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CULTURAL PERSPECTIVES

ON GUN REGISTRATION, THE NRA, ADOLF HITLER, AND NAZI GUN LAWS: EXPLODING THE GUN CULTURE WARS (A CALL TO HISTORIANS)

*Bernard E. Harcourt**

INTRODUCTION

Say the words “gun registration” to many Americans—especially pro-gun Americans, including the 3.5 million-plus members of the National Rifle Association (“NRA”)—and you are likely to hear about Adolf Hitler, Nazi gun laws, gun confiscation, and the Holocaust. More specifically, you are likely to hear that one of the first things that Hitler did when he seized power was to impose strict gun registration requirements that enabled him to identify gun owners and then to confiscate all guns, effectively disarming his opponents and paving the way for the genocide of the Jewish population. “German firearm laws and hysteria created against Jewish firearm owners played a major role in laying the groundwork for the eradication of German Jewry in the Holocaust,” writes Stephen Halbrook, a pro-gun lawyer.¹ “If the Nazi experience teaches anything,” Halbrook declares, “it teaches that totalitarian governments will attempt to disarm their subjects so as to extinguish any ability to resist crimes against humanity.”² Or, as David Kopel, research director of the Independence Institute, states more succinctly: “Simply put, if not for gun control, Hitler would not have been able to murder 21 million people.”³

* Professor of Law, University of Chicago. Special thanks to Saul Cornell, Martha Nussbaum, and Richard Posner for conversations and comments; and to Kate Levine and Aaron Simowitz for excellent research assistance.

1. Stephen P. Halbrook, *Nazi Firearms Law and the Disarming of the German Jews*, 17 *Ariz. J. Int'l & Comp. L.* 483, 483-84 (2000).

2. *Id.* at 532.

3. David Kopel & Richard Griffiths, *Hitler's Control—The Lessons of Nazi History*, Nat'l Rev. Online, May 22, 2003, at <http://www.freerepublic.com/focus/f-news/916520/posts>; see also David B. Kopel, *Lethal Laws*, 15 *N.Y.L. Sch. J. Int'l & Comp. L.* 355 (1995).

Though by no means alone, the NRA has been at the forefront of this historical argument for many years. At least as far back as 1968, the NRA has claimed that “[n]o dictatorship has ever been imposed on a nation of free men who have not been first required to register their privately owned weapons.”⁴ Charlton Heston, the former president of the NRA, never failed to emphasize the connection between gun registration and the Holocaust. “First comes registration, then confiscation,” Heston would exclaim at pro-gun conventions and rallies.⁵ “Any of the monsters of modern history—such as Hitler and Stalin—confiscated privately held firearms as their first act.”⁶ Wayne R. LaPierre, the current executive vice president and chief executive officer of the NRA, similarly highlights the link between gun registration, confiscation, and the German experience. In his book, *Guns, Crime, and Freedom*, under the heading “National Firearms Registration,” LaPierre gives the following account of gun registration systems:

Ultimately registration will let the government know who owns guns and what guns they own. History provides the outcome: confiscation. And a people disarmed is a people in danger.

In Germany, firearm registration helped lead to the holocaust. Each year we solemnly remember in sorrow the survivors and those lost in the holocaust, but the part gun registration and gun confiscation played in that horror is seldom mentioned. The German police state tactics left its citizens, especially Jews, defenseless against tyranny and the wanton slaughter of a whole segment of its population.⁷

A few pages later, LaPierre traces the historical argument in more detail, underscoring the link between registration and the Holocaust:

In Germany, Jewish extermination began with the Nazi Weapon Law of 1938, signed by Adolph Hitler, that required police permission of ownership of a handgun. All firearms had to be registered. Germans who enjoyed using bolt-action rifles for target practice were told to join the Wehrmacht if they wished to shoot “military” rifles. The Nazis also enacted the “Regulations against Jews’ possession of weapons” within the days of Kristallnacht—the

4. Robert Sherrill, *The Saturday Night Special* 179 (1973). According to Sherrill, Lois Buchan, reference assistant in the Library of Congress, was assigned to research whether there was any evidence for the NRA claim, and returned detailed findings that were incorporated in the hearings on amendments to the 1968 Gun Control Act to Prohibit the Sale of Saturday Night Special Handguns. Buchan’s findings are reproduced in *The Saturday Night Special*. *Id.* at 179–80.

