimore ($500.00)

Laurel Racing Ass'n
Laurel ($10,000.00)

Laurel Sand & Gravel, Inc.
Laurel ($5,000.00)

Legum Chevrolet-Nissan
Baltimore ($1,000.00)

Levan, Schimel, Richman & Belman
Columbia ($100.00)

Louis J. Grasmick Lumber Co., Inc.
Baltimore ($1,000.00)

Loyola Federal Savings & Loan
Baltimore ($1,000.00)

Macks & Macks, Inc.
Baltimore ($1,000.00)

Manekin Corp.
Baltimore ($1,000.00)

Mars Super Markets, Inc.
Baltimore ($250.00)

Maryland Cab Ass'n
Kensington ($1,000.00)

Maryland Legislative Black Caucus
Landover ($2,000.00)

Maryland State Teachers Ass'n
Baltimore ($7,000.00)

Meridian Healthcare, Inc.
Towson ($1,250.00)

Meridian, Inc.
Towson ($3,750.00)

Micro Machining
Baltimore ($500.00)

Noxell Corp.
Hunt Valley ($20,000.00)

Number Ten Foundation, Inc.
Baltimore ($500.00)

N. Hess' Sons, Inc.
Baltimore ($500.00)

Perini Construction Inc.
Hagerstown ($1,000.00)

PHP Healthcare Corp.
Alexandria, Va. ($1,000.00)

Pioneer City Realty Co. I
Baltimore ($150.00)

Pioneer City Realty Co. 3
Baltimore ($300.00)

Piper & Marbury
Baltimore ($5,000.00)

Poor, Bowen, Bartlett, Kennedy
Baltimore ($100.00)

Prem & Oumier
Baltimore ($50.00)

Quille-Crown Parking, PMC Management MD, Inc.
Baltimore ($500.00)

Quille's Parking Co. No. 4
Baltimore ($500.00)

RCM & D
Baltimore ($250.00)

Redwood Tower Associates
Baltimore ($100.00)

Ritz Camera Centers, Inc.
Beltsville ($50.00)

Rummel, Klepper & Kahl Eng.
Baltimore ($1,000.00)

R.E. Michel Co., Inc.
Glen Burnie ($7,000.00)

Samuel Meisel & Co., Inc.
Glen Burnie ($100.00)

Schulman & Treem, PA
Baltimore ($100.00)

Stone & Associates, Inc.
Baltimore ($250.00)

Sun Furniture, Inc.
Forestville ($25.00)

The Bank of Baltimore
Baltimore ($5,000.00)

Thomas Baines, Baines Construction
Annapolis ($20.00)

Time Management Group
Baltimore $15,000.00)

T. Talbott & Ann Bond
Ruxton ($200.00)

United Methodist Mission
Baltimore $1,600.00)

White Ridgely & Associates, Inc.
Towson ($25.00)

Whiting-Turner Contracting
Baltimore $10,000.00)

Windsor House Apts. Franklin Park Apt. Co.
Baltimore ($300.00)

Woman's Suburban Democratic Club
Bethesda ($500.00)

Item 2

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL NO. HJR 7
PUBLISH DATE: 1/9/89

# FISCAL NOTE

REQUEST:

Revision Date: _____
Title: Const. Amendment - Right To Keep and Bear Arms
Sponsor: Donley
Requestor: Donley

Agency Affected: Office of the Governor
BRU: Division of Elections
Components: 1 Elections

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING | FY 89 | FY 90 | FY 91 | FY 92 | FY 93 | FY 94 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | -0- | -0- | 2.2* | -0- | -0- | -0- |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | -0- | -0- | 2.2* | -0- | -0- | -0- |
| CAPITAL | | | | | | |
| REVENUE | | | | | | |

FUNDING: (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| GENERAL FUND | -0- | -0- | 2.2* | -0- | -0- | -0- |
| FEDERAL FUNDS | | | | | | |
| OTHER | | | | | | |
| TOTAL | -0- | -0- | 2.2* | -0- | -0- | -0- |

POSITIONS:

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL-TIME | | | | | | |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

ANALYSIS: (Attach a separate page if necessary)

* Costs included cover 2 to 3 pages in each Official Elections Pamphlet, for printing and typesetting, and costs estimated to cover computer program-ing requirements for vote (Continued)

Prepared by: Linda Edgeworth
Division: Elections
Phone: 465-4611
Date: 1/12/89

Approved by Commissioner: Sandra Stone
Agency: Division of Elections
Date: 1/17/89

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

## CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HJR 7

counting purposes. However, these costs are based on the assumption that all candidates and issues will fit on three ballot cards, which is the norm. It should be noted, however that should the inclusion of this issue require a 4th ballot to be printed, the cost increase would have to be calculated at 16 cents per ballot x approximately 320,000 voters. The total cost of printing the additional ballot card would be $51.2.

Under these circumstances the fiscal note would be:

53.4

Item 3

BILL NO: SJR 4

DATE: January 30, 1989

TITLE: "Proposing an amendment... relating to the right to keep and bear arms."

CONTACT: Gayle A. Horetski
Deputy Commissioner
465-4322

DEPARTMENT OF PUBLIC SAFETY

If passed by the legislature, SJR 4 would place a proposed constitutional amendment before the voters at the next general election. The resolution contains an amendment to article I, section 19 of the state constitution, relating to a citizen's right to keep and bear arms.

The stated purpose of the proposed amendment is twofold:

1) to establish that the right to keep and bear arms under the state constitution is an individual right, rather than a collective one; and

2) to preclude local regulation of the possession or use of firearms. (At present, local regulations regarding firearms may differ from state law.)

I am concerned that the present language of the amendment, if adopted by the voters at the next election, might allow later constitutional challenge to some existing state statutes. Present law, for example, prohibits a convicted felon from possessing a concealable firearm, prohibits possession of certain weapons such as bombs, hand grenades, silencers, and sawed-off shotguns, prohibits possession of a firearm while intoxicated, the discharge of a firearm from, on, or across a highway, the carrying of a concealed weapon, possession of a loaded firearm on licensed premises, or possession of a firearm by a minor without parental consent. (See AS 11.61.200-11.61.220.)

These statutes promote public safety by restricting the possession of especially dangerous weapons or weapons carried in an especially dangerous manner or place. If any of these laws were to be struck down by the courts as violative of the amended language of article I, section 19 of the constitution, the ability of the state to regulate the possession of deadly weapons could be seriously impaired. This, in turn, could present a serious threat to the safety of innocent persons.

The Department of Public Safety sees no compelling need to change the existing language in Alaska's Constitution. The Department of Public Safety therefore opposes SJR 4.

Arthur English
Commissioner

STEVE COWPER, GOVERNOR

**DEPARTMENT OF PUBLIC SAFETY**

*COUNCIL ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT*

P.O. BOX N
JUNEAU, ALASKA 99811-1200
PHONE (907) 465-4356

OFFICE ADDRESS 450 WHITTIER STREET

January 31, 1989

The Honorable Jan Faiks, Chair
Senate Judiciary Committee
P. O. Box V
Juneau, AK 99811

Re: Senate Joint Resolution 4

Dear Senator Faiks:

I am writing on behalf of the Council on Domestic Violence and Sexual Assault. The Council opposes Senate Joint Resolution 4. Of particular concern is the lack of any language in S.J.R. 4 which explicitly preserves the state's right to regulate firearms. We strongly believe the state must retain the right to regulate firearms. Recent incidents in Alaska and in other states demonstrate that unlimited access to firearms by everyone, including the mentally unstable and convicted felons, can lead to tragedies like the death last April of the woman in an insurance office in Anchorage, and the more recent shootings of children on a school playground in Stockton, California.

The mission of the Council is to provide for planning and coordination of services to victims of domestic violence. We believe this proposed resolution directly affects victims of domestic violence. In 1987, 51 murders occurred in Alaska. 36% of the victims in these murders were either family members or in a boyfriend/girlfriend relationship. Furthermore, firearms were used in 61% of the murders.

If this proposed amendment is approved, we urge that it be amended to add a phrase preserving the state's ability to reasonably regulate the possession and use of firearms.

Sincerely,

Barbara Miklos

Barbara Miklos
Executive Director

12-L16LH

Four young victims of the Stockton massacre are laid to rest last week

SHELLEY GAZE—BLACK STAR

● COVER STORY

# The Other Arms Race

*America's streets become free-fire zones as police, criminals and terrified citizens wield more and ever deadlier guns*

BY GEORGE J. CHURCH

When Patrick Purdy sprayed 100 or so bullets from a rapid-fire assault rifle into a crowd of children outside a Stockton, Calif., elementary school, killing five students and wounding 29 others and one teacher before dispatching himself with a pistol he set off a national wave of horror. If tots playing innocently in a schoolyard at recess are no longer safe from heavily armed criminals and lunatics, who is? Many citizens concluded that no one is, and some on the West Coast resolved to take action. Their solution: to arm themselves for survival in a world seemingly gone mad.

And so the Stockton massacre started a new spiral in America's domestic arms race. All last week California gun shops were jammed with customers, sometimes standing three or four deep at counters, clamoring to buy an imitation AK-47 like the one Purdy used or, failing that, some other semiautomatic paramilitary weapon. (His gun was actually an AKS, a Chinese-made semiautomatic version of the fully automatic Soviet AK-47, though many gun dealers and users call both versions AK-47s.) At B & B Sales in North Hollywood, owner Bob Kahn spent much of Thursday frantically phoning suppliers to replenish his sold-out stocks. "We're in a frenzy," he said. Kahn assured customers that 50 AK-47 look-alikes would arrive on Friday, but some buyers were in no mood to wait. Jay Montoya, a Los Angeles salesman who had already visited

Dallas gunshop manager Chuck Payne shows off a formidable shotgun

three other stores in a futile attempt to buy the Chinese-made weapon, finally plunked down $341 and walked out with a Ruger Mini-14, an American semiautomatic rifle with a smaller caliber. Said he: "In case there's an earthquake, I'm going to protect my house [from looters, presumably]. I know how to use this gun, and I would."

In Castro Valley, Calif., Dick Bash, owner of a store named Combat Arms, reports that he is overwhelmed by demand, largely from gun fanciers who fear that the Purdy massacre might at last prod legislators into taking some serious steps to control the sale of guns. Says he: "There is an arms race on, all right. People are rushing to buy guns before the government takes them away."

In all probability, however, Combat Arms customers need not worry. The Stockton slaughter has indeed prompted talk in state legislatures and the halls of Congress about cracking down on gun sales, and a few actual proposals. Some would ban the high-powered paramilitary weapons that, foes say, have only one use: to kill human beings. Others would institute a federally mandated waiting period, generally 15 days, before a qualified buyer could pick up his gun. (Under the bewildering mosaic of state laws now in effect, waiting periods range from 30 days in New York to zero in Virginia and Oregon, where Purdy bought his rifle.) Such a cooling-off period is thought necessary to allow time for a thorough background check that would disclose whether the would-be buyer is a felon or mentally ill. Such proposals have picked up powerful new allies: police chiefs who once opposed gun control but fear that their patrolmen are being outgunned by crack-dealing gangs and other criminals.

Yet there is little reason to believe

# A Calendar of Senseless Shootings

**APRIL 23, 1987** William Bryan Cruse, 59, shoots 16, six fatally, at a shopping mall in Palm Bay, Fla. He reportedly became enraged when a teenager walked on his lawn.

Weapon: .223-cal. rifle

**FEBRUARY 16, 1988** Richard Wade Farley, 39, allegedly shoots to death seven employees of ESL, a Sunnyvale, Calif., computer company. Farley was apparently avenging his dismissal.

Weapon: 12-gauge shotgun

**MAY 20, 1988** Laurie Wasserman Dann, 30, a baby-sitter with a history of mental problems, kills one student and wounds five others at a Winnetka, Ill., elementary school.

Weapons: .357 Magnum pistol, .22-cal. pistol, .32-cal. pistol

**SEPTEMBER 16, 1988** James William Wilson, 19, allegedly attacks an elementary school in Greenwood, S.C., killing two students and wounding eight others.

Weapon: .22-cal. pistol

that the new push for gun control will get very far. Standing in the way, as always, are two mighty forces: the stubborn belief of many Americans that they have a moral and constitutional right to own guns, and the efforts of the 3 million-member National Rifle Association to fan that belief. The N.R.A. has lost none of its ability to flood the offices of Congressmen and state legislators with angry mail against the mildest gun-control initiatives. True, it lost a highly publicized referendum last fall on a Maryland law that will in effect ban cheap handguns, but that defeat was offset by a little-noticed victory in Nebraska: voters changed the state constitution to make it more difficult for Nebraska towns and counties to enact strict gun legislation. On the federal level, N.R.A. lobbying helped kill a rather weak plan that would have imposed a seven-day waiting period on buyers of handguns.

Gun-control advocates can expect no help from the Bush Administration. Quite the contrary: the new President, a life member of the N.R.A., has sweepingly asserted that "free men and women have the right to own a gun to protect their home." His views echo those of his predecessor, Ronald Reagan, who reiterated his opposition to gun control even after he was wounded by John W. Hinckley. Hinckley used a pistol he had acquired from a Dallas pawnshop only four days after his arrest in Nashville for attempting to board an airliner while concealing three handguns in a carry-on bag.

So the prospect is that the arms race in the streets and suburbs will continue to escalate, trapping growing numbers of innocent people in the cross fire. There were examples just last week of people endangered merely by being in the wrong place:

▸ In Watsonville, Calif., Ignacio Vasquez Segura on Tuesday walked into a packing shed on a mushroom farm where a former girlfriend worked. She was not there, so he asked for one of her friends, Raquel Guiterrez, 24, shot her dead and blasted away with a semiautomatic rifle, wounding two co-workers. Segura fled in a sports car and shot himself in the head as police were closing in.

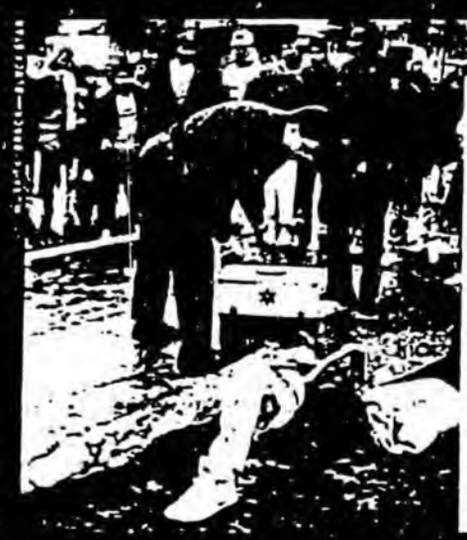
▸ In Bridgeport, Conn., the Rev. DeLen McCrae, his wife Imogene and her son Scott Bish were sleeping shortly after midnight Wednesday when a fusillade of gunfire tore through their house. They huddled on the floor in Bish's room until the firing stopped; no one was hurt, but several bullets ripped through a living-room couch on which McCrae's daughter would have slept that night had she not called off a visit. Next day an anonymous phone caller told Mrs. McCrae it had all been a mistake; the barrage was intended for a next-door neighbor.

The common element in these cases and in shootings at a high school in Washington and a car dealership in Norfolk, Va., was more than the threat to innocent bystanders. All involved the use of semiautomatic weapons. These fast-firing, powerful guns, capable of sending a bullet through a concrete wall, were once rare outside the military. But when the U.S. normalized relations with China, imports of Chinese weapons as well as other goods became legal. Purchases of the AK-47 copy soared from a mere 4,000 a year as recently as 1985-86 to more than 40,000 last year. There has also been a leap in sales of the MAC-10, a relatively cheap U.S.-manufactured semiautomatic; the AR-15, a semiautomatic copy of the U.S. military's M-16 infantry rifle; and a semiautomatic version of the Israeli-made Uzi.

A clandestine cottage industry has grown up to convert these guns into full

**JANUARY 17, 1989** A policeman displays the assault rifle used by Patrick Purdy, 26, an embittered drifter seemingly obsessed with war, when he raked the yard of an elementary school in Stockton, Calif., killing five Asian-American children and wounding 30 other people before he fatally shot himself with a pistol.

Weapons: AK-47–style rifle, 9-mm pistol



**LAST WEEK** After an earlier argument at Washington's Woodrow Wilson High School, a gunman, possibly joined by a confederate, opens fire on 200 students leaving the school for the day. Four are wounded. Police arrest an 18-year-old suspect, Rodney Reardon.

Weapon: 9-mm semiautomatic handgun

SWAT teams move in as Willie Howard Womack Jr., 26, a discharged errand runner enraged by his boss's evaluation, wounds two employees of a Norfolk, Va., auto dealership before killing himself.

Weapons: AK-47–style rifle, .32-cal. derringer, .22-cal. pistol

automatics, which can fire long bursts with a single pull of the trigger (a semiautomatic, despite its rapid-fire capability, requires a separate squeeze of the trigger for each round). A skilled gunsmith can accomplish the conversion for almost all semiautomatics, and there is a considerable demand for that service. Since 1934 federal law has made full automatics, such as machine guns, difficult to buy for anyone except police, the military and licensed collectors. A private purchaser has to obtain both federal and state licenses and undergo a rigorous federal background check.

Semiautomatics have become the weapon of choice for drug gangs looking for more firepower to blast away any threat to their giant profits, from police or rival peddlers. Law-enforcement officials note that the rise of semiautomatic weaponry parallels almost exactly the virtual takeover of parts of big cities by crack dealers. "In considerably more than half the crack arrests we make, we also seize firearms—that is, good firearms," reports Robert Stutman, head of the Drug Enforcement Administration in New York State. "The paranoia induced by the drug, which most of the traffickers use themselves, makes them pick the best weapons available for protecting themselves, and they have the money for it."

The trigger-happy crack gangs have pointed the way for other criminals who once carried relatively crude firearms or none. "The old adage about burglars and car thieves never being armed is completely changed," says Dee Anderson, an Arlington, Texas, patrolman. He reports that an Uzi and a shotgun were recently used in stickups of a convenience store and a fast-food outlet in that north Texas city. Police also note apprehensively a tendency among all types of criminals not just to carry guns but to use them rather than submit to arrest. Says Houston Police Officer Al Baker: "Just about everybody committing a crime has a gun. Not cheap Saturday-night specials, but guns they can count on. And they're willing to shoot it out rather than go to jail."

In simple self-defense, law enforcers are also turning to heavier and more sophisticated artillery, ratcheting up the arms race another notch. "The police are definitely outgunned in this country," asserts Dewey Stokes, national president of the Fraternal Order of Police. A cop armed with the six-shot .38-cal. service revolver that has been standard for decades has little chance in a shootout with a criminal wielding, say, a converted Colt AR-15 capable of firing 900 rounds a minute: if not hit in the first fusillade, the policeman is likely to be shot while reloading. Out of that fear, police departments across the country are discarding the old .38 for semiautomatic weapons, and the DEA started a year ago to rearm its agents with the Colt SMG, a submachine gun designed by Colt Industries specifically for the agency. It is small enough to fit under a coat, yet packs quite a wallop.

The final and most dismaying turn in this cycle: responsible, law-abiding citizens—afflicted by a lack of confidence in the police, reading every morning and watching on TV every night the stories about shootouts endangering innocent bystanders—start arming themselves in case they have to join the battle. It used to be that the great majority of American gun owners bought their weapons for hunting or sport (target shooting, for instance). But recent surveys show nearly 50% mentioning self-protection as their primary reason. Says Mark Warr, a soci-


Suiting up for battle: a Los Angeles police officer dons a bulletproof vest

ologist at the University of Texas: "It's a giving up on the system. People have lost confidence in the ability of local government to control crime. There is a growing feeling that 'We must do it ourselves.' "

Strikingly, it is often Jane rather than John Q. Public who is the first-time gun buyer these days. Guns have long been viewed as a symbol of male sexual power and arrogance, an attitude captured by the Beatles' song *Happiness Is a Warm Gun*. Yet surveys by Gallup for Smith & Wesson, the gunmaker, show that the number of women purchasing firearms increased 53% between 1983 and 1986, while the number thinking of buying one quadrupled, to nearly 2 million. Many of those plans have undoubtedly turned into purchases, though no updated figures are available.

