Robert Sprecher and the *Absolute* Right to Bear Arms

The Civil Rights Act of 1964 became law in July of that year with support from 70% of all federal Representatives and an even higher proportion of Senators. That same month, the American Bar Foundation (a political satellite of John D. Rockefeller's University of Chicago School of Law) announced the topic of its annual Constitutional Law Essay competition:

"What does the Second Amendment, guaranteeing "the right of the people to keep and bear arms", mean? Does the guarantee extend to the keeping and bearing of arms for private purposes not connected with a militia?"

How are we to understand the virtually simultaneous timing of these two events? One indication may be found in the fact that the deadline for either direct submissions or separately published essays was November 2, the day before the upcoming Presidential election ("Essay Contest Announced," 1964, p. 33). It is crucial to recognize that much of the political Right saw the Civil Rights Act to be an existential threat to their cause. Some conservative pundits clung to the hope that the passage of this bill would trigger a major backlash in the upcoming Presidential election. Instead, President Lyndon Johnson decisively defeated the Republican candidate Barry Goldwater. In conceptual terms, the Civil Rights Act eliminated the legal basis for the Jim Crow system of social control which had guided governmental policies across much of the United States for most of the previous century. In broader political terms, the legislative success of the Civil Rights Act not only invalidated this long accepted approach to keeping blacks 'in their place', it indicated that a substantial majority of the American populace supported a rejection of that general approach to racial politics. The Right's campaign slogan that they represented the political beliefs of the 'real' Americans yielded the seemingly inescapable conclusion that their 'real' Americans now constituted a distinct minority of the general populace.

While Jim Crow doctrine covers a wide range of social and political interactions, without ambiguity, its core basis is the principle that every adult white male has the right, if not the obligation, to bear arms in public for the purpose of intimidating and, 'if need be', murdering any black person who steps out of line. That decentralized system of enforcement came into use after the Civil War. Before that time, the slaveowner was understood to bear the primary responsibility for insuring that none of his slaves stepped out of line. With the victory by the Northern armies and the blanket emancipation of the slave population, no such system of 'public safety' was left in place. As such, it became the expectation of every adult white male to step up and accept their social responsibility. If this principle of vigilante intimidation were to be legally reaffirmed, the Civil Rights Act would become neutered, both in theory and in practice.

While in general terms, the 'correct' answer to the American Bar Foundation's essay question was surely a foregone conclusion, the winner of the 1964 Constitutional Law Essay competition was *The Lost Amendment*, submitted by constitutional lawyer Robert Sprecher. This winning essay was then published in the *American Bar Association Journal* (Sprecher, 1965). It would become the founding document of the American Gun Rights movement. In his essay, Sprecher called for the need "to convert the Second Amendment into an *absolute* [his italics] right to bear arms, unhampered by any concept of arms for militia use only". Politically crucial would be Sprecher's focus, not upon the right to "keep" arms, but the right to "bear" arms.

Throughout the bulk of his essay, Sprecher systematically laid out the absence of any established legal precedence for the meaning he had 'discovered', either before or after the writing of the Bill of Rights by the first session of Congress in 1789. At that time, 'legal precedence' was virtually synonymous with English common law. Up until the American Revolution, the laws of the British colonies were generally bound by the tenets of English common law. Indeed, from the Revolutionary War through to the early nineteenth century when the various states began to compose detailed law codes, American courts continued to recognize the legal validity of English common law. Published during the late 1760s, William Blackstone's *Commentaries* was generally regarded by the Founding Fathers to be the definitive compilation of English common law. Notably, Sprecher's essay directly quoted Blackstone's *Commentaries* which stated that "The offense of *riding* or *going armed* with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land, and is particularly prohibited by statute" (Blackstone, p. 149).

Without ambiguity, at the time when the Bill of Rights was being ratified, this passage from Blackstone's famed *Commentaries* was recognized as being the law of the land regarding the governmental authority to regulate the bearing of arms. If the Founding Fathers had felt that their newly ratified Second Amendment had invalidated such a long-standing principle of English law, it is unimaginable that they would not have called any attention to that fact. Indeed, during the intervening 175 years, none of the four Supreme Court cases that had previously ruled upon the meaning of the Second Amendment had found the 'lost' interpretation that Robert Sprecher had claimed to have discovered.

Despite a striking lack of supporting evidence for the claims he was about to make, Sprecher began his essay asking the reader to believe in the "infinite" "WISDOM OF THE Founding Fathers". Although directly pointing to the Founding Fathers, Sprecher does not mention the actual discussions that occurred during the writing of those first ten amendments. Notably, consider the relevant amendment as composed by the House of Representatives and submitted to the Senate (Cogan, 1997, p. 173):

"A well regulated militia, composed of the body of the People, being the best security of a free State, the right of the People to keep and bear arms, shall not be infringed, but no one religiously scrupulous of bearing arms, shall be compelled to render military service in person."