5. Charlton Heston, Speech, reported in *No Freedom Without Right to Own Guns*, Actor Charlton Heston Says, Canadian Press Newswire, Apr. 13, 2000, available at LEXIS, News Library, Allnws File.

6. *Id.*

7. Wayne R. LaPierre, *Guns, Crime, and Freedom* 86–87 (1994).

“night of broken glass”—when stormtroopers attacked synagogues and Jews throughout Germany. . . .

Firearms registration lists, moreover, were used to identify gun owners. When the SS arrived, more than the gun would disappear—the owner would never to be seen [sic] again. These policies were promulgated in every country conquered by Hitler, and with the same results.⁸

Other pro-gun organizations deploy the same historical argument, only sometimes more graphically. The Citizens Committee for the Right to Keep and Bear Arms, a smaller national pro-gun organization,⁹ has an educational arm called the Second Amendment Foundation. A Second Amendment Foundation advertisement from 1986, which featured a photo of Hitler, Castro, Khadafy, and Stalin, stated:

The experts have always agreed that gun control is the single best way to take freedom away from the people. It worked in Nazi Germany, and gun control works today in Cuba, Libya and the Soviet Union. Today, a bunch of do-gooders, politicians and their friends in the media are trying to make gun control work in America. These people feel that if you aren't allowed to own a gun, our nation will be a 'better' place. And they're very close to making it happen.¹⁰

Another group, Jews for the Preservation of Firearms Ownership (“JPFO”), is even more colorful. The JPFO, which was founded in 1989 and labels itself “America’s Aggressive Civil Rights Organization,”¹¹ has published two books on the Nazi gun laws, with counterpart reproduction of the German laws and English translations. In the first book, “*Gun Control*” *Gateway to Tyranny: The Nazi Weapons Law, 18 March 1938*, Executive Director Aaron Zelman and Research Director J.E. Simkin explain, in bold, under the capitalized heading, “WHY YOU SHOULD USE THIS BOOK TO DE-NAZIFY AMERICA,” that “Germany’s Nazis were criminals—mass murderers. Those who support Nazi-style public policies—e.g., gun control—are also criminals or ‘criminal-coddlers’ G-d forbid!* Nazi policies—of which ‘gun control’ surely is one—have no place in America or in any other ‘civilized’ country.”¹² Their logo is a

8. *Id.* at 167–68.

9. The organization is much smaller and somewhat more radical than the NRA. It was founded in 1974 by Alan Merrill Gottlieb to “defend the Second Amendment of the United States Constitution and to provide aid and information to individuals throughout the Nation seeking to maintain the right to keep and bear arms.” Josh Sugarmann, *National Rifle Association: Money, Firepower & Fear* 131 (1992).

10. *Id.*

11. *Id.* at 139.

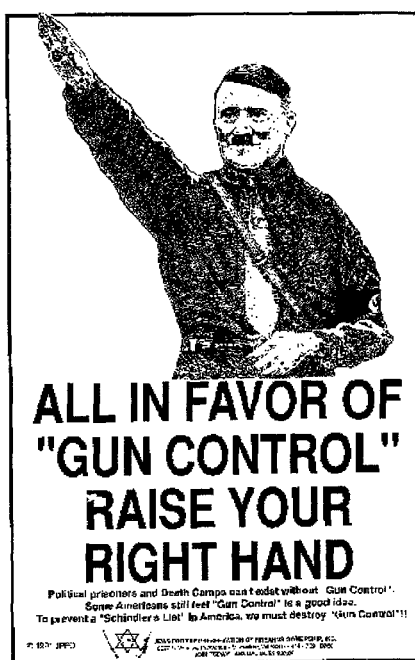
12. Jay Simkin & Aaron Zelman, “*Gun Control*” *Gateway to Tyranny: The Nazi Weapons Law, 18 March 1938*, at 2 (1993).