The reason is that women feel especially vulnerable to violent crime—often with good reason. Carol Kolen, a Chicago psychologist, was attacked several years ago at the University of Illinois Medical Center by two men, one carrying a gun. She fought off a rape but was severely beaten. Then, on a Saturday morning last year, she was attacked again as she approached her car parked outside a neighborhood church. "After that I said, 'That's it, no more.' I made the decision then and there that my protection was in my own hands." Kolen bought a gun and is going to indoor shooting ranges to practice because she realizes that "guns are dangerous. You need to become comfortable with a gun to use it in the right situation."

But it is not only victims who are arming themselves. For many citizens of both sexes the mere thought of crime arouses a terror great enough to overcome their onetime revulsion toward firearms. "Cathy," an executive secretary in Danvers, Mass., says she once felt "absolute

# Running Guns up the Interstate

The term gunrunning brings to mind images of swift boats landing rifles on shadowy and foreign shores. But the gunrunning that plagues the U.S. these days is more a matter of illicit firearms stashed in vehicles rolling boldly up interstate highways. Federal law strictly limits the resale of weapons. However, that has not stanched a flood of firepower that travels from Southern states, where guns are quickly and easily bought, to Northern ones, where sales are more tightly regulated. Firearms bought in gun shops in Florida, Texas and Virginia—the three largest supply states—fetch top dollar when sold on the black market to drug dealers, street gangs and assorted thugs in Washington and New York City.

"With the huge profits to be made, gunrunners are flooding the market," laments federal firearms agent Phil Chojnacki in Houston. "You take off one group, and another springs up." In fact, the markup on black-market firearms is not bad. A .357-cal. magnum that sells for $250 in a Dallas gun shop will bring $700 on the streets of New York. Just $300 will buy a semiautomatic in Florida, which can be sold at the Northern end of the pipeline for $1,000 or more.

Drug dealers have been finding the gun trade a nice side business. In the past two years Jamaican drug gangs, known as "posses," that run the crack houses in Dallas have moved some 1,200 Southern firearms to other drug dealers in the North. Enterprising dope shippers can even arrange a "package deal" for their wealthy Northern buyers: a stolen luxury car that has drugs hidden in the door panels, with a cache of arms thrown in.

The driving force behind domestic arms smuggling is the discrepancy among state laws. Northern states such as New York and Massachusetts have waiting periods of several weeks on gun purchases. That gives authorities time to check buyers for a criminal record and makes it harder for miscreants to get weapons. Not so in Texas or many parts of the South, such as Florida, South Carolina and Virginia, where customers need only show a driver's license or other form of identification that certifies them as state residents.

That kind of ID is easily forged by out-of-state buyers. "People come into a gun shop with a Virginia driver's license, and the ink is barely dry," laments George N. Metcalf, Assistant U.S. Attorney in Richmond. "They buy half a dozen guns with cash, get into a car with New York license plates, and they are gone." Some gunrunners prefer to hire one or more "straw buyers," local Southerners paid as little as $100 for the use of their legitimate IDs to make the purchases. Through such means, gun smugglers often buy a dozen weapons or more at a time. Though gun dealers in some states are required to report multiple purchases, federal agents say sellers do not always cooperate.

Stopping this clandestine trade is almost impossible for agents of the Treasury Department's Bureau of Alcohol, Tobacco and Firearms. The weapons are transported by car or truck, aboard trains or stashed in the cargo hold of interstate buses and planes. Federal agents even uncovered one shipment sent by United Parcel Service and labeled "sewing-machine parts." Most of the time they move unimpeded by the kinds of inspections imposed on shipments from outside the U.S. Until more uniformity can be established among state gun laws, gun smuggling on the interstates will remain a flourishing trade.

*—By Richard Lacayo*

*Reported by Elaine Shannon/Washington and Richard Woodbury/Dallas*

fear" toward the guns her former husband kept in their house. But word went around her office building of a rape at knifepoint in the parking lot, and a greater fear took hold. "I thought about what happened, and I know I'm no match for a knife," says Cathy. "So I did a lot of thinking about whether I really wanted to carry a gun. Then I did a lot of shopping around about what kind of gun I wanted." She wound up packing a snub-nosed Smith & Wesson revolver in a shoulder holster under her business suit. "I feel safer with my gun," she says. "I feel safer walking out into the parking lot at night."

Is she actually safer? No definitive answer can be given unless someone devises a way to count crimes that are not committed because the would-be perpetrators fear that the potential victims may be armed. Some respectable authorities think the wide dispersion of guns among ordinary citizens does help deter crime. Sociologists James Wright and Peter Rossi conducted in-depth interviews over a three-year period starting in 1982 with more than 1,874 imprisoned felons. Among their findings: 56% of the cons agreed with the statement that "a criminal is not going to mess around with a victim he knows is armed with a gun," and 57% believed that "most criminals are more worried about meeting an armed victim than they are about running into the police." Fully 74% thought that "one reason burglars avoid houses when people are at home is that they fear being shot."

But the great bulk of expert opinion is that owning a gun undermines rather than increases safety: whatever deterrence of burglars or rapists might occur is more than offset by other factors. First come the suicides: in 1986, 18,153 people shot themselves to death. No one knows how many might have lived if they had been unable to pick up a gun and how many might have merely chosen other means to end their lives. But surely the presence of a loaded gun in a bureau drawer must have tempted many, particularly teens, to yield to a black depression that might have lifted had the means to carry out the dark wish not been so readily available.

Then come the accidental shootings, many by klutzes who never bother to learn how to handle their weapons. More heartbreaking are the frequent incidents of children picking up their parents' guns and finding out in the most disastrous way that they are not toys; for example, an eight-year-old boy who shot his six-year-old sister dead last week in Fairfax, Va. Then there are the quarrels between spouses, between parents and children, between neighbors and friends that suddenly turn lethal because one or both can pick up a gun. Police commonly estimate that if a household gun is ever used at all, it is six times as likely to be fired at a member of the family or a friend as at an intruder. (It is even more likely, says Dr. Carl Bell, a Chicago psychiatrist who has conducted research into crime and victimization, that the gun will be stolen: guns are prime targets for burglars because they can be easily and profitably sold to other criminals.) And finally, in the relatively rare shoot-outs between householders and burglars that do occur, it might easily be the burglar who proves more skilled in handling his gun and the householder who winds up in the morgue.

Adding all types of deaths together, James Mercy and Vernon Houk, researchers from the Atlanta-based Centers for Disease Control, point out that "during 1984 and 1985, the last two years for which data are available, the number of people who died of injuries inflicted by firearms in the United States (62,897) exceeded the number of casualties during the entire 8½-year Viet Nam conflict." Writing in the Nov. 10 issue of the *New England Journal of Medicine*, Mercy and Houk judged that "injury from firearms is a public-health problem whose toll is unacceptable." Gunfire is, in fact, the eleventh most frequent cause of death in the U.S. and sixth among people under 65. For young black men in the inner city, homicide is the leading cause of death.

In the same issue of the journal, another group of researchers presented evidence that lax U.S. gun laws might be to blame. The team, headed by emergency room surgeon John Henry Sloan, studied a pair of cities just 140 miles apart: Seattle and Vancouver. The two cities had similar unemployment rates, household incomes, law-enforcement policies and even favorite TV shows. Two differences: in Canada, handgun ownership is tightly restricted; in Washington State, guns are more easily purchased. And between 1980 and 1986 Seattle had 388 homicides, vs. 204 in Vancouver. The divergence in murder rates cannot be fully explained by different attitudes toward law-and-order. The two cities had almost identical robbery and burglary rates and even virtually the same number of killings by non-gun

## STREET FAVORITES

Assault weapons available over the counter

| NAME | COST | CAPACITY | MANUFACTURER | COMMENT |
|---|---|---|---|---|
| AK-47 | $370 | 30-round magazine; 5, 20 and 40 available; also 75-round drums | Type 56 produced by the Chinese for U.S. import | Soviet designed, adopted by armed forces in many nations |
| AR-15 | $750 | 5-round magazine; 20 and 30 available | Colt Industries, Hartford, Conn. | Civilian model of the military's M-16 used in Viet Nam |
| TEC-9 | $325 | 36-round magazine | Intratec USA, Miami, Fla. | Models have threaded barrels for attachment of silencers and barrel extensions |
| Ruger Mini-14 | $469 | 5- and 20-round magazines | Sturm Ruger & Co., Southport, Conn. | A light weapon often favored hunters |
| Uzi | $699 | 10- or 25-shot magazines | Israel Military Industries, imported by Action Arms, Philadelphia, Pa. | A compact version is carried by the Secret Service |

0 in 10 in 20 in 30 in 40 in

A head-on view of target practice at a Salisbury, Mass., shooting range, captured on film by a remote-controlled camera

methods, but gun homicides were five times as common in Seattle. The research team's scientifically understated conclusion: "Our results suggest that a more restrictive approach to handgun control may decrease national homicide rates."

That opinion is growing in the wake of the Stockton slaughter. In California, Governor George Deukmejian and Los Angeles Police Chief Daryl Gates, longtime foes of gun control, have lessened their opposition—at least when it comes to paramilitary weapons. Deukmejian now calls for a 15-day waiting period for the purchase of assault rifles. Gates would apply the waiting period to purchases of all kinds of guns, and has called for an outright ban on paramilitary weapons. Says he: "We have been too tolerant. There is no need for citizens to have highly sophisticated military assault rifles designed for the sole purpose of killing people on the battlefield."

But gun control still faces daunting practical and philosophical objections. Even some advocates think it is oversold. Police officers tend to equate guns with drugs; so long as the crack trade is not significantly reduced, they think, the inner-city shoot-outs will rage on and contribute to the impression (not entirely justified in light of slight overall declines in the national crime rate) of a rising tide of violent crime that has driven so many peaceful citizens to arm themselves. On the practical side, writing a definition of paramilitary weapons that would distinguish them from some types of semiautomatic hunting rifles is no easy job.

To be effective, any law regulating semiautomatic assault rifles would have to be federal. It would make no sense to ban such weapons in, say, California, if they could be legally purchased in neighboring Arizona or Oregon. But tens of millions of Americans—not to mention the Bush Administration—resist the thought of giving Washington that much power over citizens' lives.

Most important of all, affection for guns runs deep in the American psyche, as evidenced by the common estimate that 50 million to 60 million U.S. households, about half the total, own at least one gun. And many of those households are convinced that gun ownership is an inalienable right guaranteed by the Second Amendment to the Constitution, which reads, "A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." Actually, the wording is ambiguous: legal scholars have been quarreling for decades over whether it guarantees the right to bear arms to citizens individually or collectively—that is, as members of a "well-regulated militia." The Supreme Court has never ruled squarely on that issue and has not even faced it indirectly since the 1930s. Then it upheld a law banning sawed-off shotguns on the ground that they would be of no use to a militia, seemingly upholding the collective interpretation. On the other hand, some writings of the Founding Fathers indicate they believed an armed citizenry to be the ultimate check against any tendency of their own government to turn into an oppressive tyranny, which would imply an individual right to bear arms.

But in a society that subjects drivers to more rigorous tests before they can operate an automobile than it does gun purchasers before they can buy a deadly firearm, such logic has its limits. It surely does not apply to semiautomatic assault rifles, which are unsuitable for either hunting or reasonable self-protection. Such steps as banning paramilitary weapons and instituting a uniform waiting period would not prevent hunters, target shooters, gun collectors or even ordinary citizens legitimately concerned with self-defense from buying weapons. They would merely make it a bit more difficult. In the process they might begin to slow, if not stop, the domestic arms race and avert the greatest danger of all—that the every-man-for-himself atmosphere of an armed camp would erode the bonds of trust that keep a society from slipping into anarchy. Gun control is no panacea, but it might help forge a better society—and if the U.S. cannot make progress in the wake of the Stockton massacre, when can it?

*—Reported by Jonathan Beaty/Los Angeles, Elaine Shannon/Washington and Richard Woodbury/Dallas*

## What Should Be Done

**1** **The Federal Government should ban outright the import or sale of paramilitary weapons to civilians.**

**2** **A new federal law should replace wildly varying state and local gun statutes and should require a buyer to provide detailed background information, on pain of a felony charge for making false statements.**

**3** **The law should require a two-week waiting period to allow time for checking a buyer's background.**

**4** **It should also require that private transfers of guns be formalized by licensed gun dealers to maintain up-to-date records of actual ownership.**

**5** **States should require licensing of all gun owners and should create data banks with information on everyone with a firearm so that his or her record can be investigated as easily as that of a licensed driver.**

Item 5

Amendment HJR 7

By Donley

line 16 after "state." add:

The use or possession of arms by individuals convicted of a crime and the carrying of weapons concealed on the person may be regulated by the legislature.

Item # 6

AMENDMENT

By Spohnholz

Suggested Language for HJR 7:

SECTION 19. RIGHT TO KEEP AND BEAR ARMS. The individual [A WELL-REGULATED MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE] right [OF THE PEOPLE] to keep and bear arms for lawful purposes shall not be denied or infringed, except that the manner of keeping and bearing arms may be regulated by law.

HOUSE COMMITTEE ON STATE AFFAIRS

# RECAP OF HJR 7

*Right To Keep and Bear Arms*

Received January 9. 1989
by Reps. Donley, Boucher, Menard, Gruenberg and Leman

Heard February 7, 1989
Heard February 8, 1989

Committee Substitute adopted February 8, 1989

Passed Out of Committee February 8, 1989
4 Do Pass
3 Do Not Pass Without Amendment

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### HJR 7: Right to Keep and Bear Arms

Official Business

**COMMITTEE:** HOUSE STATE AFFAIRS

**DATE:** 2/7/89

**Subject of meeting:** SCR 10, HJR 7

# SIGN-IN

| | NAME | ADDRESS | PHONE | REPRESENTING | If testifying, which Bill #? |
|---|---|---|---|---|---|
| | Jeff Morrison | PO Box C Juneau | 465-4600 | DMVA | |
| ✓ | Laurie Otto | PO Box KC | 3428 | Law | HJR7 |
| ✓ | GAYLE HORETSKI | BOX N, JUN. | 4322 | DPS | HJR 7 |
| | BARBARA MIKOS | Box N Jun | 4356 | ADOSA | Observe. HJR7 |
| ✓ | PAUL GRANT | 217 2nd # 204 Jun | 6-2701 | ACLU/SELF | HJK7 |
| | Kate Tesar | | | Fran Ulmer | |
| ✓ | Pegge Andersen | 9414 Long Run Dr., Juneau | 9-7422 | NRA- | HJR-7 |
| | Tom Somerville | Juneau | 4-3450 | AOC | HJR 7 |
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^PM-Right To Arms NPT,740(
^Judge Says Right To Bear Arms Means Felons Can Have Guns(
^ss2(

NORTH PLATTE, Neb. (AP) _ The new right-to-bear-arms amendment in Nebraska's Constitution grants felons the same rights as others to possess firearms, Lincoln County District Judge Don Rowlands ruled.

Rowlands said in a legal opinion Monday the law banning felons from possessing guns is unconstitutional in light of the new amendment.

His ruling was the second in the last few days to strike down gun-possession laws in the wake of voters' passage in November of Initiative 403, which was placed on the ballot by petition.

Last week, the 13th Judicial District's other district judge, John Murphy, ruled the statute that prohibits possession of a defaced firearm also is unconstitutional because of the new language.

The rulings are the first in the state to address the implication of the amendment. Other challenges over the wording are pending in Douglas County, including one that maintains the amendment makes the death penalty unconstitutional.

The challenge that led to Rowlands' ruling was filed by attorney Kent Florom on behalf of Larry Rush, who had been charged with being a felon in possession of a firearm and being a habitual criminal.

After Rowlands dismissed the weapons charge, the habitual criminal charge also was dismissed at County Attorney Kent Turnbull's request.

Turnbull said both the Lincoln County cases will be appealed to the Nebraska Supreme Court.

The language at issue in both cases is found in Article I, Section 1 of the Constitution. As amended by the voters it now says:

''All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof.''

Like his colleague Murphy, Rowlands said that courts can look only to the specific language of the Constitution in interpreting it. And like Murphy, Rowlands looked to a 1986 Nebraska Supreme Court case that upheld the validity of Initiative 300.

In that case, the state's high court wrote that courts cannot ''sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.

''Even more so,'' the Supreme Court said, ''in a case involving the people's amendment to their Constitution, we make no attempt to judge the wisdom or the desirability in enacting such amendments.''

Based on that reasoning, then, Rowlands wrote, his opinion on the desirability of the right-to-bear-arms language is ''entirely irrelevant.

''One may argue that the voters of the state of Nebraska were duped by a special interest group from outside the state to pass an amendment to the Nebraska Constitution which was unnecessary or imprecisely drafted,'' Rowlands wrote.

''Similarly, a logical person might argue that Initiative Measure No. 403 should have permitted the state of Nebraska to exercise reasonable restrictions to prevent the possession of: semiautomatic or automatic assault rifles originally developed for combat; plastic handguns designed to evade detection at airport security stations; other types of firearms which are unreasonably dangerous and without social utility in a civilized society; or firearms by persons previously convicted of a felony.

''Whatever the relative merits or demerits of those positions might be,'' he continued, ''they must be considered matters of public policy more properly left to debate and decision by the people of the state of Nebraska and their elected representatives. ... If the voters of this state are dissatisfied with their Constitution, they may modify the language at any time in their sole and absolute discretion.''

In this specific case, Rowlands said, Rush was not charged with using the firearm for any unlawful purpose, but rather just a ''status'' offense of possession of a firearm with a barrel less than 18 inches long.

''If the Nebraska Legislature passed a law after the adoption of Initiative Measure No. 403 prohibiting the possession of handguns, but not shotguns and rifles

HJR

7 (FILE 2)

NO. CC972

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
ex rel, CITY OF PRINCETON, PETITIONER,

V.

HAROLD L. BUCKNER, RESPONDENT.

CERTIFIED FROM THE CIRCUIT COURT
OF MERCER COUNTY, WEST VIRGINIA

# BRIEF OF HAROLD L. BUCKNER

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NO. CC972

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
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V.

HAROLD L. BUCKNER, RESPONDENT.

CERTIFIED FROM THE CIRCUIT COURT
OF MERCER COUNTY, WEST VIRGINIA

# BRIEF OF HAROLD L. BUCKNER

## I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

Respondent, Harold L. Buckner, a duly elected and serving magistrate of Mercer County, West Virginia, refused to issue a warrant subsequent to the passage of Article 3, Section 22 of the West Virginia Constitution (The Right to Bear Arms Amendment). The petitioner sought a Writ of Mandamus in the Circuit Court of Mercer County, West Virginia, to require Magistrate Buckner to issue the warrant. The Circuit Court ruled that the constitutional provision did, in fact, void West Virginia Code, Chapter 61, Article 7, Section 1 insofar as it dealt with the carrying of firearms without a license. The Circuit Court directed the parties, with their agreement, to certify the questions presented to the West Virginia Supreme Court

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of Appeals, which granted the State's petition to docket the certified question on October 13, 1987.

## II. THE CERTIFIED QUESTIONS

1. Is West Virginia Code, Chapter 61, Article 7, Section 1, constitutional in light of the subsequent adoption of Article III, Section 22 of the Constitution of West Virginia?

2. May the Legislature of the State of West Virginia by proper legislation regulate the right of a person to keep and bear arms in the State of West Virginia?