By this text, the State is explicitly barred from arbitrarily deciding or compelling which segments of the society will or won't be allowed to join a properly organized domestic defense. The historical logic behind the wording of this amendment lies in the fact that the course of Western European history was fundamentally shaped by the forcible disarmament of the general populace by the emerging feudal aristocracy at the beginning of the medieval period (Duby, 1974, p. 75). As this process evolved in early Anglo-Saxon England, the local populations were disarmed and subjugated by a network of gang leaders. Our word 'lord' comes from the Old English term for such a gang leader (Bloch, 1961, p. 182). This militarily-enforced political division generally remained intact as the re-monetization of the Western economy during the late medieval period enabled the shift from feudally-pledged knights to mercenary-based armies ('soldier' is derived from the Latin for "he who is paid"). Much of the political exceptionalism of England finds its origin in the personnel shortages of the conquering Normans from France who were forced to rely upon the English bowmen of the commoner class in their wars against the more numerous enemies on the European continent. However, that perceived necessity of allowing the general populace to possess arms was explicitly coupled to the legal authority over when and where those arms could be carried in public. These basic principles were embraced by the populace as they provided a deterrence against the excesses of their own government which the peasantry of continental Europe lacked. As was cited in Sprecher's essay, in his famous *Wealth of Nations* (1776) Adam Smith wrote that "In a militia, the character of the labourer, artificer, or tradesman, predominates over that of the soldier". While our modern school textbooks celebrate the heroics of the Minutemen militia of Lexington and Concord in their defiance of the British troops sent to confiscate their weapons at the beginning of the American Revolution, equally well known to the writers of the Bill of Rights was the now suppressed tale of the subsequent ignominious surrender by the local militia within Boston who passively turned their weapons over to the British troops. As expressed by the House Resolution quoted above, the enforcement of security in a free State must be based upon the political expression of "the body of the People". While in the present day there is little reason to fear that the federal government might declare that only Wall Street bankers would be allowed to join the National Guard, the premise that such an order might limit the Guardsmen to only registered Republicans is far less unimaginable. This would be the kind of circumstance which the Second Amendment was designed to stop.

The crucial practical issue regarding the Second Amendment is that if "the body of the People" is to serve in the well regulated defense of their communities at the time when a specific threat arises, then at all times they must have direct access to the weapons needed for that defense. Both English common law and the early state laws of the United States consistently affirmed the right of the citizenry to possess firearms in their homes, and indeed during the Revolutionary era many states formally required adult male citizens to possess in their homes functional firearms for their potential use in militia service (Winkler, 2011, p. 113). The constitutionally relevant question is whether the government can legally regulate the bearing of firearms for personal reasons outside of that home.

Without ambiguity, the Second Amendment has never been 'lost'. Before the overtly fabricated invention of Sprecher's *absolute* right to bear arms, such a meaning was never to be found within the Anglo-American legal tradition. So where did Sprecher find the historical precedent that justified his proposal? The answer to that question can be seen within the heart of his essay which laid out the current plight that America was purportedly then facing. In this scenario, the country had been taken over by rampant lawlessness and the government had completely failed to protect its citizenry against that threat. Under those dire circumstances, the only alternative was for the 'real' Americans to take up their own arms and impose law and order by vigilante justice (Sprecher, 1965):

"The concern for the rights of the criminal has brought us to the rather horrifying situation"

"A great cry of despair has arisen because it has suddenly become apparent that the "average citizen" will either retreat or quietly stand by while his fellow-citizen is attacked, maimed, raped, or murdered."

"Perhaps the odds in favor of the individual citizen should be improved. Perhaps the spirit of the Second Amendment should be revived."

“Do we need the fact and spirit of a well-armed citizenry, a little self-help and some of the bravado of the Old West”

Looking back from the present day, this claim of rampant violence might seem rather strange. The murder rate in the United States was not only lower during the early 1960s than it was during the ‘idyllic’ 1950s, it was lower, much lower, than it ever had been since the earliest days of the American colonies (Fischer, 2010). However, as stated in 1964, few could have missed the political meaning of Robert Sprecher’s words. This was classic Jim Crow Speak. It had long been dogma that this system of racial intimidation was essential for hindering black men from bursting forth in a campaign of rape and murder, and now the liberal Democrats had torn down that wall of social protection while having left nothing standing for the defense of innocent ‘real’ Americans.