Star of David with an assault rifle on each side. The following is a quote from a swastika-headed advertisement for the organization:

Stop Hitlerism in America! Gun haters who support gun banning, registration, and waiting period schemes are elitist Fascists who want *total* control of people's lives. Gun haters, knowingly or unknowingly, are advocating the Hitler doctrine of the 1990s. Gun control is a tragic mistake of the past. Millions of tortured and mutilated corpses testify to that fact. The Hitler Doctrine and those that favor it, must not be tolerated in America. Politicians, police officials, and media liberals who support the Hitler Doctrine of gun hate are un-American and have betrayed the public's trust. BE ANTI-NAZI!! Help eradicate gun hate in American [sic]. . . .¹³

The directors of the JPFO summarize their position succinctly—again, in bold: “[T]he hardest lesson of the Holocaust—for Jews and Gentiles alike, and one yet to be learned—is that ‘gun control’ is a lethal policy.”¹⁴

JPFO have a number of provocative items on their website, including bumper stickers and posters for sale. The following is, according to the organization, their most popular poster:¹⁵



13. Sugarmann, *supra* note 9, at 139.

14. Jay Simkin et al., Lethal Laws: “Gun Control” Is the Key to Genocide 159 (1994).

15. Simkin & Zelman, *supra* note 12, at 135.

In much of the literature and argument, the references to Hitler and Nazi gun laws are often dressed in Second Amendment rhetoric. The message, in essence, is that the founders specifically crafted the Second Amendment to protect the Republic from dictators—and that Adolf Hitler proved the founders right. “Disarming political opponents was a categorical imperative of the Nazi regime,” Halbrook explains. “The Second Amendment to the U.S. Constitution . . . was not recognized in the German Reich.”¹⁶ Charlton Heston often drew similar connections between the Second Amendment and Nazi Germany. Heston’s notorious speech on the Second Amendment, *The Second Amendment: America’s First Freedom*, for instance, is laced with references to Hitler’s Germany.¹⁷

Not surprisingly, the Nazi-gun-registration argument has entered the public lexicon and is repeatedly rehearsed today on the opinion pages of newspapers across the country. Most of the time, the message is simple: gun registration will lead to confiscation, and confiscation to tyranny, as demonstrated in the German experience. Here are a few typical letters to the editor, the first from the pages of the *Modesto Bee*: “Guns were registered in Germany, and when Hitler took control, his people went from house to house demanding that each registered gun be given up.”¹⁸ This, from the opinion pages of the *Post-Standard* of Syracuse, New York: “Throughout history, every country that has registered guns has always told its populace it is for the greater good and safety of all. Once the registration was complete, the confiscation began. Remember Hitler? How about Stalin? Saddam Hussein?”¹⁹

16. Halbrook, *supra* note 1, at 484.

17. See Charlton Heston, *The Second Amendment: America’s First Freedom*, Address Before the National Press Club (Sept. 11, 1997), in *Guns in America: A Reader* 199 (Jan E. Dizard et al. eds., 1999). At every level, from the subliminal to the nakedly exposed, Heston weaves together the American and German experiences, declaring for instance:

I remember when European Jews feared to admit their faith. The Nazis forced them to wear yellow stars as identity badges. It worked. So—what color star will they pin on gun owners’ chests? How will the self-styled elite tag us? There may not be a gestapo officer on every street corner, but the influence on our culture is just as pervasive.

Id. at 200.

18. G. Ray Wiman, *Look at the History*, *Modesto Bee*, Nov. 5, 2002, at B6.

19. Mike Mastrogiovanni, *Just Another Attempt to Violate Constitution, Ballistic Fingerprinting, Pro and Con*, *The Post-Standard* (Syracuse, New York), Nov. 12, 2002, at A5; see also, e.g., John Messinger, *Armed Populace Can Defend*, Ashbury Park Press (N.J.), Nov. 16, 2002, at 18A (“Adolf Hitler implemented full gun registration in Germany under the banner of public safety and police efficiency. Many thought this sensible and applauded the move. In the weeks leading to Nov. 9, Hitler ordered the confiscation of Jewish firearms, setting the stage for his ‘final solution.’”); Kitty Werthmann, *Freedoms Can Disappear in a Hurry if We Aren’t Careful*, *Argus Leader* (Sioux Falls, S.D.), Mar. 11, 2003, at 5B (“Gun registration followed [in Austria], with a lot of talk about gun safety and hunting accidents. Since

Sometimes the opinion commentary contains an infamous statement by Adolf Hitler himself, where he praises Germany's gun registration system in these chilling terms:

This year will go down in history! For the first time, a civilized nation has full gun registration! Our streets will be safer, our police more efficient, and the world will follow our lead into the future!²⁰

The quote has been published more than a hundred times in papers across the country. In fact, a Lexis search of the news library returns 115 references to Hitler's statement. The quote has generated its own cottage industry of referents.²¹

The Nazi-gun-registration argument has also infiltrated the political and legal elite. A bill was introduced in Florida in November 2003 intended to ban any person from keeping a list of gun owners. The proposed bill prominently endorses the historical argument in its preamble, where it declares that "history has also shown that the registration of firearms in Nazi Germany enabled Adolph Hitler to confiscate firearms and render the disarmed population helpless in the face of Nazi atrocities."²² Even the federal bench—at the circuit level—has dipped in the well. Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit now weaves the argument into his writing. Judge Kozinski recently stated in a dissent from a denial of rehearing:

All too many of the other great tragedies of history—Stalin's atrocities, the killing fields of Cambodia, the Holocaust, to name a few—were perpetrated by armed troops against unarmed populations. Many could well have been avoided or mitigated, had the perpetrators known their intended victims were equipped with a rifle and twenty bullets apiece If a few hundred Jewish fighters in the Warsaw Ghetto could hold off the Wehrmacht for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars.²³

the government already knew who owned firearms, confiscation followed under threat of capital punishment.”).

20. This quote usually runs with some variant of the following attribution: Adolph Hitler, 'Abschied vom Hessenland!' ['Farewell to Hussia!'], ['Berlin Daily' (loose English translation)], Apr. 15, 1935, at 3, Einleitung Von Eberhard Beckmann [Introduction by Eberhard Beckmann]. For an example of this attribution see *ARMS, Bearing of*, at <http://users.mstar2.net/brucewrites/d%20arms.htm> (last visited Sept. 28, 2004). For examples of letters to the editors that include this infamous statement, see, for example, Seth Kleinbeck, *Wanted: Guns and Morals*, Arkansas Democrat-Gazette (Little Rock, Ark.), Sept. 27, 1998, at J5; Michael Paul Williams, *Flag Salute's Context is Revealing*, Richmond Times Dispatch (Va.), Feb. 11, 2002, at B1.

21. See, e.g., Letters to the Editor, The Toronto Sun, Dec. 17, 2000, at C2.

22. See H.B. 155, 106th Gen. Assem., Reg. Sess. (Fla. 2003).

23. *Silveira v. Lockyer*, 328 F.3d 567, 569-70 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc).

In fact, the Nazi-gun-registration argument has so far penetrated the American consciousness that, today, a majority of Americans—approximately 57%—believe that handgun registration will lead to confiscation.²⁴

I. PUZZLES OF HISTORY AND RHETORIC

Now, much of the rhetoric is questionable as a historical matter. It turns out, for example, that Hitler's infamous quote, rehearsed in so many newspapers, is probably a fraud and was likely never uttered. The citation reference is a jumbled and incomprehensible mess that has never been properly identified or authenticated, and no one has been able to produce a document corresponding to the quote. It has been the subject of much research, all of it fruitless, and has now entered the annals of urban legends—in fact, it is an entry in the urban legends website. The bloggers seem to have this one right: "This quotation, however effective it may be as propaganda, is a fraud"²⁵ They also state:

This quotation, often seen without any date or citation at all, suffers from several credibility problems, the most significant of which is that the date often given [1935] has no correlation with any legislative effort by the Nazis for gun registration, nor would there have been any need for the Nazis to pass such a law, since gun registration laws passed by the Weimar government [in part to address street violence between Nazis and Communists] were already in effect.²⁶

More important, as a historical matter, the passage of gun registration laws in Germany during the first part of the twentieth century is a complicated matter. Following Germany's defeat in World War I, the Weimar Republic passed very strict gun control laws essentially banning all gun ownership, in an attempt both to stabilize the country and to comply with the Versailles Treaty of 1919. The Treaty of Versailles itself imposed severe gun restrictions on German citizens. One of the key provisions of the Versailles Treaty, Article 169, stated that:

Within two months from the coming into force of the present Treaty, German arms, munitions and war material, including anti-aircraft material, existing in Germany in excess of the quantities

24. Kristin A. Goss, *Policy, Politics, and Paradox: The Institutional Origins of the Great American Gun War*, 73 Fordham L. Rev. 681, 683 (2004).