## III. STATEMENT OF FACTS

On the 10th day of March, 1987, a city policeman in Princeton, Mercer County, West Virginia, arrested the operator of a motor vehicle for the offense of driving under the influence of alcohol. In a lawful search following that arrest the policeman discovered a .22 caliber automatic pistol in the pocket of the driver and requested the driver to produce a license for the same. The driver advised the city policeman that he did not have a license to carry the pistol.

The city policeman obtained a warrant for driving under the influence, charging the driver with that offense, and requested of the respondent magistrate that he issue a warrant for carrying a dangerous and deadly weapon without a license to do so. The respondent concluded that West Virginia Code, Chapter 61, Article 7, Section 1 was in violation of Article III, Section 22 of the Constitution of West Virginia. The Circuit Court of Mercer County found that the filing of a formal written complaint for this offense would have been a futile act and that no formal complaint

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under oath was necessary to properly bring the matter before the Circuit Court in the proceedings therein pending.

After hearing on the matter before the Circuit Court, the Court made the following findings of fact:

1. "The Court finds that in comparing West Virginia Code, Chapter 61, Article 7, Section 1, and in Article 3, Section 22 of the Constitution of West Virginia, that the said statute appears to be in conflict with the constitutional provision."

2. "The Court, therefore, finds that Article 3, Section 22, of the Constitution has voided that part of West Virginia Code, Chapter 61, Article 7, Section 1, dealing with the carrying of firearms without a license. The Court finds that the Legislature of the State of West Virginia may regulate in some fashion the right to keep and bear arms under circumstances not in conflict with Article 3, Section 22 of the Constitution of West Virginia."

The petitioner and respondent agreed to certify this matter to this Court.

## ARGUMENT

### A. THAT THE VOTERS WERE LED TO BELIEVE THAT THEIR PASSAGE OF THE AMENDMENT WOULD NOT ABROGATE EXISTING STATUTORY REGULATION OF DANGEROUS WEAPONS.

The State, in its brief, observes that "much of this argument was distilled from a draft of James W. McNeely's comprehensive article entitled 'The Right of Who to Bear What, When and Where—W.Va. Firearms Law v. The Right to Bear Arms Amendment', 90 W. Va. L. Rev. p. 1125 (1987)".

As pointed out in the amicus curiae brief of the National Rifle Association, Mr. McNeely was a member of the Legislature which passed the constitutional amendment in question, having been elected and duly serving as such from Mercer County. As pointed out on page 5 of the amicus curiae brief, Delegate McNeely

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attempted to insert the word "lawful" by amendment on March 20, 1985, and that amendment was subsequently stricken by the Legislature. Subsequently, on the next day Delegate Thomas A. Knight, D-Kanawha, attempted to have the resolution returned to second reading in order to make an amendment, subjecting the right to the "police power" of the state. This attempt was defeated seventy-six to twenty-two in the House of Delegates. The House of Delegates then voted ninety-one to seven to pass the resolution.

On the Senate side, Senator Palumbo argued long and hard against the resolution for the fear that it would strike down existing laws. See Appendix A-20 to the amicus curiae brief.

A review of the various articles, which are attached to the amicus curiae brief, as an appendix, indicates that newspapers and debates throughout the State during the passage of the resolution and thereafter, fully and thoroughly expressed the opinion of those who would oppose the resolution on the basis that it would cancel existing gun-control laws.

The State, in its brief, concludes (page 8) that "it is clear that the Right to Keep and Bear Bears Amendement to the West Virginia Constitution was not meant to nullify existing laws." This conclusion is without factual support or logic. Had the efforts of Delegate McNeely to add the word "lawful" and had the efforts of Delegate Knight to make the amendment subject to the "police power" of the State, or either of these efforts, been successful, then the argument of the State might bear some logic. The fact that both of these efforts were specifically turned down by the Legislature indicates clearly that the Legislature had no such intent as stated by the State. Had that been the clear intent of the Legislature in passing the resolution, it could have simply added language to that effect, or adopted one of the amendments referred to.

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The argument of the State in its brief, on page six and seven, alleging that the proponents repeatedly asserted "that the proposed amendment would have no effect on existing gun laws; the express purpose of the amendment was simply to prohibit municipalities from, at some point in the future, banning guns", is equally illogical in light of West Virginia Code, Chapter 8, Article 12, Section 5A, which very clearly provides that

> "...neither a municipality nor the governing body of any municipality shall have the power to limit the right of any person to own any revolver, pistol, rifle or shotgun, or any ammunition or ammunition components to be used therewith nor to so regulate the keeping of gunpowder so as to directly or indirectly prohibit the ownership of such ammunition...."

This statute was passed by the Legislature in 1982 prior to the passage of the resolution in question. That statute goes on to permit the municipalities to pass ordinances relating to the arresting and conviction of persons for carrying about their persons any revolver or other pistol, etc. It is interesting to note that this section does not even require an exemption where the person has a license therefor. Thus, with West Virginia Code, Chapter 8, Article 12, Section 5A in place, the municipalities could not have passed any laws banning or possessing the listed firearms in the future.

The basis of the argument of the State is that the proponents took the position that the right to bear arms amendment did not change existing laws. The fact of the matter is that the opponents of the amendment took the position that it would, in fact, change existing law and the Legislature refused, although given opportunity to do so, to word the amendment in such a fashion so as to deal with that question.

As pointed out by the undersigned in Respondent's Note of Argument heretofore filed, the function of constitutional provisions as opposed to statutory provisions, was discussed by Judge Browning in State v. Brown, 157 S.E. 2d 580 (W. Va. 1967), in which he makes the following observation:

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> "At the outset it might be well to reiterate what this court has said on several occasions...'The Legislature of this State, unlike the Congress of the United States, under the Federal Constitution, does not depend for its authority upon the express grant of legislative power. The Federal Constitution is a grant of power; the State Constitution is a restriction of power. The Constitution of the State is examined to ascertain the restraints, if any, which the people have imposed upon the Legislature, not to determine the powers they have conferred.'"

If West Virginia Code, Chapter 61, Article 7, Section 1 is still effective, why did we need Article III, Section 22 of the Constitution? If Article III, Section 22 of the Constitution means anything, it has to mean that the people of the State wanted to change the law in existence at the time and place restraints upon the Legislature. Any other conclusion is illogical and would render the act of the Legislature and the people in adopting the constitutional provision an exercise in futility.

The comparison by the State of the instant constitutional provision with the federal constitutional provision as discussed in State v. Workman, 35 W.Va. 367, 14 SE 9 (1891) ignores the fact that the provisions now before the Court are substantially different from the Second Amendment to the United States Constitution, which says

> "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."

The Federal Constitution refers to the "people" as a class, as compared to the constitutional provision now before the court, which refers to "a person".

There is an obvious and clear inconsistency between West Virginia Code, Chapter 61, Article 7, Section 1, and Article III, Section 22 of the Constitution. It is the duty, therefore, of this Court to apply the clear intention of the electorate and hold the statute in question unconstitutional. This principal has been enunciated by this court in unequivocable language:

> "If a constitutional provision is clear in its terms, and the intention of the electorate is clearly embraced in the language of the provision itself, this court must apply and not interpret the provision." State ex rel Bagley v. Blankenship, 246 SE 2d 99 (W. Va. 1978).

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## B. THAT THE RIGHT TO BEAR ARMS IS NOT UNLIMITED, AND IS SUBJECT TO REASONABLE REGULATION BY THE LEGISLATURE TO PROMOTE THE PUBLIC WELFARE.

### 1. THAT THE LEGISLATURE'S POLICE POWER PERMITS REASONABLE REGULATION OF THE EXERCISE OF FUNDAMENTAL CONSTITUTIONAL RIGHTS.

The Right to Bear Arms Amendment is, as observed by the State in its brief on page nine, clear and unequivocable. It is conceded that the amendment would by implication exclude the use of arms for purposes other than as stated in the amendment. The Legislature may address those other purposes in a fashion not inconsistent with the constitutional provision. Unfortunately, West Virginia Code, Chapter 61, Article 7, Section 1 far exceeds the power of the Legislature to so address the use of arms for purposes not set forth in the Right to Bear Arms Amendment.

To argue that the licensing scheme satisfies the constitutional amendment is to ignore reality. The licensing scheme in West Virginia now in place is found in West Virginia Code, Chapter 61, Article 7, Section 2, and requires the applicant for the license to publish a notice setting forth his name and occupation and the fact that he will appear before the Circuit Court on a certain day and make application. The section goes on to provide that the court "may" grant the license. The applicant must file a verified application showing (1) that he is a citizen of the Uniteds States of America; (2) that he has been a bona fide resident of the state for at least one year and of the county for sixty days; (3) that he is over eighteen years of age, a person of good moral character, of temperate habits, not addicted to intoxicants nor controlled substance and that he has not been convicted of a felony or any offense involving the use of a weapon in an unlawful manner, and that he is gainfully employed in a lawful occupation and has been so engaged for a period of five years

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ATTORNEYS AT LAW
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PRINCETON, WV 24740

next preceding the date of his application; (4) the purpose or purposes for which the applicant desires to carry a weapon, the necessity therefor, the counties in which he desires to do so; (5) that he is qualified under minimum requirements for the handling and firing of firearms as promulgated by the Department of Natural Resources. The applicant, if he can convince the Circuit Court that he ought to have a license under these provisions, is then required to pay $50.00 to the Sheriff and file a bond with the Clerk of the Circuit Court in the penalty of $5,000.00. After all of this is done and the fees paid, the license is issued and the Clerk furnishes the Superintendent of the Department of Public Safety a certified copy of the order.

How is it possible to read into the constitutional amendment that a person's right to keep and bear arms can be so restricted? There is nothing in the constitutional amendment which could restrict the right to citizens of the United States of America, to a one-year residency of the state and a sixty day residency of the county. The statute requires that the person be gainfully employed in a lawful occupation and have been so engaged for a period of five years next preceding the date of his application. This would eliminate retired persons, persons on disability, housewives, persons in school and anyone else who has not been gainfully employed for a period of five years. Is the State taking the position that these people are not "persons" as contemplated by the constitutional amendment? Where in the constitutional amendment does it authorize the Legislature to delegate to the Department of Natural Resources the power to make rules and regulations for the handling and firing of firearms? Where in the constitutional amendment does it say that a person is restricted to a particular county or counties in which he may keep and bear arms? Where in the Constitution does it say that the Circuit Court shall, in its exclusive discretion, decide who can keep and bear arms and who can't keep and bear arms?

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This rather brief analysis of the licensing law should make it obvious that the existing law, with regard to the right to keep and bear arms for the reasons set forth in the amendment, is clearly unconstitutional.

It is admitted that the Legislature's police power may encompass "reasonable" restraints upon constitutionally granted rights, but the State herein is taking an extremely unreasonable view of that right. By way of example, the right of free speech as established by the Constitution does not extend to the right of a person to yell fire in a crowded theater. But here, if the State's position is well taken, the right of free speech could be restricted to persons who have a license to speak, who have been residents of the state for more than a year, have been gainfully employed for more than five years, and conform to the regulations set forth by some bureauracy of state government. All other persons would not have the right of free speech.

## 2. THAT LEGISLATURES FROM JURISDICTIONS WITH CONSTITUTIONAL PROVISIONS SIMILAR TO WEST VIRGINIA'S REGULATE CARRYING HANDGUNS.

The State here argues that many other states have similar constitutional provisions and goes forward with statutory regulations concerning the same. While this argument might be helpful, it is submitted that the same is an argument to the wrong branch of government. This is a legislative matter. The question before this court being narrowly limited to the constitutionality of West Virginia Code, Chapter 61, Article 7, Section 1, and the certified question as to whether or not the Legislature may regulate in some fashion the right to keep and bear arms under circumstances not in conflict with Article III, Section 22 of the Constitution of West Virginia.

The State seems on pages 13 and 14 of its brief to be conceding that the licensing requirements of West Virginia are oppressive, at least in the two instances of the posting of a bond and that the person be employed for the five preceding

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years, and concludes that they may be stricken without compromising legislative intent. The undersigned does not find in the statute the usual provision that the provisions therein are severable and that the statute would survive if any part of it is found to be unconstitutional. However, the entire philosophy of the licensing statute was passed without the benefit of the guidance of the Right to Bear Arms Amendment. The undersigned does not concede, by any interpretation, that the Legislature has the power to require a license based upon the other requirements set forth in West Virginia Code, Chapter 61, Article 7, Section 2. The Circuit Court still has, under the State's suggestion, the absolute right to grant or not grant the license and the other provisions of the licensing statute are equally oppressive. A person does not need a license to exercise the right of free speech. The Right to Bear Arms Amendment does not provide for a license. The right is stated in clear and unequivocable language, and is not subject to interpretation by applying conditions and restrictions not contained therein.

### 3. THAT COURTS FROM JURISDICTIONS WITH SIMILAR CONSTITUTIONAL PROVISIONS UPHOLD THE LEGISLATURE'S POWER TO IMPOSE REASONABLE RESTRICTIONS ON HANDGUN CARRYING VIA LICENSING.

Why does the State insist upon a license? Why can't we just accept the constitutional amendment as it is written and in its clear language? What is the fear?

These questions seem to require some answer before this issue can be put in perspective. For some unknown reason, governments in modern times seem to think that they can control people by requiring licenses for various aspects of life. The population of West Virginia by an overwhelming majority passed Article III, Section 22 of the Constitution of West Virginia and didn't put the word license in there anywhere. Why is it so hard for the State to accept the provisions of that constitutional amendment as it is written?

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PRINCETON, WV 24740

Perhaps the State feels that bad people will have weapons and hurt good people. It probably shouldn't be a shock to the State to know that bad people already have weapons and are already hurting good people. Apparently the State feels that if the constitutional amendment is allowed to stand in its clear language, the bad people will have more guns and will hurt more good people. If this is their thought, they don't live in the real world. The bad people have all the guns they want. It is the good people, the people who respect and obey the law, who don't want to go to the trouble of going to the Circuit Court to obtain a license, post a bond, run an ad in the newspaper and prove all the requirements of the law, to obtain "permission" to keep and bear arms; these are the people who don't have arms in our state. Convicted felons are prohibited by federal law from possessing or carrying firearms which have moved in interstate commerce (18 U.S.C.A. Section 922(g), (1987 pocket part), which should alleviate the fear that these people will lawfully have weapons.

The State's chart of licensing statute indicates that most states permit the open bearing of arms without a license. The undersigned is informed by attorneys for the National Rifle Association, appearing by amicus curiae, that the claim in the chart, that Michigan requires a license to carry openly, is incorrect, citing M.S.A., Section 28. 424, M.C.L. Section 750.227, which reads as follows:

> "A person who shall carry a dagger, dirk, stiletto or other dangerous weapon, except hunting knives adapted and carried as such, concealed on or about his person, or whether concealed or otherwise in any vehicle operated or occupied by him, except in his dwelling house or place of business or on other land possessed by him; and a person who shall carry a pistol concealed on or about his person, or, whether concealed or otherwise, in a vehicle operated or occupied by him, except in his dwelling house or place of business, or on other land possessed by him, without a license to carry the pistol as provided by law, or if licensed, carrying in a place or manner inconsistent with any restrictions upon which such license, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than five years, or by a fine of not more than $2,500.00."

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Further that Connecticut and Indiana require a license to carry a pistol openly. However, a license is issued as a matter of right because of the right to bear arms. Rabbitt v. Leonard, 36 Conn. Super. 108, 413 A. 2d 498 (1979; Schubert v. Debard, 73 Ind. Dec. 510, 398 N.E. 2d 1339) (Ct.App. 1980), and that it has even been held that "not making (pistol license) applications available at the chief's office effectively denied members of the community the opportunity to obtain a gun permit and bear arms for their self defense". Motley v. Kellogg, 78 Ind. Dec. 316, 409 N.E. 2d 1207, 1210 (Ct. App. 1980).

Further, according to counsel for the National Rifle Association, the State has cited Utah Constitution erroneously, the same having been reworded to read as follows:

> "The individual right of the people to keep and bear arms for security in defense of self, family, others, property, or the state, as well as for other lawful purposes, shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms."

The up-to-date right to bear arms guarantees of the forty-two states may be found in the Appendix to the amicus curiae brief on pages A-25 to A-29.

Since virtually every case relative to the position of the respondent herein has been cited in the amicus curiae brief, the respondent adopts that brief and the contents thereof herein.

Respectfully submitted.

HAROLD L. BUCKNER, Respondent, P.Q.

JOHNSTON, HOLROYD & GIBSON

By _____
ROBERT E. HOLROYD
Of Counsel for Respondent
1438 Main Street
Princeton, West Virginia 24740

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& GIBSON
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PRINCETON, WV 24740

## CERTIFICATE OF SERVICE

I, ROBERT E. HOLROYD, of counsel for Respondent, do hereby certify that I served a copy of the foregoing Brief upon the following counsel, by depositing a true copy of same in the United States Mail, postage prepaid, addressed to them as follows, on the 12th day of January, 1988:

SILAS B. TAYLOR
Counsel for State of West Virginia
State Capitol, Room 26-E
Charleston, West Virginia 25305

ROGER D. CURRY, Esquire
McLaughlin, Curry & Williams
Post Office Box 1629
Fairmont, West Virginia 26555

ROBERT E. HOLROYD

JOHNSTON, HOLROYD
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1438 MAIN STREET
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see bill referral file for full report

97th Congress
2d Session

COMMITTEE PRINT

# THE RIGHT TO KEEP AND BEAR ARMS

## REPORT

OF THE

## SUBCOMMITTEE ON THE CONSTITUTION

OF THE

## COMMITTEE ON THE JUDICIARY

## UNITED STATES SENATE

## NINETY-SEVENTH CONGRESS

SECOND SESSION

FEBRUARY 1982

Printed for the use of the Committee on the Judiciary

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WASHINGTON : 1982

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Washington, D.C. 20402

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE NAVARRE

NAME: BILL LUND
TITLE: 376-5149 WK #
DDRESS: POB 870368
CITY: WASILLA ZIP: 99687
PHONE: 376-6533
ILL NO:
UBJECT: LOCAL AUTONOMY-ILLEGALIZE HOME BREWING???
ESSAGE: DEAR SIRS
PLEASE WORK TO REPEAL OR AMEND THE LAW WHICH MAKES HOME BREWING ILLEGAL IN THE STATE. I REALIZE AFTER TALKING TO MISTER LARSON'S OFFICE, THAT THE INTENT WAS NOT TO ILLEGALIZE IN THIS AREA AND WAS ADVISED THAT I COULD PROBABLY CONTINUE. BUT THIS IS A HOBBY OF MINE THAT I LIKE TO BRAG ABOUT AND I LIKE TO BE LEGAL. WOULD APPRECIATE A REPLY.

POMID: 14112057
DATE: 01/17/89
TIME: 11:20:57
IONAME: MAT-SU LIO

| COPIES: | REPRESENTATIVES | REPRESENTATIVES | SENATORS |
|---|---|---|---|
| | LARSON | MENARD | KERTTULA |
| | BARNES | BOUCHER | SZYMANSKI |
| | BOYER | CATO | BINKLEY |
| | COLLINS | COTTEN | FAHRENKAMP |
| | DAVIS, M. | DONLEY | FAIKS |
| | ELLIS | FOSTER | HALFORD |
| | FURNACE | GOLL | JONES |
| | HANLEY | HOFFMAN | PEARCE |
| | KOPONEN | MARTIN | STURGULEWSKI |
| | MILLER | PETTYJOHN | UEHLING |
| | PHILLIPS | SHARP | ZHAROFF |
| | SHULTZ | SWACKHAMMER | |
| | TAYLOR | ULMER | |
| | ZAWACKI | | |

PUBLIC OPINION MESSAGE

1389

DEAR: REPRESENTATIVE NAVARRE

NAME: RICHARD ROSS
TITLE: CHIEF OF POLICE
ADDRESS: 107 S. WILLOW ST
CITY: KENAI, ALASKA ZIP: 99611
PHONE: 283-7879
BILL NO: HJR 7
SUBJECT: RIGHT TO KEEP AND BEAR ARMS
MESSAGE: REQUEST THAT YOUR COMMITTEE NOT MOVE THIS RESOLUTION UNTIL IT HAS RE CEIVED THOROUGH LEGAL REVIEW. THE CONCERN BEING THAT THE MINIMAL STATUATORY R ULATION CURRENTLY PLACED ON FIREARMS POSSESSION (IE FELON IN POSSESSION;POSSES ION ON LICENSED PREMISES; WHILE INTOXICATED; OF ILLEGAL WEAPONS; CONCEALED WEA PONS) MAY BE JUDICALLY NULLIFIED IF ADOPTED.