Given that the conservative leadership was acutely aware the majority of the populace had rejected the Jim Crow style of social control, their operational goal became to count bullets rather than ballots. Significantly, their anticipated targets would no longer be limited to people of color and other similarly marginalized members of American society. With the overwhelming popular support for LBJ during the early years of his presidency, the majority of American society had now come into the crosshairs of the Right. Sprecher’s *Lost Amendment* was a call for a redefined interpretation of the Second Amendment as the legal mechanism to negate the Civil Rights Act and the reauthorization of a new round of Jim Crow social control through threats of violence. By this re-interpretation of the Second Amendment, the Right would establish a legal mechanism to enable its faithful to indiscriminately threaten the lives of those they considered to be a political adversary. The key insight was that the destruction of American democracy could potentially be achieved by a systematic implosion rather than by requiring a full scale civil war. If you claim for yourself the right to kill your political adversary, it becomes psychologically intolerable to treat them as equals at the ballot box. The *Lost Amendment* quickly became a significant component of the intellectual framework of the ‘Southern Strategy’ which brought Richard Nixon into the White House at the beginning of 1969. In recognition of that fact, President Nixon appointed Robert Sprecher to a federal Circuit Court judgeship. What better qualification could one imagine for a federal judgeship than a constitutional lawyer who had earned his claim to fame by advocating for a nationwide vigilante-based law enforcement system?

Yet if Robert Sprecher’s *Lost Amendment* has played such a central role in the emergence of the modern American Gun Rights movement, why has he remained so completely unknown among the broader general public? His essay provides the obvious answer. Sprecher’s writings exude the self-congratulatory enthusiasm of one who has discovered a seemingly well-hidden truth that had escaped the recognition by American courts for more than 170 years. However, Sprecher’s self-congratulation stands in stark contrast to the key underlying premise of his essay. The reader of his essay is required to assume that the alleged silence of the Founding Fathers on this issue demonstrated their unspoken belief that the bearing of arms for private purposes and for the organized defense of the community are legally inseparable and therefore no explicit assertion of that principle was to be expected. Yet as presumed by Sprecher, for the next 170 years, the American judiciary had been totally oblivious of that ‘fact’.

A more plausible approach to the desired political goal is offered in the historical fairytale summarized on the cover of Stephen Halbrook’s *The Founders’ Second Amendment* (2008), a highly valued reference book of the Gun Rights movement:

“Recent years have seen a sea change in scholarly interpretation of the Second Amendment. Beginning in the 1960s, a revisionist view emerged that individuals had a “right” to bear arms only in military service – in other words, a limited, collective right.”

We must consider how the Left so ineptly succeeded in providing political plausibility to Halbrook’s claim that they had been responsible for the “sea change in scholarly interpretation of the Second Amendment”. Rather than directly citing the writings of the Founding Fathers to demonstrate their clear understanding of a legal distinction between the bearing of arms for private purposes and the right to bear arms in the organized defense of the community, the Left joined with the Right to explicitly affirm their legal equivalence. The political logic of the Left was straightforward. Modern society has long since moved beyond the model of a “well regulated Militia” based upon individuals bringing their own muskets to the battlefield. Since such a militia is no longer deemed to be “necessary to the security of a free State”, the conclusion offered by the Left was that the Second Amendment had become dead letter law and as a direct result “the right of the people to keep and bear Arms” had become extinguished. The Right seized upon this political ineptitude to transform the public discussion into a debate over whether or not federal agents should break into houses across America to confiscate the guns owned by law-abiding citizens. Despite Robert Sprecher having made perfectly clear that the crucial legal issue is the bearing of arms for public vs. private purposes, the arrogant stupidity of the Left placed the Gun Rights movement in the political driver’s seat.

This sham choice offered by both the Left and Right was based upon the premise that the bearing of arms for private purposes and the right to bear arms in the organized defense of the community are legally inseparable. In fact, there is not the slightest ambiguity that the Founding Fathers clearly understood the traditional English common law distinction between the private use of firearms and the collective responsibility of a militia to act in the defense of their community. As cited by Stephen Halbrook in his now classic text, two years before the federal Constitution was drafted, the future composer of the Second Amendment James Madison submitted to the Virginia state legislature a bill, drafted by Thomas Jefferson, which proposed that anyone who is found to have hunted deer out of season and then during the course of the following year "shall bear a gun out of his inclosed ground, unless whilst performing military duty" will be held criminally liable (Halbrook, 2008, pp. 166-167).