25. Bogus Gun Control Quotes, at http://www.guncite.com/gun_control_gcbogus.html (last modified Sept. 20, 2004). For similar sentiments, see Did Hitler Ban Gun Ownership?, at <http://www.straightdope.com/mailbag/mhitlrgun.html> (June 16, 2000); The Long List of "Gun-Control" Myths, at <http://rkba.org/research/rkba.faq> (last modified Sept. 20, 2004).

26. Bogus Gun Control Quotes, *supra* note 25.

allowed, must be surrendered to the Governments of the Principal Allied and Associated Powers to be destroyed or rendered useless.²⁷

But even before the Treaty was signed, the German parliament of the Weimar Republic enacted legislation prohibiting gun possession. In January 1919, the Reichstag enacted legislation requiring the surrender of all guns to the government.²⁸ This law, as well as the August 7, 1920, Law on the Disarmament of the People passed in light of the Versailles Treaty, remained in effect until 1928, when the German parliament enacted the Law on Firearms and Ammunition (April 12, 1928)—a law which relaxed gun restrictions and put into effect a strict firearm licensing scheme.²⁹ The licensing regulations foreshadowed Hitler's rise to power—and in fact, some argue, were enacted precisely in order to prevent armed insurrection, such as Hitler's attempted coup in Munich in 1923, as well as Hitler's later rise to power.³⁰

And there are other curious aspects to the Nazi-gun-registration argument. In the first place, the argument is of an odd form for the NRA and pro-gun proponents. After all, the NRA stands for the proposition that "it's not guns that kill people, it's people who kill people." The central idea here is that instrumentalities—in this case handguns—are just that: instrumentalities. They are not to be blamed for what people do wrongly with them. If you follow the logic of that argument, then you would expect a member of the NRA to respond in the same manner when confronted with the Nazi-gun-registration argument: "It's not gun registration that produces gun confiscation and genocide, it's people who do."

The Nazi-gun-registration argument is also a bit disorienting because, at least whenever I have been to a gun show, there are always displays of Nazi paraphernalia. The fringe pro-Nazi element in this country has far more ties to the pro-gun community than it does to the anti-gun community, and you are far more likely to see a swastika at a gun show or a pro-gun rally than you are at the anti-gun Million Mom March on the Washington Mall. The relationship between pro-gun organizations and minorities has always been a topic of heated and intense debate. The NRA and other pro-gun

27. Treaty of Versailles, June 28, 1919, art. 16q, 42 Stat. 1939, 1944, 225 Consol. T.S. 188, 267.

28. See *infra* note 90 and accompanying text.

29. See *infra* note 93 and accompanying text.

30. N.A. Browne, *The Myth of Nazi Gun Control*, available at http://www.guncite.com/gun_control_gcnazimyth.html (last modified July 21, 2001). Browne states:

Gun control was not initiated at the behest or on behalf of the Nazis—it was in fact designed to keep them, or others of the same ilk, from executing a revolution against the lawful government. In the strictest sense, the law succeeded—the Nazis did not stage an armed coup.

Id.

organizations try to appeal to minorities by arguing that gun control is an effort to disarm vulnerable African-American residents in crime-stricken inner-cities—a devious way to perpetuate elite oppression of minorities.³¹ At the same time, though, the NRA often appeals directly to the white middle-class male voter. As Charlton Heston stated:

Heaven help the God-fearing, law-abiding, Caucasian, middle class, protestant, or even worse evangelical Christian, midwest or southern or even worse rural, apparently straight or even worse admitted heterosexual, gun-owning or even worse NRA-card-carrying, average working stiff, or even, worst of all, a male working stiff, because then, not only don't you count, you're a downright nuisance, an obstacle to social progress, pal.³²

Of course, being a white male middle-class evangelical southern Christian admittedly-heterosexual rural working stiff is not the same as being a white supremacist. And it is probably a minority status. But the symbolic message in Heston's comment is not one of inclusion or integration. At least, the imagery used is a far cry from that of the oppressed Jewish family in the Warsaw Ghetto during the Nazi regime.