POMID: 13143834
DATE: 01/17/89
TIME: 14:38:34
LIONAME: SOLDOTNA LIO

| COPIES: | REPRESENTATIVE | SENATOR |
|---|---|---|
| | SWACKHAMMER | FISCHER |

Copy Rep. Go!

Niggliek
Feb 2

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: SHIRLEY WARNER/APOA
TITLE: VICE PRESIDENT
ADDRESS: 7800 LOTUS DRIVE
CITY: ANCHORGE, ALASKA ZIP: 99502
PHONE: 786-8851
BILL NO: SJR 15
SUBJECT: RIGHT TO KEEP AND BEAR ARMS
MESSAGE: THE APOA STRONGLY OPPOSES THIS BILL. THE ALASKA CONSTITUTION AS IT IS WRITTEN WORKS WELL FOR LAW ENFORCEMENT. THERE ARE SOME POTENTIAL PROBLEMS WITH WHAT THE NRA WANTS. IF IT WORKS FINE IT SHOULD BE LEFT ALONE. PLEASE REMEMBER GUNS IN BARS AND ON SCHOOLGROUNDS. KEEP IN MIND RHEA VEGA.

POMID: 03171430
DATE: 05/03/88
TIME: 17:14:30
LIONAME: ANCHORAGE LIO

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GRUENBERG
BARNES
COTTEN
NAVARRE
TAYLOR
ULMER

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: ROBERTA ROGERS
TITLE:
ADDRESS: 7310 MARCH COURT #2
CITY: ANCHORAGE, ALASKA ZIP: 99504
PHONE: 333-9485
BILL NO: HB 348
SUBJECT: MEMBERSHIP OF MEDICAID RATE COMMISSION
MESSAGE: I VOTE FOR YOU NOT TO TAKE CHIROPRACTIC OFF MEDICAID.

POMID: 03172411
DATE: 05/03/88
TIME: 17:24:11
LIONAME: ANCHORAGE LIO

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BARNES
COTTEN
GRUENBERG
NAVARRE
TAYLOR
ULMER

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: JIM WEIDNER
TITLE: PRES. ASSOC. FOR PROTECTTION OF PF
ADDRESS: 5479 CHEAN HOT SPRINGS ROAD
CITY: FAIRBANKS ZIP: 99701
PHONE: 480-6366
BILL NO: SJR 25
SUBJECT: USE OF INCOME FROM PERMANENT FUND
MESSAGE: THIS ALSO PERTAINS TO HJR48. LET US NOT FORGET THESE IMPORTANT BALLOT PROPOSITIONS. URGE THAT THE CONCEPTS CUTLINED IN THESE RESOLUTIONS BE PLACED ON THE BALLOT. HJR 48'S TEXT SEEMS MOST REASONABLE, BUT SJR 25 IS ALL RIGHT TOO. EOM-FZ

POMID: 07091632
DATE: 05/04/88
TIME: 09:16:32
LIONAME: FAIRBANKS LIO

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DONLEY ELLIS
FRANK FURNACE
GOLL GRUENBERG
GRUSSENDORF HANLEY
HERRMANN HOFFMAN
HUDSON KOPONEN
LARSON MARTIN
MENARD MILLER
NAVARRE PEARCE
PETTYJOHN PHILLIPS
POURCHOT RIEGER
SHULTZ SPRINGER
SHACKHAMMER TAYLOR
ULMER WALLIS
ZAWACKI

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE SUND

NAME: DUANE UDLAND
TITLE: PRES.ALASKA CHIEFS OF POLICE
ADDRESS: BOX 2499
CITY: SOLDOTNA ZIP: 99669
PHONE: 262-4455
BILL NO: SJR 15
SUBJECT: RIGHT TO KEEP AND BEAR ARMS
MESSAGE: THE CHIEFS OF POLICE HAVE NOT CHANGED THEIR POSITION ON SJR15. WE D NOT BELIEVE A CONSTITUTIONAL AMMENDMENT IS NECESSARY. THE RIGHTS OF ALASKANS ARE ALREADY WELL PROTECTED UNDER OUR PRESENT CONSTITUTION. IF LEGISLATION MU BE PASSED WE PREFER THE VERSION AS WRITTEN BY REP. ULMER'S COMMITTEE.

POMID: 13092431
DATE: 05/04/88
TIME: 09:24:31
LIONAME: SOLDOTNA LIO

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COTTEN
GRUENBERG
NAVARRE
TAYLOR
ULMER

# Voters know NRA rhetoric from real dangers

**tom wicker**
in the nation

NEW YORK — Is the National Rifle Association slipping? If the 1988 election returns are a guide, this most feared special interest in American politics may be shooting itself in the foot.

It's well known that the NRA poured $6.1 million into Maryland to overturn a state law banning cheap, concealable handguns. Voters nevertheless supported the legislation by a wide margin, as the NRA suffered its first defeat in a statewide referendum on gun control.

It's not so well known that every U.S. senator targeted by the NRA won re-election anyway. Among them was Howard Metzenbaum, D-Ohio, a persistent advocate of gun control who has been as persistently denounced by the gun lobby ("our biggest foe," declared Wayne LaPierre, chairman of the NRA Political Victory Fund).

Metzenbaum was the Senate sponsor of the Brady amendment. Named for James Brady, the former press secretary wounded in the attempt on President Reagan's life, the amendment called for a seven-day waiting period during which police could determine whether anyone trying to buy a handgun had a felony record.

Despite the organization's efforts to defeat Metzenbaum — he estimates that they spent "hundreds of thousands" against him in Ohio — he was re-elected by 602,000 votes.

Metzenbaum thinks his triumph over the NRA will improve chances for the Brady amendment in the next Congress.

The Maryland referendum defeat also should lessen legislators' fears of the NRA's ability to retaliate, since it happened on the congressional doorstep and was heavily covered by Washington press and television. The gun lobby put up $6.1 million of the total of $6.6 million spent in opposition to the state's handgun law.

Supporters of the handgun law spent only $752,107 to win by 58 to 42 percent. With Gov. Schaefer and most Maryland law enforcement officials on their side, they succeeded in convincing voters that the law did not threaten legitimate sportsmen and gun owners, but would be effective in banning sales of cheap weapons useful only to criminals.

These blows to the NRA in the 1988 elections were balanced, if at all, only by a Nebraska vote to amend the state Constitution to guarantee the right to bear arms. Bush's election also may be a boost for the NRA, since he has opposed the waiting period and other gun control legislation.

None of this necessarily means that the NRA will not remain a powerful opponent of legislation and candidates that appear to threaten the millions of non-criminal Americans who legitimately own and want to keep guns. In all but a few states, they form a powerful voting bloc easily aroused against anything they think would deprive them of, or restrict their ability to possess, weapons they regard as theirs by right.

The 1988 election returns suggest, however, that such gun owners may be making sharper distinctions between real threats to their perceived interests, and such reasonable, law-enhancing steps as the seven-day waiting period (already in effect in 22 states) and Maryland's ban on cheap, concealable handguns.

If that's so, the NRA will have to rethink its traditional cry-wolf tactics.

☐ Tom Wicker is a New York Times columnist.

DIALOG File 259: AP NEWS - JULY 1983 - JUN 1988 (COPR. 1988 ASSOCIATED PRESS)

In the 1986 congressional elections, not a single incumbent targeted for defeat by the NRA lost his or her seat.

LaPierre: "It's very tough to defeat incumbents in Congress these days. Most members of Congress who vote for gun control are in safe districts and nobody's going to beat them. There are few competitive districts left where the gun issue is the (major) issue."

In recent congressional battles and numerous state gun control fights, the NRA and the organized police groups have clashed bitterly. This has given state lawmakers and members of Congress a political escape hatch, allowing them to oppose the NRA by supporting their local police.

"I don't see their relationship with police as ever being very good again," says Jerald Vaughn, executive director of the International Association of Chiefs of Police.

LaPierre says he held meetings recently with "three or four" members of Congress, "people who we felt were confused" over the early version of the plastic gun bill. "They're still friends of the NRA."

LaPierre's view of his meeting with Exon: "I view it as informational. If information is fence-mending, and fence-mending is information, I guess you could interchange them."

Vaughn says of the NRA, "They are by no means out of the picture, but there are signs their stranglehold on this administration and Congress is starting to loosen a bit. There's a growing recognition in law enforcement the NRA is an organization out of control. But politically, they're a savvy organization. They make sure they're never in a position of having to admit defeat."

N.T. "Pete" Shields, chairman of Handgun Control Inc., says the entry of law enforcement groups into the fray has been crucial.

"The NRA used to call us bleeding-heart communists, soft on criminals," Shields says. "Now, whole law enforcement community the guys on the firing line on the street is behind it (the fight to control guns). It's not credible to think of those people as bleeding-heart, liberal communists."

0407539
SECTION: General news
STORY TAG: FloridaGuns
BY: COLE, RICHARD ; Associated Press Writer
DATELINE: MIAMI (AP) April 28, 1988
TIME: 1143PST CYCLE: AM
PRIORITY: Regular WORD COUNT: n/a

The shooting of three Miami policeman in a month, along with a skyrocketing murder rate, had authorities here demanding a change in Florida's liberal gun law Thursday, and the state Legislature appears to be responding.

Only hours after Miami motorcycle patrolman James Hayden was wounded twice with an automatic pistol during a routine traffic stop, a state House criminal justice subcommittee voted 4-3 Thursday to recommend an amendment to the state constitution to require a seven-day cooling-off period for gun buyers.

On Wednesday, the full Senate had approved another bill that tightened up gun law loopholes allowing some convicted criminals to get concealed weapons permits.

The current relaxed gun law, approved last year over the protests of urban police agencies, all but eliminated cooling-off periods, banned local gun control ordinances and allowed most Floridians to carry a concealed weapon.

Opponents, including Miami-area police and city officials, say it encourages a Wild West atmosphere they blame for a surge in violence.

"You liberalize gun laws and people feel they are at liberty to go out and shoot each other and shoot policemen," an angry Miami police Sgt. David Rivero said Thursday. "We're headed the wrong way."

Miami had an 18 percent increase in gun-related crimes between October and March, compared with the same period before the law was passed. And ominously, gun thefts were up 30 percent, said Rivero.

The murder rate in Dade County, after having dropped last year, has soared again, hitting the 100 mark in April four months ahead of the 1987 rate.

"We're going to have to see a lot more people killed and maybe a lot more policemen killed before the Legislature makes a change," said Metro-Dade police spokesman Al Hidalgo-Gato.

Miami Mayor Xavier Suarez on Thursday called for a new law or a state constitutional amendment giving local communities the right to regulate guns.

"We need extensive background checks and a cooling-off period," said Suarez. Under the current state law, counties can impose a limited two-day cooling-off period, but police say it's so vague that it's meaningless.

Wednesday night's wounding of Hayden, who was listed in stable condition Thursday, occurred in the same neighborhood
(cont. next page)

# Alaska State Legislature

Please enter into the record my testimony to the House Judiciary
committee name

committee on SJR 15 dated 4-20-88
bill/subject

The Alaska Association of Chief's of Police has been opposed to this resolution since it's introduction. Our position on the committee substitute at this time is that we haven't had enough time to poll our membership on the new version, it's late in the session and we don't feel there is enough time left to resolve the issues to everyone's satisfaction. At the present time there are no attempts to infringe on individual rights to keep and bear arms, therefore we don't see any need for urgency in passage right now.

Signed: Dan Rushington
Testifier

KETCHIKAN P.D. & A.A.C.O.P.
Representing (Optional)

361 MAIN ST KETCHIKAN
Address

225-6631
Phone No.

# ALASKA PEACE OFFICERS ASSOCIATION

State APOA Office • P.O. Box 240106 • Anchorage, AK 99524-0106 • (907) 786-1807



February 15, 1988

The Honorable Fran Ulmer
Chair, State Affairs Committee
Alaska State Legislature
P. O. Box V
Juneau, AK 99811

Dear Fran:

I am writing concerning Senate Joint Resolution 15 which proposes an amendment to the Constitution of the State of Alaska. The resolution has been referred to the House State Affairs Committee.

On January 14, 1988, the Alaska Peace Officers Association Board of Directors formally received the proposed resolution. At the conclusion of the review a motion was unanimously passed opposing Senate Joint Resolution 15.

Our concern with this amendment change is that the door could be conceivably left open to eliminate other laws currently on the books. Laws such as felon in possession of a handgun, possession of weapons by intoxicated persons, carrying concealed weapons, etc. We feel these are fair and justifiable laws that are obviously needed.

As you are probably aware, a majority of our members are gun enthusiast. We are engaged in many activities such as hunting, target shooting, trap shooting and almost any sporting activity relating to guns and weapons. We do not feel our current constitution prohibits or dampens any legitimate activity in relation to these activities.

Therefore, if the machine is not broken, why fix it. We do not feel the current constitution infringes upon any person or group, the right to bear arms. It does, however, allow the state to control the possession of weapons by certain people such as felons and people under the influence. It also allows the state to control certain classes of weapons, such as bombs, silencers, sawed-off shotguns, switchblade knives and the like.

If you have any further questions, please contact me.

Sincerely,

Ed Kalwara

Ed Kalwara
State President
Alaska Peace Officers Association
2760 Sherwood Lane
Juneau, AK 99801
789-2165 (work)
789-0036 (home)

cc: Governors Criminal Justice Working Group
John Sund, Chair, House Judiciary Committee ✓
All Members of the House State Affairs Committee

# CITY OF SEWARD

P.O. BOX 167
SEWARD, ALASKA 99664

- Main Office (907) 224-3331
- Police (907) 224-3338
- Harbor (907) 224-3138
- Fire (907) 224-3445
- Telecopier (907) 224-3248


APR 21 1988

April 14, 1988

The Honorable John Sund, Chairman, Judiciary Committee
House of Representatives
P.O. Box V, Mail Stop 3100
Juneau, Alaska 99811

Dear Sir:

I am writing to express my opinion on Senate Joint Resolution No. 15.

I feel that the bill is unnecessary, because the rights of the individual are already addressed in the constitution.

But more importantly, it would appear that this bill is an effort to extend those rights by muddying the water. I am sure that the intent is not to allow those individuals who would use weapons criminally more freedom. However, there is the distinct possibility that this would be a spin off effect of the passage of this resolution.

Surely it is apparent that legislative direction, which many times affects public attitudes, must remain in an area of restraint when it comes to the use of weapons that may easily be turned against the public. Our personal freedoms currently are not being infringed. Telling the public that their rights extend past the current level will only cause trouble for all of us.

How many of the public will read this to mean that Saturday night specials, automatic weapons, and others are okay to own and use? I doubt that many of the citizens of this State will. However, those who do see fit to break the laws and endanger the lives of others will use this to their advantage.

I ask that you take these matters into consideration as you deliberate on the passage of this resolution.

Sincerely,

Louis A. Bencardino
Chief of Police
Seward Police Department

LAB/dra

Municipality of Anchorage

POUCH 6-650
ANCHORAGE, ALASKA 99502-0650
(907) 264-4545

TONY KNOWLES,
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

May 6, 1986

Members of the House Judiciary Committee

Re: SJR 39

The Municipality does not oppose a constitutional amendment that redefines the "right to bear arms" as a personal right vested in each citizen of the state. We are very concerned however with the way in which the measure is now drafted. Our concerns are based on the fact that the present language, quite arguably, would not permit the state or a municipality to regulate either the type of arms possessed or the manner and circumstances of possession.

While the version passed by the Senate clearly allows regulation of the use of arms, many existing laws do not relate to the simple use of a weapon, but rather to its function and to the manner and circumstances in which it is possessed. Public safety concerns demand that the state legislature and local assemblies be permitted to ban certain types of arms such as bombs, hand grenades, machine guns, silencers, sawed-off shotguns and bullets designed to pierce protective devices worn by law enforcement officials. We believe likewise that the constitution should permit the Legislature to bar the possession of arms by certain classes of convicted criminals, intoxicated or mentally disturbed persons. Finally we feel it is essential to control the circumstances in which otherwise lawful weapons are possessed by limiting the carrying of concealed weapons, the possession of loaded firearms on licensed premises, the possession of a firearm by a minor without parental consent, et cetera. We reiterate the position taken by Attorney General Harold Brown in his March 26, 1986 letter regarding SJR 39:

> These statutes [that would be invalidated by SJR 39] serve an important public safety function by carefully regulating the possession of especially dangerous weapons or weapons

carried in an especially dangerous manner or place. If the legislature does not intend to render these statutes unenforceable, nor to foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds for example), then the legislatures intent to continue to allow a reasonable regulation by law should be made clear.

The clarity of intent referred to by the Attorney General must be embodied in the measure itself. Otherwise both State and Municipal prosecutors will face a flurry of legal challenges by those charged with weapons-related offenses.

In conclusion, we urge that if the committee does not intend to invalidate existing statutes and ordinances regulating the type of arms that may be possessed, and the circumstances of possession, then it must embody this intent clearly within the amendment that is offered to the voters for ratification.

Jerry Wertzbaugher
Municipal Attorney

Brian Porter, Chief
Anchorage Police Department

Municipality of Anchorage

POUCH 6-650
ANCHORAGE, ALASKA 99502-0650
(907) 264-4545

TONY KNOWLES,
MAYOR

OFFICE OF THE MUNICIPAL ATTORNEY

February 25, 1986

TO: Members of the Senate Judiciary Committee

Re: Senate Joint Resolution No. 39

The proposed amendment to Article I, Section 19 of the State Constitution set forth in Senate Joint Resolution No. 39 could, in its original form, preclude the regulation of conduct which has traditionally been considered to be criminal. Of particular concern is the clause beginning on line 15 which specifies "...personal defense and for the defense of family, property...". This provision could be read to invalidate all existing state and municipal laws governing the use of firearms for self-defense and the defense of property. Historically, the right to use firearms to protect self, family, and property has been curtailed. The amendment in its present form would cast doubt on the viability of continued regulation of such items.

The amendment, in its present form, would also have the likely affect of nullifying state and municipalities laws regulating the possession of firearms. This is because of the deletion of provisions referencing a "well regulated militia." Historically, the courts have interpreted that phrase as creating not a personal right to bear arms, but rather a right of the state to maintain a militia. The deletion of that phrase would cast doubt on the validity of all previous court decisions pertaining to the interpretation of section 19, and a similar provision of the Federal Constitution. With the deletion of that body of law, the phrase "shall not be infringed" would take on a whole new meaning. Thus, the state and local governments could lose the ability to regulate such activities as the carrying of concealed weapons and the obliteration of serial numbers on firearms.

The provision could easily be amended so as to affirm the right of the individual to own and possess firearms (as opposed to the right of the state to maintain a militia) without precluding the Legislature's ability to prescribe certain conduct with respect

to the use and possession of deadly weapons. First, I would propose a change to line 15 whereby the term "personal" would be replaced by "lawful" and the phrase "and for the defense" be replaced by the phrase "of self". In addition, line 17 should be changed by adding language after the term "city" which would read "...except that the manner in which arms are possessed may be subject to reasonable regulations designed to protect the public safety".