Later, in the Congressional debate over codifying the Second Amendment, the House Speaker Frederick A. Muhlenberg wrote (Halbrook, 2008, p. 270):

"There was a curious medley of them [proposed amendments that had been rejected by the special Committee], and such as even our Minority in Pennsylvania would rather have pronounced dangerous Alterations than Amendments – these they offered in separate Resolution to the House in Order to get them referred to a Comittee of the whole, but both Attempts failed"

By misleadingly editing a quote from Speaker Muhlenberg, Stephen Halbrook attempted to blunt this stark sarcasm of the previously rejected *Dissent of the Minority* report (Halbrook, 2008, p. 270). In fact, House Speaker Muhlenberg had written from direct experience on the then widely discussed *Dissent of the Minority* report which had been submitted during the Pennsylvania constitutional ratification convention for which Muhlenberg had served as president (*The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents*). The bill of rights proposed by those Pennsylvania minority delegates held that "the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game". Regarding that right to hunt, these delegates asserted that the federal government should have no authority to restrain every citizen's unfettered right to hunt bird and beast on all unenclosed lands and to fish in all non-privately held waters without limit. That proposal was rejected by the Pennsylvania ratification convention by a vote of 46 to 23 (Halbrook, 2008, pp. 195-196). Without question, the Pennsylvania ratification convention had upheld the governmental authority to restrict the bearing of guns for private purposes.

The sharp distinction that James Madison drew between a right to bear arms as part of a well-regulated militia and a right to bear arms for private purposes has recently gained further cogency in light of the Supreme Court decision New York State Rifle & Pistol Association, Inc. v. Bruen (2022) in which the Originalist Justices proclaimed that "The government must then justify its regulation by demonstrating it is consistent with the Nation's historical tradition of firearm regulation". By explicitly refusing to define a coherent standard for assessing the legality of any proposed firearm regulation, the Supreme Court has stated a formula that insures its future opportunity to pass judgment upon any such regulation without its own judgment being constrained by any such previously defined legal standard. Even more relevantly, the American populace would be foolish to pretend that Jim Crow laws are not part of "the Nation's historical tradition of firearm regulation" in the eyes of this Supreme Court. With the recent legal resurrection of the anti-abortion Comstock Act of 1873 and the 1864 law of the Arizona Territory which imposed a virtually complete ban on abortions in that territory, it is naïve in the extreme to pretend that legality of Jim Crow regulations could not be similarly resurrected. After all, is that not precisely why the *absolute* right to bear arms was invented in 1964?

The embrace of Sprecher's *Lost Amendment* by the political elite of the Right established a potential legal path to the literal weaponization of American society and set the stage for the political weaponization of the National Rifle Association that occurred when a coup within that organization in 1977 gave rise to the NRA that we see today (Smyth, 2020, pp. 96-100). This newly reorganized NRA became the focal point for the top-down Gun Rights empowerment program. It is befitting to the spirit of Sprecher's essay that the leader of the infamous NRA coup was Harlon B. Carter whose previous most noteworthy accomplishment in the field had been his unprovoked shooting of a Hispanic boy. While his own obvious lack of provocation and compelling testimony from the witnesses had led to his conviction for murder, being that this was Texas in 1931, Carter's conviction was overturned on appeal. Carter then proceeded to join the U.S. Border Patrol, rising to becoming its chief in 1950 before being appointed the Southwest regional commissioner for the Immigration and Naturalization Service in 1961 (Smyth, 2020, pp. 83-84). Throughout his earlier career, Carter had gone to considerable lengths to hide his earlier murder conviction, including changing his name. However, upon rising to prominence within the transformed NRA, Carter 'came out of the closet' to bask in the adulation of the Gun Rights Faithful as a real live vigilante who had notched up a real dead Hispanic (Winkler, 2011, p. 66).

It is far past time that those who oppose this resurrected Second Amendment Jim Crow vigilantism explicitly call out the historical fraud upon which it has been built. The ratification debates over the federal Constitution directly considered the option of incorporating specific protections for the bearing of arms for private purposes and explicitly rejected that option. Previous to Sprecher's 'discovery' of *The Lost Amendment*, no affirmed federal court ruling attempted to introduce a blanket private right to bear arms. Without ambiguity, the increasing number of mass shootings that the American society now faces is a direct manifestation of the vigilante culture that Robert Sprecher and the American Bar Foundation called for, and it should be acknowledged as such. To make that fact clear to all, the American public should call upon every conscientious news outlet to prominently display a daily running count of the ABF-Sprecher Score that lists the yearly running totals both for the number of people killed in mass shootings (≥ 4 wounded) and for all individuals killed by gun violence. The American populace deserves such a prominent reminder that these manifestly avoidable deaths are largely the direct result of a 'populist' movement manufactured by the political elite which is driven by the addictive sense of empowerment that the Jim Crow mentality provides.

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