Finally, the Nazi-gun-registration argument is somewhat puzzling because there is, in a number of states in this country, a lengthy tradition of gun regulation, including gun registration. In fact, the Anglo-American tradition of gun registration dates back to seventeenth-century England. Both prior to and after the adoption of the English Bill of Rights, there were a number of gun regulations in place in England, including registration requirements.³³ In 1660, for instance, all gunsmiths were ordered to produce a record of all firearms they had sold and of all their buyers from the past six months.³⁴ Gunsmiths were then required to report this information weekly.³⁵ These requirements—which constitute the first known gun registration scheme—remained in place after the adoption of the English Bill of Rights of 1689, which declared that “the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law.”³⁶ Prior and subsequent English

31. See, e.g., Sugarmann, *supra* note 9, at 158–62. As Wayne R. LaPierre writes, “Gun licensing and other restrictions, for example, were used to suppress blacks before and after the Civil War.” LaPierre, *supra* note 7, at 90.

32. Heston, *supra* note 17, at 201.

33. Joyce Lee Malcolm, *Guns and Violence: The English Experience* 49-52 (2002).

34. *Id.* at 52.

35. *Id.*

36. English Bill of Rights, at <http://www.yale.edu/lawweb/avalon/england.htm> (last visited Sept. 20, 2004). For the persistence of these requirements post-1689 see Malcolm, *supra* note 33 at 60. Malcolm suggests that the Game Act of 1671 remained on the books after 1689, though she does contend that a 1692 revision of that act

history reflects a long and steady tradition of substantial statutory limitations on gun ownership.³⁷

In the founding period on this continent, a variety of measures were implemented to regulate the possession of firearms—ranging from the administration of loyalty oaths, to militia laws, to reporting requirements, to outright prohibition on gun possession. In eighteenth-century Massachusetts, for instance, militiamen were required to give an exact account of their firearms and equipment, and this information was then transmitted to officers of the state.³⁸ Historian Saul Cornell traces in detail the variety of firearms regulations in place in the eighteenth and nineteenth centuries, including the rules that laid out weaponry requirements and reporting requirements associated with militia service.³⁹ Cornell argues that the heavy regulation reflects an early civic-rights conception of the Second Amendment—as opposed to both a collective-rights or individual-rights interpretation of the Amendment.⁴⁰ Regardless of the implications for the constitutional and historical debates over the meaning of the Second Amendment, Cornell's historical findings reveal a number of measures that imposed reporting requirements.

Moreover, in the United States today there are a number of state gun registration schemes in place. Hawaii and the District of Columbia require registration of primary and secondary transfers of firearms.⁴¹ Twenty-one states have record-of-sales registration laws: Alabama, Alaska, California, Colorado, Connecticut, Delaware,

removed firearms from its ambit by removing them from the list of prohibited devices. *Id.* See generally P.B. Munsche, *Gentlemen and Poachers: The English Game Laws 1671-1831* (1981) (arguing that the Game Act of 1671 was part of the systematic class-based restriction of weapons available to the peasantry that continued up through the Waltham Black Acts).

37. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *Fordham L. Rev.* 487 (2004); Malcolm, *supra* note 33, at 49-53.

38. Cornell & DeDino, *supra* note 37, at 511 (citing 1792 Mass. Acts 208); see also *id.* (referring to similar statutes in New York and Pennsylvania).

39. Cornell & DeDino, *supra* note 37, at 505. According to Cornell, the trend in the nineteenth century was toward prohibition. *Id.* at 512-13. In 1821, in Tennessee, for instance, the legislature allowed a right to self-defense, but adopted a ban on carrying concealed weapons. *Id.* at 515-16. In Virginia in 1838, the legislature passed a ban on carrying concealed weapons by those who habitually carried a concealed weapon: If a defendant was prosecuted but acquitted for murder in self-defense with a concealed weapon, the individual could still be prohibited from carrying in the future. *Id.* at 514. Georgia, in 1837, passed a ban on the sale and possession of guns. *Id.*

40. See *id.* at 491. Under this view, the constitutional right to bear arms is inextricably linked to the ban on standing armies and the citizens' obligation to protect the collectivity. As Cornell suggests, "[t]he text and structure of the provision both support a civic, military reading of the right to bear arms, not an individual right for personal protection." *Id.* at 496.