In addition, if the Committee's intent is merely to establish a personal right to the ownership and possession of firearms and not to overturn existing laws governing the use of firearms, then such intent should be plainly set forth in a permanent report that will serve in the future to guide the courts. Furthermore, if the additional language I have suggested is added to the amendment, the Committee report should clarify the Committee's intent by specifying that the ability of state and local government to impose reasonable regulations on the possession of firearms would include laws curtailing the possession of concealed weapons or weapons that have altered identification marks, but would not include the right of the state or local government to enact an outright ban on the ownership or possession of arms.

Very truly yours,

DEPARTMENT OF LAW

Jerry Wertzbaugher
Municipal Attorney

JW:gml

STATE OF ALASKA

Bill Sheffield, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K - STATE CAPITOL
JUNEAU, ALASKA 99811
PHONE: (907) 465-3600



March 26, 1986

The Honorable Vic Fischer
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: S.J.R. 39

Dear Senator Fischer:

You have asked for the Department of Law's comments upon the current language of S.J.R. 39, a resolution proposing an amendment to Article I, sec. 19 of the state constitution, relating to a citizen's right to keep and bear arms. As I understand it, S.J.R. 39, as amended on the Senate floor yesterday, provides that art. I, sec. 19 of the Alaska Constitution will be amended to read:

> SECTION 19. RIGHT TO KEEP AND BEAR ARMS. The [A WELL-REGULATED MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE] right of each citizen of the state [THE PEOPLE] to keep and bear arms for lawful defense of self, family, property, and the state and for lawful hunting, recreation, and other lawful purposes, shall not be infringed by a state or by a borough or city of the state.

We are concerned that the language presently contained in S.J.R 39 might allow later constitutional challenge to some existing state statutes. Present law, for example, prohibits a convicted felon from possessing a concealable firearm, prohibits possession of certain weapons such as bombs, hand grenades, silencers, and sawed-off shot guns, prohibits possession of a firearm while intoxicated, or the discharge of a firearm from, on, or across a highway, the carrying of a concealed weapon, possession of a loaded firearm on licensed premises, or possession of a firearm by a minor without parental consent. (See AS 11.61.200-.220.)

These statutes serve an important public safety function by carefully regulating the possession of especially dangerous weapons or weapons carried in an especially dangerous manner or place. If the legislature does not intend to render

these statutes unenforceable, nor to foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds, for example), than the legislature's intent to continue to allow reasonable regulation by law should be made clear. The possibility that the language proposed in S.J.R. 39 could be interpreted as invalidating some portions of Alaska's present criminal code is a real one. See, for example, State v. Kessler, 614 P.2d 94 (Ore. 1980), and State v. Delgado, 692 P.2d 610 (Ore. 1984).

We believe that any possible ambiguity could be eliminated by the addition, at the end of the current language, of the phrase "except that the manner of keeping and bearing arms may be regulated by law." This suggested language is based upon similar provisions in the constitutions of several other states, including Florida (art. I, sec. 8), Georgia (art. I, sec. 1), and Utah (art. I, sec. 6). The addition of this clause would make it clear that, although a citizen's basic right to keep and bear arms may not be infringed, reasonable and appropriate regulation of the manner in which arms are kept or borne (i.e., possession by felons, by minors, in a bar, while intoxicated, etc.) is not an infringement on an individual's constitutional right. Mr. Rupe Andrews, Alaska Field Representative for the National Rifle Association, has indicated that his organization would not object to the inclusion of this additional language in S.J.R. 39. I also suggest that you consider retaining the language in the present constitutional provision "the people," rather than change it to "each citizen of the state." State constitutional provisions have traditionally recognized the equal rights of all residents of the state, regardless of the resident's national origin.

A carefully drafted amendment would minimize the possibility that, should the proposed constitutional amendment be adopted, a criminal defendant would later be able to argue that a criminal weapons misconduct statute is unconstitutional because it violates his right to keep and bear arms under art. I, sec. 19 of the state constitution.

Sincerely,

Harold H. Brown

Harold H. Brown
Attorney General

HMB:GAH:gb-13

# STATE OF ALASKA

**DEPARTMENT OF LAW**

*OFFICE OF THE ATTORNEY GENERAL*

*Bill Sheffield, Governor*

*POUCH K – STATE CAPITOL*
*JUNEAU, ALASKA 99811*
*PHONE: (907) 465-3600*


May 8, 1986

The Honorable M. Mike Miller
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Dear Representative Miller:

You have asked this office to comment upon the effect of "legislative intent" language currently contained in a resolution now under consideration by the House Judiciary Committee: CS SJR 39 (Jud) am. This resolution, if passed, would place a proposed constitutional amendment before the voters at the next general election. The resolution contains an amendment to art. I, sec. 19 of the state constitution, relating to a citizen's right to keep and bear arms. The stated purpose of the proposed amendment is to establish that the right to keep and bear arms under the state constitution is an individual right, rather than a collective one.

The proposed constitutional amendment now states that a citizen's right to keep and bear arms "shall not be infringed by the state or by a borough or city of the state." During consideration of CS SJR 39 (Jud) am on the Senate floor Senator Vic Fischer proposed an amendment which would have added the phrase "except that the manner of keeping and bearing arms may be regulated by law." This proposed amendment was rejected by the Senate on a vote of 16 to 2. See Senate Journal, March 26, 1986, at pp. 2166-2167. The Judiciary Committee version of the resolution, adopted with amendment by the Senate, contains a section entitled "legislative intent." Section 2 of CS SJR 39 (Jud) am now provides, in part, that the proposed constitutional amendment "should not be construed to preclude the regulation of the manner in which arms may be borne, carried, or used."

We are concerned that the language presently contained in CS SJR 39 (Jud) am might allow later constitutional challenge to some existing state statutes. Present law, for example, prohibits a convicted felon from possessing a concealable firearm, prohibits possession of certain weapons such as bombs, hand grenades, silencers, and sawed-off shot guns, prohibits possession of a firearm while intoxicated, the discharge of a firearm from, on, or across a highway, the carrying of a concealed weapon, possession of a loaded firearm

on licensed premises, or possession of a firearm by a minor without parental consent. (See AS 11.61.200-11.61.220.)

These statutes serve an important public safety function by restricting the possession of especially dangerous weapons or weapons carried in an especially dangerous manner or place. If the legislature does not intend that the proposed amendment of art. I, sec. 19 would render these statutes unenforceable, nor foreclose a future legislature from adopting similar provisions (prohibiting possession of loaded firearms in a church or on school grounds, for example), then the legislature's intent to continue to allow reasonable regulation by law should be made clear.

It may be that the Senate, in rejecting the amendment proposed by Senator Fischer but adopting section 2 of CS SJR 39 (Jud) am, believed that it was not necessary to explicitly state in the proposed constitutional provision that regulation of firearms by law is allowed, as this point is included in their "legislative intent" language. As a general rule, however, a measure will be enforced according to the plain meaning of the language on its face. 2A C. Sands, Sutherland Statutory Construction § 45.02 at 4 (4th ed. 1984); Wilson v. Municipality of Anchorage, 669 P.2d 569, 571 (Alaska 1983). It is a "fundamental principle of statutory interpretation ... that a statute means what its language reasonably conveys to others..." North Slope Borough v. Sohio Petroleum Corp., 585 P.2d 534, 540 (Alaska 1978); South Central Health Planning v. Commissioner, Dept. of Administration, 628 P.2d 551, 553 (Alaska 1981). 1/

While the courts in Alaska may consider a measure's legislative history to the extent it may assist the court in correctly interpreting the measure, a legislative committee report or formal statement of legislative intent may not be used to give the statute a meaning not fairly contained within its words. Chicago, M., St. P. & P. R. Co. v. Acme Fast Freight, 336 U.S. 465, 93 L.Ed.2d 817, 69 S.Ct. 692 (1949); North Slope Borough, 585 P.2d at 540.

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1/ Although general rules of legal interpretation are most often expressed in the context of statutory interpretation, the same rules apply to the interpretation of legislative resolutions and constitutional amendments. 1A C. Sands, Sutherland Statutory Construction § 29.08 at 500 (4th ed. 1985).

When a reviewing court decides that it must consider the legislature's intent in order to construe a provision, the text of the measure itself is still considered the best evidence of legislative intent. See 2A C. Sands, Sutherland Statutory Construction § 46.03 at 82 (4th ed. 1984) and the cases cited there. Where the terms of a provision are clear and straightforward, the intent of the legislature will be based on those terms, even if the apparent intent conflicts with a statement of legislative intent or a committee report. See Caminetti v. United States, 242 U.S. 470, 61 L.Ed. 442, 37 S.Ct. 192 (1917) and 2A C. Sands, Sutherland Statutory Construction § 48.06 at 308 (4th ed. 1984).

In Commercial Fisheries Entry Commission v. Apokedak, 680 P.2d 486 (Alaska 1984) Apokedak, relying upon legislative intent language contained in the "preamble" to the Limited Entry Act, urged the state supreme court not to adopt a literal construction of the act. The court refused to adopt the interpretation suggested by Apokedak, stating: "a statutory preamble ... can neither restrain nor extend the meaning of an unambiguous statute; nor can it be used to create doubt or uncertainty which does not otherwise exist." 680 P.2d at 488, n.3. Thus, to the extent that language contained in the "legislative intent" section of CS SJR 39 (Jud) am conflicts with the plain meaning of the terms of the constitutional provision, it is the constitutional language which will control.

The courts may also consider the history of legislative action taken on a given measure when determining legislative intent. Generally, the rejection of a proposed amendment indicates that the legislature did not intend the bill to include the provisions embodied in the rejected amendment. Lapina v. Williams, 232 U.S. 78, 58 L.Ed. 515, 34 S.Ct. 196 (1914); United States v. Great Northern Railway Co., 287 U.S. 144, 155, 77 L.Ed. 223, 53 S.Ct. 28 (1932); 2A C. Sands, Sutherland Statutory Construction § 48.04 at 302, § 48.18 at 341 (4th ed. 1984). Thus, a reviewing court may well conclude that if the legislature had intended to allow the continued regulation by law of some aspects of a person's right to possess arms it would have adopted the language proposed by Senator Fischer during the Senate's consideration of the resolution. See, e.g., North Slope Borough, 585 P.2d at 541; Wilson, 669 P.2d at 571.

Perhaps the most important consideration here is that in the case of a measure (such as this one) which is to be decided by a vote of the electorate, descriptive statements accompanying the proposition are an important source of

guidance for interpretation. 2A C. Sands, Sutherland Statutory Construction § 48.04 at 301, § 48.19 at 345 (4th ed. 1984); State v. Lewis, 559 P.2d 630, 637-638 (Alaska 1977), cert. denied, 97 S.Ct. 2943, 432 U.S. 901, 53 L.Ed.2d 1073.

Under art. XIII, sec. 1 of the Alaska Constitution, the lieutenant governor is required to prepare a ballot title and a summary of the proposed constitutional amendment. The election pamphlet prepared pursuant to AS 15.58.010 must contain: 1) the text of the proposed constitutional amendment, 2) the ballot title and summary prepared by the lieutenant governor, 3) "a neutral summary" of the proposition prepared by the Legislative Affairs Agency, and 4) advocatory statements for and against the proposed amendment. AS 15.58.020(6). Thus, although the resolution directs the Legislative Affairs Agency to "consider" the statement contained in section 2 of CS SJR 39 (Jud) am when preparing its neutral summary for the ballot, this language will not appear on the ballot, and may well not appear in the elections pamphlet. Since, in the final instance, a reviewing court will look to the intent in the minds of the voters who voted to adopt the constitutional amendment, the legislature's statement of its intent when placing the measure on the ballot has limited significance. Lewis, 559 P.2d at 637-638.

One of the main purposes of a constitution is to limit legislative power. Ordinary acts of the legislature (i.e., statutes), whether adopted before or after a given constitutional provision, cannot be given effect if the statute conflicts with a substantive provision in the constitution. Thus, an amendment to the constitution may expressly, or by implication, repeal existing legislative enactments. Rhode Island v. Palmer, 253 U.S. 350, 64 L.Ed. 946, 40 S.Ct. 486 (1919); 1A C. Sands, Sutherland Statutory Construction § 23.20 at 387 (4th ed. 1985). The possibility that the language proposed in SJR 39 could be interpreted as invalidating some portions of Alaska's present criminal code is a real one, as this has occurred in similar circumstances in other states. See, for example, State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980) and State v. Delgado, 298 Or. 395, 692 P.2d 610 (1984).

Principals of both common sense and responsible draftsmanship dictate that a well-drafted statute or constitutional provision should reduce the need for disputes about interpretation. 2A C. Sands, Sutherland Statutory Construction § 45.02 at 5 (4th ed. 1984). Statements of "legislative intent" are not an adequate substitute for clear, unambiguous language in the proposed constitutional amendment. A more precisely drafted amendment would minimize the

possibility that, should the proposed constitutional amendment be adopted, a criminal defendant would later be able to argue that a criminal weapons misconduct statute is unconstitutional because it violates his right to keep and bear arms under art. I, sec. 19 of the state constitution.

Sincerely,

Harold M. Brown
Attorney General

In the present case, had Publishers made a reasonable inquiry and informed Stevens that the inquiry was in preparation for its purchase of the timberland from Fernandez, then Stevens would have informed Publishers that plaintiffs held a mortgage on the timberland and had a "standard timber restriction" clause covering the land. The discovery of these facts would have immediately informed both parties that Fernandez was defrauding plaintiffs. Publishers is therefore charged with knowledge of the fraud because it would have learned of the fraud had it made a reasonable inquiry. *Murray v. Wiley, supra* at 407.

We therefore conclude that Publishers failed to sustain its burden of proving its affirmative defense. Publishers was not entitled to the status of a bona fide purchaser without notice.

Affirmed.





IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
*Respondent,*
*v.*
RANDY KESSLER,
*Petitioner.*

(TC DA 160004-7811, CA 14296, SC 26705)

On review from the Court of Appeals:*

Argued and submitted March 4, 1980.

David L. Slader, Portland, argued the cause and filed the brief for petitioner.

W. Benny Won, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief was James A. Redden, Attorney General, and Walter L. Barrie, Solicitor General, Salem.

Before Denecke, Chief Justice, and Tongue, Howell, Lent and Peterson, Justices.

LENT, J.

Affirmed in part, reversed in part.

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*Appeal from Circuit Court, Multnomah County Phillip T. Abraham, Judge 43 Or App 303, 602 P2d 1096 (1979).

STATE v. KESSLER, 289 OR. 359 (1980)

614 P.2d 94

LENT, J.

The defendant in this case was convicted of "possession of a slugging weapon," ORS 166.510(1).[1] We allowed review to consider his claim that the legislative prohibition of the possession of a "billy"[2] in ORS 166.510(1) violates Article I, section 27, of the Oregon Constitution. That provision states:

"The people shall have the right to bear arms for the defence [sic] of themselves, and the State; but the Military shall be kept in strict subordination to the civil power."

The language of this provision raises several questions in this case, including:

(a) To whom does the right belong?

(b) What is the meaning of "defense of themselves"?

(c) What is the meaning of "arms," and what, if any, weapons of current usage are included in this term?

The scope of Article I, section 27, has not previously been analyzed by Oregon courts.[3] The decisions construing the second amendment to the United

[1] ORS 166.510(1) provides:

"(1) Except as provided in ORS 166.515 or 166.520, any person who manufactures, causes to be manufactured, sells, keeps for sale, offers, gives, loans, carries or possesses an instrument or weapon having a blade which projects or swings into position by force of a spring or other device and commonly known as a switch-blade knife or an instrument or weapon commonly known as a blackjack, slung shot, billy, sandclub, sandbag, sap glove or metal knuckles or who carries a dirk, dagger or stiletto commits a Class A misdemeanor."

Although the words "slugging weapon" are not used in ORS 166.510, this term was used in the complaint filed in this case.

[2] Webster's Third International Dictionary defines a "billy" as "a heavy usually wooden weapon for delivering blows: club, especially a policeman's club."

[3] In *State v. Robinson*, 217 Or 612, 619, 343 P2d 886 (1959) this court held that ORS 166.270, which prohibits ex-convicts from possessing concealed weapons did not violate Article I, section 27, of the Oregon Constitution. Accord, *State v. Cartwright*, 246 Or 120, 134-137, 418 P2d 822 (1967).

States Constitution are not particularly helpful because the wording of the second amendment differs substantially from our state provision. The second amendment has not yet been held to apply to state limitations on the bearing of arms.[4] The wording of Oregon's right to bear arms provision also differs from many other state constitutional provisions.[5]

Despite the many variations in wording, the states' constitutional provisions guaranteeing the right to bear arms share a common historical background. We begin first with an examination of this historical background and then with an examination of the meaning and purpose of the particular words chosen by the Oregon drafters. We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.

[4] The second amendment to the United States Constitution provides:

"A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

In early cases the United States Supreme Court held that the second amendment proscription applies only to Congress. *Presser v. Illinois*, 116 US 252, 6 S Ct 580, 29 L Ed 615 (1886); *United States v. Cruikshank*, 92 US 548, 23 L Ed 588 (1876). The second amendment has not yet been held applicable to the states, either directly or through selective incorporation in the fourteenth amendment. *See* Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 Catholic U L Rev 53 (1966).

[5] For a helpful categorization of various state constitutional right to bear arms provisions see Note, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U Chi L Rev 185 (1970).





I. *The historical background*

The first article of Oregon's constitution of 1859 contains the state's bill of rights. Article I, section 27, regarding the right to bear arms was taken verbatim from sections 32 and 33 of the Indiana Constitution of 1851. C. Carey, *A History of the Oregon Constitution* 469 (1926); Palmer, *The Sources of the Oregon Constitution*, 5 Or L Rev 200, 202 (1926).

The original Indiana constitution was adopted in 1816 at Indiana's first statehood convention. Indiana's constitution was revised in 1851, but the 1816 version of the right to bear arms provision remained unchanged. *See* W. Swindler, *Sources and Documents of U.S. Constitutions*, vol 3, p 345-400 (1974).

The drafters of Indiana's bill of rights of 1816 borrowed freely from the wording of other state constitutions, most notably the constitutions of Kentucky, Ohio, Tennessee, and Pennsylvania. Twomley, *The Indiana Bill of Rights*, 20 Ind L J 211, 212-213 (1945). These state constitutions were drafted between 1776 and 1802. Oregon's right to bear arms provision therefore can be traced to state provisions drafted in the revolutionary and post-revolutionary war era.

The constitutions adopted by the original colonies generally included a bill or declaration of rights. Many of the declarations of rights were patterned largely upon the English Bill of Rights of 1689.[6] The background of the English Bill of Rights sheds some light upon the meaning of the right to bear arms provisions in the colonial constitutions.

James II, a Catholic king, ascended the English throne in 1685 amidst domestic religious controversy between the Catholics and Protestants. James II established a strong standing army which he

[6] *See generally*, B. Schwartz, *The Great Rights of Mankind* 1-36 (1977); Feller and Gotting, *The Second Amendment: A Second Look*, 61 Northwestern U L Rev 46, 47-56 (1966).

quartered in private homes. He sought to repeal certain laws of Parliament which barred Catholics from public offices. The Protestants revolted in the "Glorious Revolution" of 1688 and succeeded in deposing James II and bringing to power the king's Protestant daughter, Mary, and her husband, William of Orange. William and Mary were offered the crown in 1689 on condition that they sign the Declaration of Rights. The Declaration was later enacted as a statute, which was divided into two parts, first listing the allegedly illegal actions of James II, then declaring the rights of the people. The first part stated that James II:

> "* * * did endeavor to subvert and extirpate the Protestant Religion and the Laws and Liberties of this Kingdom * * *.
>
> "5. By raising and keeping a Standing army within this Kingdom in Time of Peace without Consent of Parliament and quartering Soldiers contrary to Law.
>
> "6. By causing several good Subjects, being Protestants, to be disarmed at the same Time when Papists were both armed and employed contrary to Law."