41. D.C. Code Ann. § 7-2502.01 (2004); Haw. Rev. Stat. Ann. § 134-3 (Michie 2003).

Illinois, Indiana, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, Vermont, Washington, and Wyoming.⁴² Among those states, California, Maryland, and Massachusetts require information on gun sales to be forwarded to a state authority for centralized tracking.⁴³ Other states require local law enforcement to retain the information, usually for a limited period of time.⁴⁴

Both the Hawaii and D.C. registration schemes have survived constitutional challenge. The District of Columbia registration and licensing statutes were challenged on Second Amendment grounds in *Sandidge v. United States*.⁴⁵ The court there held that “[t]he second amendment says nothing that would prohibit a state (or the legislature for the District of Columbia) from restricting the use or possession of weapons in derogation of the government’s own right to enroll a body of militiamen bearing arms supplied by themselves as in bygone days.”⁴⁶ The Hawaii registration and licensing schemes were challenged under both federal and state constitutional provisions. In *State v. Mendoza*,⁴⁷ the Hawaiian court declared that “the Second Amendment does not apply to the States through the Fourteenth Amendment to the United States Constitution”⁴⁸ and that “the right to bear arms may be regulated by the state in a reasonable manner.”⁴⁹

II. LEGAL CULTURAL WARS

Why is it, then, that gun registration would trigger images of Adolf Hitler and the Holocaust among so many Americans—rather than the blue transparency, tropical fish, and coral reefs of the Hawaiian islands? The obvious answer is that these debates are not about history, nor are they about truth. These are cultural arguments. They are the stark manifestations of one of our most heated culture wars today—the gun war.

In this respect, Charlton Heston may have been right—at least, with regard to the metaphor. There is a legal culture war in contemporary America that has everything to do with how we, as public citizens, imagine gun control. There is, as Heston exclaimed, “a cultural war that’s about to hijack you right out of your own birthright.”⁵⁰ If you

42. The Brady Campaign to Prevent Gun Violence, Licensing and Registration: Frequently Asked Questions (June 2002), at <http://www.bradycampaign.org/facts/faqs/?page=licreg>.

43. Cal. Penal Code § 12073 (West 2004); Md. Code Ann., Public Safety § 5-120 (2003); Mass. Gen. Laws ch. 140, § 123 (2004).

44. The Brady Campaign to Prevent Gun Violence, *supra* note 42.

45. 520 A.2d 1057 (D.C. 1987).

46. *Id.* at 1058 (internal quotation marks omitted).

47. 920 P.2d 357 (Haw. 1996).

48. *Id.* at 360.

49. *Id.* at 368.

50. Heston, *supra* note 17, at 199.

are a gun owner and especially if you do not dare tell others you own a gun, “[t]hen you are a victim of the cultural war. You’re a casualty of the cultural battle being waged against traditional American freedom of beliefs and ideas.”⁵¹ Pro-gunners are silenced, Heston proclaimed, because “[t]hat’s how cultural war works.”⁵²

Now, according to Heston, “we are losing”⁵³—but not for long. Heston had a plan: “There is only one way to win a cultural war,” Heston exclaimed.

Do the right thing. Triumph belongs to those who arm themselves with pride in who they are and what they believe, and then do the right thing. Not the most expedient thing, not what’ll sell, not the politically correct thing, but the right thing. . . . Do not yield, do not divide, do not call truce. It is your duty to muster with pride and win this cultural war.⁵⁴

Not everyone agrees. Some suggest, instead, that what we need more than anything is a more muted expressive idiom that brings opposing cultural factions closer together and that reconciles, rather than aggravates, the cultural conflict. “In order to civilize the gun debate,” Dan Kahan argues, “moderate citizens—the ones who are repulsed by cultural imperialism of all varieties—must come out from behind the cover of consequentialism and talk through their competing visions of the good life without embarrassment.”⁵⁵ Rather than fight cultural wars, enlightened citizens “must, in the spirit of genuine democratic deliberation, appeal to one another for understanding and seek policies that accommodate their respective

51. *Id.* at 200.

52. *Id.* at 201.

53. *Id.*

54. *Id.* at 203–04.