The parallel provisions of the declaration of rights provided:

> "* * * 5. That the raising or keeping a Standing Army within the Kingdom unless it be with the Consent of Parliament is against Law.
>
> "6. That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law."[7]

Historians have noted that the early colonial legislatures perceived themselves as descendants of the House of Commons who shared many of the same political experiences of their 17th century English counterparts. See B. Schwartz, *The Great Rights of Mankind* 15, 31-32 (1977). The French and Indian War ending in 1763 brought large numbers of British

[7] Bill of Rights, 1 W. & M., sess. 2, c. 2 (1689), *reprinted in* Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hastings Const L Q 961, 973 (1975).





soldiers to the colonies. King George III maintained and increased these standing armies following that war, and ordered the troops to be quartered in private homes. The colonists who were accustomed to relying on their own citizen militias viewed the standing armies as an unlawful instrument of oppression. *See* Weatherup, *Standing Armies and Armed Citizens; An Historical Analysis of the Second Amendment*, 2 Hastings Const L Q 961, 975-978 (1975). The state constitutions drafted in the revolutionary war era therefore included provisions guaranteeing the right to bear arms and prohibiting standing armies in time of peace. The relevant provisions of the English Bill of Rights of 1689 provided a useful model for the colonial drafters.

II. *The Oregon right to bear arms*

A. *"Defense of themselves and the state"*

We have noted that Oregon's constitutional right to bear arms provision, Or Const. Art I, § 27, was taken verbatim from the Indiana constitutional provision drafted in 1816. The phrase "for defense of themselves and the state" in Indiana's provision was most likely taken from the Kentucky provision in its 1799 constitution, or the Ohio provision in its 1802 constitution.[8] The phrase "for defense of themselves and the

[8] Art X, §§ 23 and 24, of the 1799 Kentucky constitution provided:

"Sec. 23. That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned. "Sec. 24. That no standing army shall, in time of peace, be kept up, without the consent of the legislature; and the military shall, in all cases and at all times, be in strict subordination to the civil power."

W. Swindler, *Sources and Documents of U. S. Constitutions*, Vol 4, p 183 (1975).

Art VIII, § 20, of the 1802 Ohio constitution provided:

"Sec. 20. That the people have a right to bear arms for the defence of themselves and the State; and as standing armies, in time of peace, are dangerous to liberty, they shall not be kept up, and that the military shall be kept under strict subordination to the civil power."

W. Swindler, *Sources and Documents of U. S. Constitutions*, Vol 7, p 855 (1978). Ohio's constitutional provision was most likely taken from Art XIII of Pennsylvania's constitutional Bill of Rights of 1776 which provided

(Continued on following page)

state" appears in the present day constitutions of Oregon, Indiana, and six other states.[9] The language is subject to varying interpretations. It has been suggested that the language includes three separate justifications for a state constitutional right to bear arms: (a) The preference for a militia over a standing army; (b) the deterrence of governmental oppression; and (c) the right of personal defense.[10]

The language "the right to bear arms * * * for defense of * * * the state" most likely refers to the historical preference for a citizen militia rather than a standing army as outlined above.[11] *See People v. Brown*, 253 Mich 537, 235 NW 245, 246 (1931):

> "It is generally recognized that * * * the right to bear arms had its origin in the fear of the American colonists of a standing army and its use to oppress the people, and in their attachment to a militia composed of all able-bodied men. Probably the necessity of self protection in a frontier society also was a factor."

The phrase "the right to bear arms in defense of themselves" has a suggested purpose which is

*(Continued from previous page)*

"That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power."

W. Swindler, *Sources and Documents of U. S. Constitutions*, Vol 8, p 279 (1979).

[9] The phrase "for defense of themselves and the state" appears in the constitutions of Florida, Declaration of Rights § 20; Kentucky Bill of Rights § 1; Pennsylvania, art I, § 21; South Dakota, art VI, § 24; Vermont, ch I, art 16, and Wyoming, art I, § 24.

[10] *See* Note, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U Chi L Rev 185, 190-198 (1970).

[11] Despite the early Americans' objection to standing armies and their preference for citizen militias, our society today apparently prefers the maintenance of federally controlled standing armies. The federal government has assumed total responsibility for training and supplying the "state militias," i e, the National Guard. *See, e g*, 32 USC, §§ 101, 102, 501, 502, 701 (1976); Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 Cath U L Rev 53, 72 (1966).





closely related to the preference for citizen militias. That suggested purpose is the deterrence of government from oppressing unarmed segments of the population. For example, King James II attempted to disarm the Protestants while allowing Catholics to bear arms, thus prompting the guarantee in the 1689 Bill of Rights that Protestants could have "arms for their defense."[12] Joseph Story wrote that,

> "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."

J. Story, *Commentaries on the Constitution*, Vol 3, p 746 (1833). *Cf, Carlton v. State*, 63 Fla 1, 58 So 486, 488 (1912) (state provision was "intended to give the people the means of protecting themselves against oppression and public outrage").

"Defense of themselves" has also been said to include an individual's right to bear arms to protect his person and home. *Schubert v. DeBard*, Ind , 398 NE2d 1339, 1341 (1980) (Indiana constitution provides citizenry the right to bear arms for their personal self-defense). Self-defense has been recognized as a privilege in both civil and criminal law since about 1400 in England and at all times in the United States.[13] Although the right to bear arms for self protection does not appear to have been an important

[12] *See* text accompanying note 7 *supra*.

[13]

> "The privilege of self-defense rests upon the necessity of permitting a man who is attacked to take reasonable steps to prevent harm to himself, where there is no time to resort to the law. The early English law, with its views of strict liability, did not recognize such a privilege; * * *. But since about 1400 the privilege has been recognized, and it is now undisputed, in the law of torts as well as in the criminal law." (citations omitted) W. Prosser, *Law of Torts* 108 (4th ed 1971).

development in England, the justification for a right to bear arms in defense of person and home probably reflects the exigencies of the rural American experience. *See People v. Brown, supra. Cf., Matthews v. State,* 237 Ind 677, 689-692, 148 NE2d 334, 339-341 (1958) (Emmert, C. J., dissenting) (constitutional guarantee based on historical necessity for personal defense.)[14]

B. *The meaning of the term "arms"*

The term "arms" is also subject to several interpretations. In the colonial and revolutionary war era, weapons used by militiamen and weapons used in defense of person and home were one and the same. A colonist usually had only one gun which was used for hunting, protection, and militia duty, plus a hatchet, sword, and knife. G. Neumann, *Swords and Blades of the American Revolution,* 6-15, 252-254 (1973). When the revolutionary war began, the colonists came equipped with their hunting muskets or rifles, hatchets, swords, and knives. The colonists suffered a severe shortage of firearms in the early years of the war, so many soldiers had to rely primarily on swords, hatchets, knives, and pikes (long staffs with a spear head). W. Moore, *Weapons of the American Revolution,* 8 (1967).

Therefore, the term "arms" as used by the drafters of the constitutions probably was intended to include those weapons used by settlers for both personal and military defense. The term "arms" was not limited to firearms, but included several handcarried weapons commonly used for defense. The term "arms" would not have included cannon or other heavy ordnance not kept by militiamen or private citizens.

[14] *Compare* the provisions in several state constitutions which guarantee that a person has the right to bear arms "in defense of his home, person and property." Colo Const, Art II, § 13; Miss Const, Art III, § 12; Mo Const, Art I, § 23; Mont Const, Art III, § 13; Okla Const, Art II, § 26; *State v. Nickerson,* 126 Mont 157, 247 P2d 188 (1952) (defendant cannot be convicted of assault if he pointed a loaded gun at a trespasser in his home), *accord, State v. Hassani,* 356 Mo 90, 195 SW2d 495 (1946).





The revolutionary war era ended at a time when the rapid social and economic changes of the so-called Industrial Revolution began. The technology of weapons and warfare entered an unprecedented era of change. P. Cleator, *Weapons of War* 143-152 (1967). Firearms and other hand-carried weapons remained the weapons of personal defense, but the arrival of steam power, mechanization, and chemical discoveries completely changed the weapons of military warfare. The development of powerful explosives in the mid-nineteenth century, combined with the development of mass-produced metal parts, made possible the automatic weapons, explosives, and chemicals of modern warfare. P. Cleator, *Weapons of War* 153-177 (1967).

These advanced weapons of modern warfare have never been intended for personal possession and protection. When the constitutional drafters referred to an individual's "right to bear arms," the arms used by the militia and for personal protection were basically the same weapons. Modern weapons used exclusively by the military are not "arms" which are commonly possessed by individuals for defense, therefore, the term "arms" in the constitution does not include such weapons.

If the text and purpose of the constitutional guarantee relied exclusively on the preference for a militia "for defense of the State," then the term "arms" most likely would include only the modern day equivalents of the weapons used by colonial militiamen. The Oregon provision, however, guarantees a right to bear arms "for defense of *themselves,* and the State." The term "arms" in our constitution therefore would include weapons commonly used for either purpose, even if a particular weapon is unlikely to be used as a militia weapon.

The constitutional guarantee that persons have the right to "bear arms" does not mean that all individuals have an unrestricted right to carry or use personal weapons in all circumstances. For example,

the danger of firearms was recognized shortly after the development of gunpowder. The English Statute of Northampton in 1327 forbade persons to ride at night carrying a firearm for the purpose of terrifying the people.[15] A 1678 Massachusetts law forbade shooting near any house, barn, garden, or highway in any town where a person may be "killed, wounded, or otherwise damaged."[16] The courts of many states have upheld statutes which restrict the possession or manner of carrying personal weapons. The reasoning of the courts is generally that a regulation is valid if the aim of public safety does not frustrate the guarantees of the state constitution. For example, many courts have upheld statutes prohibiting the carrying of concealed weapons, *see, e.g., State v. Hart*, 66 Idaho 217, 157 P2d 72 (1945); and statutes prohibiting possession of firearms by felons, *see, e.g., State v. Carturight*, 246 Or 121, 418 P2d 822 (1966).

III. *The present case*

We now turn to the facts of the present case. The defendant was involved in an off and on verbal argument with his apartment manager in the course of the day on November 13, 1978. The dispute escalated into name calling, colorful words, and object throwing. At one point the defendant kicked the elevator door in the apartment building. The police were called and arrested the defendant. The defendant asked the police to get his coat from his apartment. The officers found two "billy clubs" in the defendant's apartment.

The defendant was charged with disorderly conduct, ORS 166.025, and possession of a slugging weapon, ORS 166.510. The matter went to trial with-

[15] 2 Edward III, ch 3 (1328), reprinted in J. Bishop, Statutory Crimes, § 783 (3d ed 1901).

[16] Council held in Boston, March 28, 1678; referred to in Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 Chi Kent L Rev 148, 150, n 18 (1971).





out a jury. The defendant at trial demurred to and moved to dismiss the second charge on the grounds that it failed to state a crime. The motion was denied and the defendant was found guilty as charged on both counts.

The defendant appealed to the Court of Appeals, contending first that his acts did not amount to the crime of disorderly conduct, and second that the statute prohibiting possession of billy clubs, ORS 166.510(1), violates Article I, section 27, of the Oregon Constitution. The Court of Appeals did not consider defendant's first contention because it was not raised at trial.[17] The Court of Appeals held that ORS 166.510(1) was within the reasonable exercise of the "police power" of the state to curb crime. 43 Or App 303, 307, 602 P2d 1096 (1979).

The defendant contends that his conviction for possession of a billy club violates his right to possess arms in his home for personal defense. Pursuant to our previous discussion regarding the purpose and scope of the right to bear arms provision, we hold that Aricle I, section 27, of the Oregon Constitution includes a right to possess certain arms for defense of person and property. The remaining question is whether the defendant's possession of a billy club in this case is protected by Article I, section 27.

The club is considered the first personal weapon fashioned by humans. O. Hogg, *Clubs to Cannon* 19 (1968). The club is still used today as a personal

[17] The general rule in both civil and criminal cases is that a question not raised and preserved in the trial court will not be considered on appeal. *State v. Abel*, 241 Or 465, 467, 406 P2d 902 (1965). Failure to raise an objection in trial court does not automatically preclude appellate review. The defendant's contention that his acts did not constitute the crime of disorderly conduct, however, does not present the exceptional circumstance or manifest error which justifies this court's consideration of such a claim. It follows that defendant's conviction of disorderly conduct is affirmed. Note that this case is not concerned with that aspect of the statute prohibiting disorderly conduct which we held to be unconstitutional in *State v. Spencer*, 289 Or 225, P2d (1980).

weapon, commonly carried by the police. ORS 166.510 prohibits possession of a "billy;" however, ORS 166.520 states that peace officers are not prohibited from carrying or possessing a weapon commonly known as a "blackjack"[18] or "billy."

The statute in this case, ORS 166.510, prohibits the mere possession of a club. The defendant concedes that the legislature could prohibit carrying a club in a public place in a concealed manner, but the defendant maintains that the legislature cannot prohibit all persons from possessing a club in the home. The defendant argued that a person may prefer to keep in his home a billy club rather than a firearm to defend against intruders.

Our historical analysis of Article I, section 27, indicates that the drafters intended "arms" to include the hand-carried weapons commonly used by individuals for personal defense. The club is an effective, hand-carried weapon which cannot logically be excluded from this term. We hold that the defendant's possession of a billy club in his home is protected by Article I, section 27, of the Oregon Constitution.

The defendant's conviction for disorderly conduct is affirmed, and his conviction for possession of a slugging weapon is reversed.

[18] Webster's Third International Dictionary defines a "blackjack" as "* * * 4. a small striking weapon typically consisting at the striking end of a leather enclosed piece of lead or other heavy metal and at the handle end of a strap or springy shaft that increases the force of impact."



Vol 47 August 4, 1980 No. 24

# COURT OF APPEALS REPORTS

## 47 OR APP 1 — 108

CASES DECIDED
by the
COURT OF APPEALS

289 Or. 359

**STATE of Oregon, Respondent,**

v.

**Randy KESSLER, Petitioner.**

TC DA 160004-7811; CA 14296 and SC 26705.

Supreme Court of Oregon.

Argued and Submitted March 4, 1980.

Decided July 15, 1980.

Defendant was convicted in the District Court, Multnomah County, Philip T. Abraham, J., of disorderly conduct and possession of two billy clubs and he appealed. The Court of Appeals, 43 Or.App. 303, 602 P.2d 1096, affirmed and review was allowed. The Supreme Court, Lent, J., held that: (1) defendant's contention that his act did not constitute the crime of disorderly conduct did not present the exceptional circumstance or manifest error which would justify consideration of such claim on appeal, where it was not raised at trial, and (2) defendant's possession of a billy club in his home was protected by right to bear arms provision of Oregon Constitution.

Defendant's conviction for disorderly conduct affirmed; defendant's conviction for possession of a slugging weapon reversed.

**1. Weapons ⇨1**

Term "arms" in right to bear arms provision of Oregon Constitution does not include modern weapons used exclusively by the military. Const. Art. 1, § 27.

See publication Words and Phrases for other judicial constructions and definitions.

**2. Weapons ⇨1**

Term "arms" in right to bear arms provision of Oregon Constitution includes modern day equivalents of weapons used by colonial militiamen and weapons used for personal defense. Const. Art. 1, § 27.

**3. Weapons ⇨1**

Oregon constitutional guarantee that persons have right to "bear arms" does not mean that all individuals have an unrestricted right to carry or use personal weapons in all circumstances. Const. Art. 1, § 27.

**4. Appeal and Error ⇨169, 181**
**Criminal Law ⇨1028, 1030(1)**

Generally, in both civil and criminal cases, a question not raised and preserved in the trial court will not be considered on appeal; however, failure to raise an objection at trial court does not automatically preclude appellate review.

**5. Criminal Law ⇨1030(3)**

Defendant's contention that his acts did not constitute crime of disorderly conduct did not present exceptional circumstance or manifest error which would justify consideration of the claim on appeal, where it was not raised at trial. ORS 166.025.

**6. Weapons ⇨1**

Right to bear arms provision of Oregon Constitution includes a right to possess certain arms for defense of person and property. Const. Art. 1, § 27.

**7. Weapons ⇨1**

Defendant's possession of a billy club in his home was protected by right to bear arms provision of Oregon Constitution and therefore he could not be prosecuted under statute prohibiting mere possession of a club. ORS 166.510; Const. Art. 1, § 27.

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David L. Slader, Portland, argued the cause and filed the brief, for petitioner.

W. Benny Won, Asst. Atty. Gen., Salem, argued the cause, for respondent. With him on the brief was James A. Redden, Atty. Gen., and Walter L. Barrie, Sol. Gen., Salem.

Before DENECKE, C. J., and TONGUE, HOWELL, LENT and PETERSON, JJ.

LENT, Justice.

The defendant in this case was convicted of "possession of a slugging weapon," ORS 166.510(1).[1] We allowed review to consider his claim that the legislative prohibition of the possession of a "billy"[2] in ORS 166.-510(1) violates Article I, section 27, of the Oregon Constitution. That provision states:

> "The people shall have the right to bear arms for the defence [sic] of themselves, and the State, but the Military shall be kept in strict subordination to the civil power."

The language of this provision raises several questions in this case, including:

(a) To whom does the right belong?

(b) What is the meaning of "defense of themselves"?

(c) What is the meaning of "arms," and what, if any, weapons of current usage are included in this term?

The scope of Article I, section 27, has not previously been analyzed by Oregon courts.[3] The decisions construing the second amendment to the United States Constitution are not particularly helpful because the wording of the second amendment differs substantially from our state provision. The second amendment has not yet been held to apply to state limitations on the bearing of arms.[4] The wording of Oregon's right to bear arms provision also differs from many other state constitutional provisions.[5]

Despite the many variations in wording, the states' constitutional provisions guaranteeing the right to bear arms share a common historical background. We begin first with an examination of this historical background and then with an examination of the meaning and purpose of the particular words chosen by the Oregon drafters. We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivations for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.

## I. *The historical background*

The first article of Oregon's constitution of 1859 contains the state's bill of rights.

1. ORS 166.510(1) provides:

   "(1) Except as provided in ORS 166.515 or 166.520, any person who manufactures, causes to be manufactured, sells, keeps for sale, offers, gives, loans, carries or possesses an instrument or weapon having a blade which projects or swings into position by force of a spring or other device and commonly known as a switch-blade knife or an instrument or weapon commonly known as a blackjack, slung shot, billy, sandclub, sandbag, sap glove or metal knuckles or who carries a dirk, dagger or stiletto commits a Class A misdemeanor."

   Although the words "slugging weapon" are not used in ORS 166.510, this term was used in the complaint filed in this case.

2. Webster's Third International Dictionary defines a "billy" as "a heavy usually wooden weapon for delivering blows: club, especially a policeman's club."

3. In *State v. Robinson*, 217 Or. 612, 619, 343 P.2d 886 (1959) this court held that ORS 166.-270 which prohibits ex-convicts from possessing concealed weapons did not violate Article I, section 27, of the Oregon Constitution. Accord, *State v. Cartwright*, 246 Or. 120, 131-137, 418 P.2d 822 (1967).

4. The second amendment to the United States Constitution provides:

   "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

   In early cases the United States Supreme Court held that the second amendment proscription applies only to Congress. *Presser v. Illinois*, 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615 (1886); *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1876). The second amendment has not yet been held applicable to the states, either directly or through selective incorporation in the fourteenth amendment. *See* Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 Catholic U.L.Rev. 53 (1966).

5. For a helpful categorization of various state constitutional right to bear arms provisions see Note, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 35 U.Chi.L.Rev. 185 (1970).

Article I, section 27, regarding the right to bear arms was taken verbatim from sections 32 and 33 of the Indiana Constitution of 1851. C. Carey, *A History of the Oregon Constitution* 469 (1926). Palmer, *The Sources of the Oregon Constitution*, 5 Or.L. Rev. 200, 202 (1926).

The original Indiana constitution was adopted in 1816 at Indiana's first statehood convention. Indiana's constitution was revised in 1851, but the 1816 version of the right to bear arms provision remained unchanged. *See* W. Swindler, *Sources and Documents of U.S. Constitutions*, Vol. 3, p. 345–400 (1974).

The drafters of Indiana's bill of rights of 1816 borrowed freely from the wording of other state constitutions, most notably the constitutions of Kentucky, Ohio, Tennessee, and Pennsylvania. Twomley, *The Indiana Bill of Rights*, 20 Ind.L.J. 211, 212 213 (1945). These state constitutions were drafted between 1776 and 1802. Oregon's right to bear arms provision therefore can be traced to state provisions drafted in the revolutionary and post-revolutionary war era.

The constitutions adopted by the original colonies generally included a bill or declaration of rights. Many of the declarations of rights were patterned largely upon the English Bill of Rights of 1689.[6] The background of the English Bill of Rights sheds some light upon the meaning of the right to bear arms provisions in the colonial constitutions.

James II, a Catholic king, ascended the English throne in 1685 amidst domestic religious controversy between the Catholics and Protestants. James II established a strong standing army which he quartered in private homes. He sought to repeal certain laws of Parliament which barred Catholics from public offices. The Protestants revolted in the "Glorious Revolution" of 1688 and succeeded in deposing James II and bringing to power the king's Protestant daughter, Mary, and her husband, William of Orange. William and Mary were offered the crown in 1689 on condition that they sign the Declaration of Rights. The Declaration was later enacted as a statute, which was divided into two parts, first listing the allegedly illegal actions of James II, then declaring the rights of the people. The first part stated that James II:

> "• • • did endeavor to subvert and extirpate the Protestant Religion and the Laws and Liberties of this Kingdom • • •.
>
> "5. By raising and keeping a Standing army within this Kingdom in Time of Peace without Consent of Parliament and quartering Soldiers contrary to Law.
>
> "6. By causing several good Subjects, being Protestants, to be disarmed at the same Time when Papists were both armed and employed contrary to Law."

The parallel provisions of the declaration of rights provided:

> "• • • 5. That the raising or keeping a Standing Army within the Kingdom unless it be with the Consent of Parliament is against Law.
>
> "6. That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law."[7]

Historians have noted that the early colonial legislatures perceived themselves as descendants of the House of Commons who shared many of the same political experiences of their 17th century English counterparts. *See* B. Schwartz, *The Great Rights of Mankind* 15, 31 32 (1977). The French and Indian War ending in 1763 brought large numbers of British soldiers to the colonies. King George III maintained and increased these standing armies following that war, and ordered the troops to be quartered in private homes. The colonists who were accustomed to relying on their

6. *See generally* B. Schwartz, *The Great Rights of Mankind* 1 36 (1977); Feller and Gotting, *The Second Amendment: A Second Look*, 61 Northwestern U.L.Rev. 46, 47 56 (1966).

7. Bill of Rights, 1 W. & M. sess. 2, c. 2 (1689), *reprinted in* Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hastings Const.L.Q. 961, 973 (1975).

own citizen militias viewed the standing armies as an unlawful instrument of oppression. *See* Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 Hastings Const.L.Q. 961, 975-978 (1975). The state constitutions drafted in the revolutionary war era therefore included provisions guaranteeing the right to bear arms and prohibiting standing armies in time of peace. The relevant provisions of the English Bill of Rights of 1689 provided a useful model for the colonial drafters.

## II. *The Oregon right to bear arms*

### A. *"Defense of themselves and the state"*

We have noted that Oregon's constitutional right to bear arms provision, Or. Const. Art. I, § 27, was taken verbatim from the Indiana constitutional provision drafted in 1816. The phrase "for defense of themselves and the state" in Indiana's provision was most likely taken from the Kentucky provision in its 1799 constitution, or the Ohio provision in its 1802 constitution.[8] The phrase "for defense of themselves and the state" appears in the present day constitutions of Oregon, Indiana, and six other states.[9] The language is subject to varying interpretations. It has been suggested that the language includes three separate justifications for a state constitutional right to bear arms: (a) The preference for a militia over a standing army; (b) the deterrence of governmental oppression; and (c) the right of personal defense.[10]

The language "the right to bear arms • • • for defense of • • • the state" more likely refers to the historical preference for a citizen militia rather than a standing army as outlined above.[11] *See People v. Brown*, 253 Mich. 537, 235 N.W. 245, 246 (1931):

> "It is generally recognized that • • • the right to bear arms had its origin in the fear of the American colonists of a standing army and its use to oppress the people, and in their attachment to a militia composed of all able-bodied men. Probably the necessity of self protection in a frontier society also was a factor."

The phrase "the right to bear arms in defense of themselves" has a suggested purpose which is closely related to the prefer-

8. Art. X, §§ 23 and 24, of the 1799 Kentucky constitution provided:

> "Sec. 23. That the rights of the citizens to bear arms in defence of themselves and the State shall not be questioned.
>
> "Sec. 24. That no standing army shall, in time of peace, be kept up, without the consent of the legislature; and the military shall, in all cases and at all times, be in strict subordination to the civil power."

W. Swindler, *Sources and Documents of U.S. Constitutions*, Vol. 4, p. 163 (1975).

Art. VIII, § 20, of the 1802 Ohio constitution provided:

> "Sec. 20. That the people have a right to bear arms for the defence of themselves and the State; and as standing armies, in time of peace, are dangerous to liberty, they shall not be kept up, and that the military shall be kept under strict subordination to the civil power."

W. Swindler, *Sources and Documents of U.S. Constitutions*, Vol. 7, p. 553 (1978). Ohio's constitutional provision was most likely taken from Art. XIII of Pennsylvania's constitutional bill of Rights of 1776 which provided:

> "That the people have a right to bear arms for the defence of themselves and the state, and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up. And that the military should be kept under strict subordination to, and governed by, the civil power."

W. Swindler, *Sources and Documents of U.S. Constitutions*, Vol. 8, p. 279 (1979).

9. The phrase "for defense of themselves and the state" appears in the constitutions of Florida, Declaration of Rights § 20; Kentucky Bill of Rights § 1; Pennsylvania, art. I, § 21; South Dakota, art. VI, § 24; Vermont, ch. I, art. 16; and Wyoming, art. I, § 24.

10. *See* Note, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U.Chi.L.Rev. 185, 190-198 (1970).

11. Despite the early Americans' objection to standing armies and their preference for citizen militias, our society today apparently prefers the maintenance of federally controlled standing armies. The federal government has assumed total responsibility for training and supplying the "state militias," i.e., the National Guard. *See, e.g.*, 32 U.S.C. §§ 101, 102, 301, 502, 701 (1976). Rohner, *The Right to Bear Arms—A Phenomenon of Constitutional History*, 16 Cath.U.L.Rev. 54, 72 (1966).

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> "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."

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Therefore, the term "arms" as used by the drafters of the constitutions probably was intended to include those weapons used by settlers for both personal and military defense. The term "arms" was not limited to firearms, but included several handcarried weapons commonly used for defense. The term "arms" would not have included cannon or other heavy ordnance not kept by militiamen or private citizens.

12. *See* text accompanying note 7 *supra*.

13. "The privilege of self-defense rests upon the necessity of permitting a man who is attacked to take reasonable steps to prevent harm to himself, where there is no time to resort to the law. The early English law, with its views of strict liability, did not recognize such a privilege; • • • But since about 1400 the privilege has been recognized, and it is now undisputed in the law of torts as well as in the criminal law." (citations omitted) W. Prosser, *Law of Torts* 108 (4th ed. 1971).

14. *Compare* the provisions in several state constitutions which guarantee that a person has the right to bear arms "in defense of his home, person and property." Colo.Const., Art. II, § 13; Miss.Const., Art. III, § 12; Mo.Const., Art. I, § 23; Mont.Const., Art. III, § 13; Okla. Const., Art. II, § 26; *State v. Nickerson*, 126 Mont. 157, 247 P.2d 188 (1952) (defendant cannot be convicted of assault if he pointed a loaded gun at a trespasser in his home); *accord, State v. Plassard*, 355 Mo. 90, 195 S.W.2d 495 (1946).

The revolutionary war era ended at a time when the rapid social and economic changes of the so-called Industrial Revolution began. The technology of weapons and warfare entered an unprecedented era of change. P. Cleator, *Weapons of War* 143–152 (1967). Firearms and other hand-carried weapons remained the weapons of personal defense, but the arrival of steam power, mechanization, and chemical discoveries completely changed the weapons of military warfare. The development of powerful explosives in the mid-nineteenth century, combined with the development of mass-produced metal parts, made possible the automatic weapons, explosives, and chemicals of modern warfare. P. Cleator, *Weapons of War* 153–177 (1967).

[1] These advanced weapons of modern warfare have never been intended for personal possession and protection. When the constitutional drafters referred to an individual's "right to bear arms," the arms used by the militia and for personal protection were basically the same weapons. Modern weapons used exclusively by the military are not "arms" which are commonly possessed by individuals for defense, therefore, the term "arms" in the constitution does not include such weapons.

[2] If the text and purpose of the constitutional guarantee relied exclusively on the preference for a militia "for defense of the State," then the term "arms" most likely would include only the modern day equivalents of the weapons used by colonial militiamen. The Oregon provision, however, guarantees a right to bear arms "for defense of *themselves*, and the State." The term "arms" in our constitution therefore would include weapons commonly used for either purpose, even if a particular weapon is unlikely to be used as a militia weapon.

[3] The constitutional guarantee that persons have the right to "bear arms" does not mean that all individuals have an unrestricted right to carry or use personal weapons in all circumstances. For example, the danger of firearms was recognized shortly after the development of gunpowder. The English Statute of Northampton in 1327 forbade persons to ride at night carrying a firearm for the purpose of terrifying the the people.[15] A 1678 Massachusetts law forbade shooting near any house, barn, garden, or highway in any town where a person may be "killed, wounded, or otherwise damaged."[16] The courts of many states have upheld statutes which restrict the possession or manner of carrying personal weapons. The reasoning of the courts is generally that a regulation is valid if the aim of public safety does not frustrate the guarantees of the state constitution. For example many courts have upheld statutes prohibiting the carrying of concealed weapons, *see, e. g., State v. Hart*, 66 Idaho 217, 157 P.2d 72 (1945); and statutes prohibiting possession of firearms by felons, *see, e. g., State v. Cartwright*, 246 Or. 120, 418 P.2d 922 (1966).

III. *The present case*

We now turn to the facts of the present case. The defendant was involved in an off and on verbal argument with his apartment manager in the course of the day on November 13, 1978. The dispute escalated into name calling, colorful words, and object throwing. At one point the defendant kicked the elevator door in the apartment building. The police were called and arrested the defendant. The defendant asked the police to get his coat from his apartment. The officers found two "billy clubs" in the defendant's apartment.

The defendant was charged with disorderly conduct, ORS 166.025, and possession of a slugging weapon, ORS 166.510. The matter went to trial without a jury. The defendant at trial demurred to and moved to dismiss the second charge on the grounds that it failed to state a crime. The motion was denied and the defendant was found guilty as charged on both counts.

15. 2 Edward III, ch. 3 (1328), reprinted in J. Bishop, *Statutory Crimes*, § 783 (3d ed. 1901).

16. Council held in Boston, March 28, 1678, referred to in Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 Chi.-Kent L. Rev. 148, 150, n. 18 (1971).

[4, 5] The defendant appealed to the Court of Appeals, contending first that his acts did not amount to the crime of disorderly conduct, and second that the statute prohibiting possession of billy clubs, ORS 166.510(1), violates Article I, section 27, of the Oregon Constitution. The Court of Appeals did not consider defendant's first contention because it was not raised at trial.[17] The Court of Appeals held that ORS 166.510(1) was within the reasonable exercise of the "police power" of the state to curb crime. 43 Or.App. 303, 307, 602 P.2d 1096 (1979).

[6] The defendant contends that his conviction for possession of a billy club violates his right to possess arms in his home for personal defense. Pursuant to our previous discussion regarding the purpose and scope of the right to bear arms provision, we hold that Article I, section 27, of the Oregon Constitution includes a right to possess certain arms for defense of person and property. The remaining question is whether the defendant's possession of a billy club in this case is protected by Article I, section 27.

The club is considered the first personal weapon fashioned by humans. O. Hogg, *Clubs to Cannon* 19 (1968). The club is still used today as a personal weapon, commonly carried by the police. ORS 166.510 prohibits possession of a "billy;" however, ORS 166.520 states that peace officers are not prohibited from carrying or possessing a weapon commonly known as a "blackjack"[18] or "billy."

The statute in this case, ORS 166.510, prohibits the mere possession of a club. The defendant concedes that the legislature could prohibit carrying a club in a public place in a concealed manner, but the defendant maintains that the legislature cannot prohibit all persons from possessing a club in the home. The defendant argued that a person may prefer to keep in his home a billy club rather than a firearm to defend against intruders.

[7] Our historical analysis of Article I, section 27, indicates that the drafters intended "arms" to include the hand-carried weapons commonly used by individuals for personal defense. The club is an effective, hand-carried weapon which cannot logically be excluded from this term. We hold that the defendant's possession of a billy club in his home is protected by Article I, section 27, of the Oregon Constitution.

The defendant's conviction for disorderly conduct is affirmed, and his conviction for possession of a slugging weapon is reversed.

17. The general rule in both civil and criminal cases is that a question not raised and preserved in the trial court will not be considered on appeal. *State v. Abel*, 241 Or. 465, 467, 406 P.2d 902 (1965). Failure to raise an objection in trial court does not automatically preclude appellate review. The defendant's contention that his acts did not constitute the crime of disorderly conduct, however, does not present the exceptional circumstance or manifest error which justifies this court's consideration of such a claim. It follows that defendant's conviction of disorderly conduct is affirmed. Note that this case is not concerned with that aspect of the statute prohibiting disorderly conduct which we held to be unconstitutional in *State v. Spencer*, 289 Or. 225, 611 P.2d 1147 (1980).

18. Webster's Third International Dictionary defines a "blackjack" as "• • • 4. a small striking weapon typically consisting at the striking end of a leather enclosed piece of lead or other heavy metal and at the handle end of a strap or springy shaft that increases the force of impact."

KEY NUMBER SYSTEM

289 Or. 511

## DEPARTMENT OF REVENUE, State of Oregon, Respondent,

v.

## Donald W. GREAVES and Norma P. Greaves, Appellants.

TC 1378; SC 26873.

Supreme Court of Oregon, In Banc.

Argued and Submitted June 24, 1980.

Decided July 23, 1980.

Department of Revenue petitioned for statutory writ of mandamus commanding

298 Or. 395

STATE of Oregon, Petitioner on Review,

v.

Joseph Luna DELGADO, Respondent on Review.

TC CR83-946, CA A30962, SC S31059.

Supreme Court of Oregon, In Banc.

Argued and Submitted Nov. 6, 1984.

Decided Dec. 28, 1984.

Defendant was convicted in the District Court, Polk County, Walter W. Foster, J., of unlawful possession of a stabbing weapon, and he appealed. The Court of Appeals, 69 Or.App. 254, 684 P.2d 630, reversed, and appeal was taken. The Supreme Court, Lent, J., held that defendant's constitutional right to bear arms was violated by prohibition of mere possession and mere carrying of a switchblade knife.

Decision of the Court of Appeals affirmed.

Weapons ⇐1

Defendant's constitutional right to bear arms was violated by prohibition of mere possession and mere carrying of a switchblade knife. Const. Art. 1, § 27; ORS 166.510, 166.510(1).

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Robert W. Muir, Asst. Atty. Gen., Salem, argued the cause for petitioner on review. With him on the briefs were Dave Frohnmayer, Atty. Gen., James E. Mountain, Jr., Sol. Gen., and Lynn Torno, Certified Law Student.

Susan M. Garrett, Salem, argued the cause and filed briefs for respondent on review.

Robert Dowlut, Washington, D.C., and Steven L. Krasik, Salem, filed a brief amicus curiae for Nat. Rifle Ass'n.

LENT, Justice.

The issue is whether ORS 166.510(1), insofar as it prohibits the mere possession and mere carrying of a switchblade knife, violates defendant's right to bear arms under Article I, section 27, of the Oregon Constitution. We hold that in that respect the statute does violate defendant's constitutional right.

ORS 166.510(1) provides, in relevant part:

"* * * [*Any person who* manufactures, causes to be manufactured, sells, keeps for sale, offers, gives, loans, *carries or possesses an instrument or weapon having a blade which projects or swings into position by force of a spring or other device and commonly known as a switch-blade knife* or an instrument or weapon commonly known as a blackjack, slung shot, sandclub, sandbag, sap glove or metal knuckles, or who carries a dirk, dagger or stiletto commits a Class A misdemeanor." (Emphasis added)

Article I, section 27, of the Oregon Constitution provides:

"The people shall have the right to bear arms for the defence of themselves, and the State * * * [.]"

The accusatory instrument charged that defendant "did unlawfully possess and carry" a weapon commonly known as a switch-blade knife in violation of ORS 166.510. Defendant demurred to the accusatory instrument on the ground that the statute was overbroad as impinging on the right guaranteed to him under Article I, section 27, of the Oregon Constitution. The trial court overruled the demurrer.[1]

Trial then proceeded on the basis of facts stipulated to be the same as those found by the trial court in the hearing on the motion

1. The defendant had also filed a motion to suppress the knife as evidence on the basis that it was obtained as a result of an unlawful search and seizure. The trial court's denial of that motion was not assigned as error.

to suppress mentioned in footnote 1, *supra*. Those facts are as follows.

On October 3, 1983, defendant was walking with a companion on a public street. The two appeared disorderly to an officer nearby, and when defendant reached up as he passed a street sign and tapped or struck it with his hand, the officer confronted both individuals and conducted a patdown search. Defendant was found with a switch-blade knife in his back pocket. Defendant told the arresting officer that he carried the knife "for protection" (defendant evidently feared attack by a jealous rival for his present girl friend).[2]

Defendant moved for judgment of acquittal, which was denied. The trial court then found defendant guilty and eventually sentenced defendant to jail "suspended on the condition" that defendant meet certain terms of probation.

Defendant appealed, assigning as error the trial court's overruling of his demurrer and denial of his motion for judgment of acquittal. The Court of Appeals, 69 Or. App. 254, 684 P.2d 630, per curiam, reversed on the basis of our decisions in *State v. Blocker*, 291 Or. 255, 630 P.2d 824 (1981), and *State v. Kessler*, 289 Or. 359, 614 P.2d 94 (1980). We allowed review to determine whether a switch-blade knife is within the constitutional guarantee. 298 Or. 37, 688 P.2d 845 (1984).

In *State v. Kessler, supra*, this court for the first time considered the scope of Article I, section 27. There, following the discovery by police officers of two billy clubs in his apartment, defendant was charged with the possession of billy clubs in violation of ORS 166.510(1), the same statute at issue in the case at bar. On appeal defendant argued that the statute violated Article I, section 27, of the Oregon Constitution. The Court of Appeals held that ORS 166.510(1) was within the reasonable exercise of what the court called the state's "police power" to control crime. 43 Or.App. 303, 307, 602 P.2d 1096, 1097 (1979). We reversed.

In *Kessler*, we examined the historical roots of Article I, section 27. We concluded that the drafters of Oregon's constitution did not wish to limit the right to bear arms to a citizen militia, but rather intended that the private citizen also have the right to "possess certain arms for the defense of person and property." 289 Or. at 371, 614 P.2d at 98.

Our analysis in *Kessler* of the meaning of the term "arms" is central to the case at bar and so merits a further discussion. We reasoned that because settlers during the revolutionary era used many of the same weapons for both personal and military defense, the term "arms," as contemplated by the constitutional framers, was not limited to firearms but included those hand-carried weapons commonly used for personal defense. 289 Or. at 368, 614 P.2d at 98. Thus, the term "arms" "includes weapons commonly used for either purpose, even if a particular weapon is unlikely to be used as a militia weapon." 289 Or. at 369, 614 P.2d at 98. On the basis of this historical examination, we held that the possession of a billy club was constitutionally protected:

> "Our historical analysis of Article I, section 27, indicates that the drafters intended 'arms' to include the hand-carried weapons commonly used by individuals for personal defense. The club is an effective, hand-carried weapon which cannot logically be excluded from this term."

2. We have in mind that defendant's principal argument is that, insofar as this charge of criminal conduct is concerned, the statute is overbroad in proscribing conduct in which he has a state constitutional right to engage. Ordinarily, we would have no reason to go beyond the facts described in the accusatory instrument to resolve whether error was committed in overruling defendant's demurrer. In this case, however, a factual record was developed, and the defendant also assigned as error the denial of his motion for judgment of acquittal. The facts are recounted to show that there is no evidence to support any possible charge of an illegal intent to use the weapon or an illegal use of the weapon.

289 Or. at 372, 614 P.2d at 100.[3]

The state argues that a switch-blade is not a weapon "commonly used for personal defense," and is therefore not an "arm" within the meaning of the Oregon Constitution. It insists that the switch-blade is an offensive weapon used primarily by criminals. In support of this argument we are referred to various authorities, especially the Federal Anti-Switchblade Act, 15 USC §§ 1241–44 (Supp. IV, 1980), which is aimed at prohibiting the introduction of switch-blade knives into interstate commerce because they are "almost exclusively the weapon of the thug and the delinquent." S.Rep. No. 1980, 85th Cong., 2d Sess., reprinted in 1958 U.S.Code Cong. & Ad.News 3435, 3437.

We note, first, that that material offers no more than impressionistic observations on the criminal use of switch-blades. More importantly, however, we are unpersuaded by this distinction which the state urges of "offensive" and "defensive" weapons. All hand-held weapons necessarily share both characteristics. A kitchen knife can as easily be raised in attack as in defense. The spring mechanism does not, instantly and irrevocably, convert the jackknife into an "offensive" weapon.[4] Similarly, the clasp feature of the common jackknife does not mean that it is incapable of aggressive and violent purposes. It is not the design of the knife but the use to which it is put that determines its "offensive" or "defensive" character.

There are statutes now on the books that concern the manner in which weapons are carried, the intent with which they are carried, the use to which they may not be put and the status of a person that results in forbidding his possessing a weapon.

> "This state has several such regulatory statutes, with which we are not concerned in this case: ORS 166.220(1) prohibiting possession of a dangerous weapon with intent to use such weapon unlawfully against another; ORS 166.240, prohibiting carrying certain weapons concealed about one's person; ORS 166.250, prohibiting carrying any firearm concealed upon the person or within any vehicle without a license to do so." (Footnote omitted.)

*State v. Blocker, supra*, 291 Or. at 259–260, 630 P.2d at 826. *See, also*, ORS 166.270, which prohibits an exconvict from possessing a firearm concealable on the person, which this court held not to offend Article I, section 27, of the Oregon Constitution in *State v. Robinson*, 217 Or. 612, 619, 343 P.2d 886 (1959).

The appropriate inquiry in the case at bar is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary and post-revolutionary era,[5] or in 1859 when Oregon's constitution was adopted. In particular, it must be determined whether the drafters would have intended the word "arms" to include the switch-blade knife as a weapon commonly used by individuals for self defense. To answer that question we must journey briefly into the history of knives. We have resorted primarily to three books by H. Peterson for that history: Arms and Armour in Colonial America, 1526–1783 (1956); American Knives (1958); Daggers and Fighting Knives of the Western World (1968). What we have to say generally in

3. One year later, in *State v. Blocker*, 291 Or. 255, 259, 630 P.2d 824, 826 (1981), we held that the possession of a billy club outside as well as inside the home is constitutionally protected.

4. At one time the single-action, single-shot handgun was carried by many men for defense. Did the development of the double-action feature of the handgun or the addition of the revolving cylinder which enabled one to fire the gun several times without pausing to reload, as a matter of law, transform the handgun from a defensive weapon to an offensive weapon? Obviously, the gun, both before and after such changes, could be used for either defense or offense.

5. Article I, section 27, of the Oregon Constitution was taken verbatim from sections 32 and 33 of the Indiana Constitution of 1851. Indiana's bill of rights liberally drew upon the state constitutions of Kentucky, Ohio, Tennessee, and Pennsylvania, which were drafted between 1776 and 1802. *See State v. Kessler*, 289 Or. 359, 365, 614 P.2d 94, 95 (1980).

the next few paragraphs is drawn from those works.

The popularity of the fighting knife has had an uneven history, even to today. During the Roman civilization and for several centuries thereafter, for example, the knife was little appreciated as a tool of combat, but during the Viking Period of the 9th and 10th centuries large knives (scramasax), used for general purposes as well as for war, were popular among the Northmen, Germans, Franks and Anglo-Saxons. It was during the Middle Ages that the real flowering of the fighting knife and dagger occurred. New shapes appeared and the knife became part of the standard dress for all classes: from the knights and their men-at-arms as an adjunct to the sword, to the laborer and peasant for protection and convenience. During the 16th century the dagger came to be used by the aristocracy, mainly in conjunction with the sword, and was used primarily for combat; indeed, during the early part of that century the technique of fighting with sword and dagger developed, thus giving rise to the modern school of knife fighting. Through the 16th and 17th centuries knives and daggers declined in importance and were no longer an important part of the daily civilian costume.

In early colonial America the sword and dagger were the most commonly used edged weapons. During the American colonial era every colonist had a knife. As long as a man was required to defend his life, to obtain or produce his own food or to fashion articles from raw materials, a knife was a constant necessity. Around 1650 one form of dagger popular in the colonies was the "plug bayonet," so called because it fit into the muzzle of a musket. It was used both as a dagger or as a general utility knife. Other knives became popular during the 17th and 18th centuries. The American frontiersman used a large knife to ward off danger from Indian attacks and to hunt and trap; along with that he carried a smaller knife, the blade being three to four inches long, in his rifle bag.

In the 19th century, daggers remained popular, but in the west the renowned Bowie knife became the weapon favored by the lawless and law-abiding alike. These were violent times, particularly from the 1820s through the Civil War, when a weapon might be needed at a moment's notice. In response, "the well-equipped gentleman carried a pistol in his pocket and a knife beneath his coattails."

Of the many varieties of knives, none has been a more constant or enduring companion to man than the pocket knife. Specimens of folding pocket knives have been discovered in Roman archeological sites, indicating that such knives were popular at least from the first century A.D. They have been manufactured for their utility as both instruments of labor and combat. One of the most common of the specific named knives is the jackknife, a word of uncertain origin, which was a large single-bladed folding knife, ranging in size from four to seven inches when closed. By the early 1700s, when the eastern seaboard had become a highly settled area with large towns and cities and relatively good roads, men normally carried a folding pocket knife. Even when they joined the American army during the revolution, the knife they carried was the jackknife, which was mentioned frequently in colonial records. During the American Revolution at least two states, New Hampshire and New York, required their militiamen to carry a jackknife. Even during the mid-18th century, some of these "jackknives" were rather more lethal than their name suggests, measuring two feet long with the blade extended, and designed solely for fighting. G. Neumann, Swords and Blades of the American Revolution 247 (1973). Some others had blades over 16 inches long, extending well beyond the hilt even when folded, and were designed to be used open or closed. "Gentlemen" and officers during this same era often carried canes with slender daggers mounted inside which could be drawn with a quick tug and were used for personal defense. Neumann, Swords and Blades of the American Revolution *supra*, at 239. In the early 19th century a special form of

dagger also developed, the pocket or folding dagger, with blades ranging in size from four to sixteen inches; they were intended to be carried in the pocket or in special sheathes.

It is clear, then, that knives have played an important role in American life, both as tools and as weapons. The folding pocketknife, in particular, since the early 18th century has been commonly carried by men in America and used primarily for work, but also for fighting.

This brings us to the switch-blade knife. A switch-blade is defined as a "pocketknife having the blade spring-operated so that pressure on a release catch causes it to fly open." Webster's Third International Dictionary 2314 (1971). If ORS 166.510(1) proscribed the possession of mere pocketknives, there can be no question but that the statute would be held to conflict directly with Article I, section 27. The only difference is the presence of the spring-operated mechanism that opens the knife. We are unconvinced by the state's argument that the switch-blade is so "substantially different from its historical antecedent" (the jackknife) that it could not have been within the contemplation of the constitutional drafters. They must have been aware that technological changes were occurring in weaponry as in tools generally. The format and efficiency of weaponry was proceeding apace. This was the period of development of the Gatling gun, breach loading rifles, metallic cartridges and repeating rifles. The addition of a spring to open the blade of a jackknife is hardly a more astonishing innovation than those just mentioned.[6]

We stress again, as we have stressed before, that this decision does not mean individuals have an unfettered right to possess or use constitutionally protected arms in any way they please. The legislature may, if it chooses to do so, regulate possession and use. *See State v. Blocker, supra,* 291 Or. at 259, 630 P.2d at 826; *State v. Kessler, supra,* 289 Or. at 370, 614 P.2d at 100. This court recognizes the seriousness with which the legislature views the possession of certain weapons, especially switch-blades.[7] The problem here is that ORS 166.510(1) absolutely proscribes the mere possession or carrying of such arms. This the constitution does not permit.[8]

The decision of the Court of Appeals is affirmed.

71 Or.App. 356

Gerald Lee ALBERS, Appellant,

v.

Hoyt C. CUPP, Superintendent, Oregon State Penitentiary, Respondent.

137975; CA A31762.

Court of Appeals of Oregon.

Argued and Submitted Nov. 28, 1984.

Decided Dec. 12, 1984.

Reconsideration Denied Jan. 25, 1985.

Review Denied Feb. 12, 1985.

Appeal from Circuit Court, Marion County, Clarke C. Brown, Judge.

6. Charles Dickens, in his novel Martin Chuzzlewit, published in 1842 shortly after his return from America, referred to a certain Scadder, who "picked his teeth with a sort of young bayonet that flew out of his knife when he touched a spring." This suggests that America could have been the origin of the switch-blade. *See* A. Popkess, *Flick Knives,* [1959] Crim.L.R. 640.

7. ORS 166.510(1) was amended in 1957 to include, for the first time, proscription against the possession of switch-blades. Or.Laws 1957, ch. 290, § 1.

8. The analysis we have employed in *State v. Kessler* and *State v. Blocker, supra,* at footnotes 3 and 5, concerning clubs and in the case at bar concerning a knife may not be the same analysis that would be appropriate to the application of Article I, section 27, of the Oregon Constitution to a weapon such as a can of mace, not having a pre-twentieth century form or counterpart. It has been suggested that it is incongruous to believe that a woman today to defend herself from a rapist would have constitutional sanction for carrying a switch-blade knife but not for the can of mace because the latter was unknown to the mid nineteenth century. Such a case is not before us. The time to deal with that case is when it is presented.

(b) It is an affirmative defense to a prosecution under (a)(1) of this section that

(1) the defendant took reasonable steps to remove the substance from the highway; and

(2) no person suffered physical injury as a result of the presence of the substance on the highway.

(c) Obstruction of highways is a class B misdemeanor. (§ 7 ch 166 SLA 1978)

**Collateral references.** — 39 Am. Jur. 2d, Highways, Streets and Bridges, §§ 281-310.
39A C.J.S., Highways, §§ 217-231.

## Article 2. Weapons and Explosives.



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**Collateral references.** — Validity and construction of gun control laws, 28 ALR3d 845.

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**Sec. 11.61.200. Misconduct involving weapons in the first degree.** (a) A person commits the crime of misconduct involving weapons in the first degree if the person

(1) knowingly possesses a firearm capable of being concealed on one's person after having been convicted of a felony by a court of this state, a court of the United States, or a court of another state or territory;

(2) knowingly sells or transfers a firearm capable of being concealed on one's person to a person who has been convicted of a felony by a court of this state, a court of the United States, or a court of another state or territory;

(3) manufactures, possesses, transports, sells, or transfers a prohibited weapon;

(4) knowingly sells or transfers a firearm to another whose physical or mental condition is substantially impaired as a result of the introduction of an intoxicating liquor or drug into that other person's body;

(5) removes, covers, alters, or destroys the manufacturer's serial number on a firearm with intent to render the firearm untraceable; or

(6) possesses a firearm on which the manufacturer's serial number has been removed, covered, altered, or destroyed, knowing that the serial number has been removed, covered, altered, or destroyed with the intent of rendering the firearm untraceable.

(b) It is an affirmative defense to a prosecution under (a)(1) or (2) of this section that

(1) the person convicted of the prior offense on which the action is based received a pardon for that conviction;

(2) the underlying conviction upon which the action is based has been set aside under AS 12.55.085 or as a result of post-conviction proceedings; or

(3) a period of five years or more has elapsed between the date of the person's unconditional discharge on the prior offense and the date of the possession, sale, or transfer of the firearm.

(c) It is an affirmative defense to a prosecution under (a)(3) of this section that the manufacture, possession, transportation, sale, or transfer of the prohibited weapon was in accordance with registration under 26 U.S.C. 5801-5872 (National Firearms Act).

(d) The provisions of (a)(3) of this section do not apply to a peace officer acting within the scope and authority of the officer's employment.

(e) As used in this section,

(1) "prohibited weapon" means any

(A) explosive, incendiary, or noxious gas

(i) mine or device that is designed, made, or adapted for the purpose of inflicting serious physical injury or death;

(ii) rocket, other than an emergency flare, having a propellant charge of more than four ounces;

(iii) bomb;

(iv) grenade;

(B) device designed, made, or adapted to muffle the report of a firearm;

(C) metal knuckles;

(D) switchblade or gravity knife;

(E) firearm that is capable of shooting more than one shot automatically, without manual reloading, by a single function of the trigger; or

(F) rifle with a barrel length of less than 16 inches, shotgun with a barrel length of less than 18 inches, or firearm made from a rifle or shotgun which, as modified, has an overall length of less than 26 inches;

(2) "unconditional discharge" has the meaning ascribed to it in AS 12.55.185.

(f) Misconduct involving weapons in the first degree is a class C felony. (§ 7 ch 166 SLA 1978)

The CITY OF LAKEWOOD, a municipal corporation of the State of Colorado, Petitioner,

v.

Charles Edward PILLOW, Respondent.

No. C-164.

Supreme Court of Colorado, En Banc.

Oct. 10, 1972.

Defendant was convicted in Municipal Court of violation of city ordinance making it unlawful to possess dangerous or deadly weapon, and he appealed. The District Court, Jefferson County, Christian D. Stoner, J., reversed and declared ordinance invalid, and certiorari was granted. The Supreme Court, Hodges, J., held that the ordinance was unconstitutionally overbroad, where it would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on substantial part of their business, it appeared to prohibit individuals from transporting guns to and from such places of business, it made it unlawful for person to possess firearms in vehicle or in place of business for purpose of self-defense, and several of such activities were constitutionally protected and, depending upon circumstances, might be entirely free of criminal culpability.

Affirmed.

1. Weapons ⇐3

City ordinance prohibiting possession of dangerous or deadly weapon was unconstitutionally overbroad, where it would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on substantial part of their business, it appeared to prohibit individuals from transporting guns to and from such places of business, it made it unlawful for person to possess firearm in vehicle or in place of business for purpose of self-defense, and several of such activities were constitutionally protected and, depending upon circumstances, might be entirely free of criminal culpability. 1965 Perm.Supp., C.R.S., section 40-11-1; Const. art. 2, § 13.

2. Constitutional Law ⇐81

Governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under police power, may not be achieved by means which sweep unnecessarily broad and thereby invade area of protected freedoms.

3. Constitutional Law ⇐83(1)

Even though governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

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Raymond C. Johnson, Lakewood, for petitioner.

Theodore P. Koeberle, Boulder, for respondent.

HODGES, Justice.

On petition of the City of Lakewood, we granted certiorari to review the district court's declaration that a Lakewood ordinance is invalid.

The respondent Pillow was convicted in municipal court of a violation of this ordinance which makes it unlawful to possess a dangerous or deadly weapon. He appealed to the district court which reversed the conviction on the basis of a finding that there was a failure of proof before the municipal court and on the further ground that the ordinance was invalid. The district court's declaration of invalidity was premised on its finding that the subject matter of the ordinance is a matter of statewide concern and is therefore preempted by a state statute pertaining to the carrying of a concealed weapon. This state statute is 1965 Perm.Supp., C.R.S. 1963, 40-11-1.

We affirm the district court's reversal of the respondent's conviction but do so on the ground that the Lakewood ordinance is

D's conv. reversed on overbreadth grounds, not ∆ to bear arms.

unconstitutionally overbroad. It is therefore unnecessary to discuss the failure of proof issue; moreover, this case is not a suitable vehicle for a consideration of the preemption issue. Our decision to resolve this case in this manner was prompted to some degree by statements made by counsel for the City of Lakewood during oral argument. He conceded that the ordinance lacked specificity in certain respects and that a replacing ordinance was in the process of preparation.

The subject Lakewood ordinance is numbered 0–70–47, Sec. 3–9 and is set forth in full as follows:

*"Unlawful to Possess, Carry or Use Dangerous or Deadly Weapons.* (a) It shall be unlawful for any person to have in his possession, except within his own domicile, or to carry or use, a revolver or pistol, shotgun or rifle of any description, which may be used for the explosion of cartridges, or any air gun, gas operated gun or spring gun, or any bow made for the purpose of throwing or projecting missiles of any kind by any means whatsoever; provided that nothing in this section shall prevent use of any such instruments in shooting galleries or ranges under circumstances when such instruments can be fired, discharged or operated in such manner as not to endanger persons or property and also in such manner as to prevent the projectile from traversing any grounds or space outside the limits of such gallery or range; and provided further, that nothing herein contained shall be construed to prevent the carrying of any type of gun, when unloaded, or any bow, to or from any range, gallery or hunting areas. (b) Nothing in this section shall prevent the possession or use of any of said instruments by persons duly licensed for such purpose by the City of Lakewood. (c) Nothing in this section shall prevent the use of or possession of any said instrument by law enforcement personnel."

[1] An analysis of the foregoing ordinance reveals that it is so general in its scope that it includes within its prohibitions the right to carry on certain businesses and to engage in certain activities which cannot under the police powers be reasonably classified as unlawful and thus, subject to criminal sanctions. As an example, we note that this ordinance would prohibit gunsmiths, pawnbrokers and sporting goods stores from carrying on a substantial part of their business. Also, the ordinance appears to prohibit individuals from transporting guns to and from such places of business. Furthermore, it makes it unlawful for a person to possess a firearm in a vehicle or in a place of business for the purpose of self-defense. Several of these activities are constitutionally protected. Colo.Const. art. II, § 13. Depending upon the circumstances, all of these activities and others may be entirely free of any criminal culpability yet the ordinance in question effectively includes them within its prohibitions and is therefore invalid. Shuttlesworth v. Birmingham, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965); Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948); People of the City of Detroit v. Sanchez, 18 Mich.App. 399, 171 N.W.2d 452 (1969).

[2, 3] A governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1963); NAACP v. Alabama, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed.2d 325 (1964). Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Aptheker v. Sec-