55. Dan M. Kahan, *The Tyranny of Econometrics and the Circumspection of Liberalism: Two Problems with the Gun Debate*, in *Guns, Crime, and Punishment in America* 49 (Bernard E. Harcourt ed., 2003) (emphasis omitted) [hereinafter Kahan, *The Tyranny*]; see also Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. Pa. L. Rev. 1291, 1321–22 (2003). The background to this argument appears in Dan Kahan’s essay, *The Tyranny of Econometrics and the Circumspection of Liberalism: Two Problems with the Gun Debate*, *supra*. There, Kahan explores and deconstructs the rhetorical structure of the American gun debates. Kahan argues that there are two distorting influences on the gun debates. *Id.* at 45. The first is an excessive and numbing attention to empirical data. *Id.* at 46. The best public opinion research demonstrates, Kahan argues, that individuals do not rely on empirical studies to formulate their positions regarding guns, but instead base their opinions on their cultural interpretation of gun possession. *Id.* It is not statistics, but rather “cultural allegiances and outlooks that determine citizens’ attitudes toward gun control,” Kahan writes. *Id.* at 45. The second distorting influence is our pervasive liberal discourse norm, which orients the public debate toward consequentialist arguments and away from appeals to cultural values. Yet it is precisely such appeals to values, Kahan suggests, that are needed to resolve expressive controversies. *Id.*

world views.”⁵⁶ In his work with anthropologist Donald Braman, Kahan argues that cultural arguments have a distorting effect on the gun debates; in fact, that “culture is one of the forces that ‘suppress[es]’ truth.”⁵⁷ The way out of the cultural dilemma is not through victory, or cultural dominance or imperialism, but instead through mediation and reconciliation: “Circumstances will therefore become favorable for public enlightenment on gun control only after the development of an expressively pluralist idiom for debating guns. Those who want to resolve the gun debate should do everything in their power to fashion that idiom as soon as possible.”⁵⁸

The problem is that both the cultural warriors and the cultural mediators seem to assume that the two groups—pro- and anti-gunners—are in some sense culturally monolithic. They seem to assume belt-buckle NRA members and flower-children Brady bunch. But that simply is not right. There is much more internal variety, and the variety matters. To be sure, as Michael Dorf suggests, “[t]he people who want an individual right to own and possess firearms are disproportionately white, male, and rural.”⁵⁹ Or, as Kahan argues, “[c]ontrol opponents tend to be rural, southern or western, Protestant, male, and white.”⁶⁰ They represent, as Dorf suggests somewhat colorfully, “the ‘bubba vote,’ ‘Nascar dads,’ or, in Howard Dean’s memorably unfortunate phrase, ‘guys with Confederate flags in their pickup trucks.’”⁶¹ “Control proponents, in contrast, are disproportionately urban, eastern, Catholic or Jewish, female, and African American.”⁶² But there is nevertheless a lot of variety between and within groups. There are, after all, roughly 200 to 250 million firearms in private hands, with 35 to 50% of households estimated to have at least one firearm.⁶³ As Calvin Massey describes, also rather colorfully, some of these gun owners—such as the members of the Women’s Shooting Sports League in Chelsea, Manhattan, or the Pink Pistols, an organization of gay and lesbian gun owners—do not fit the traditional stereotype.⁶⁴ But even within monolithic groups—as we will see shortly—there are often deeply

56. Kahan, *The Tyranny*, *supra* note 55 at 49.

57. D. Kabraman [Dan Kahan and Donald Braman], *Modeling Facts, Culture, and Cognition in the Gun Debate*, available at http://www.cse.unsw.edu.au/~lambert/guns/stimulating_simulations_ver_4.5.pdf, at 26 (emphasis omitted) (Nov. 14, 2003).

58. *Id.* (emphasis and internal quotations omitted).

59. Michael Dorf, *Identity Politics and the Second Amendment*, 73 Fordham L. Rev. 549, 552 (2004).

60. Kahan, *The Tyranny*, *supra* note 55, at 45.

61. Dorf, *supra* note 59, at 552.

62. Kahan, *The Tyranny*, *supra* note 55, at 45.

63. Bernard E. Harcourt, Introduction, in *Guns, Crime, and Punishment in America*, *supra* note 55, at 4.

64. Calvin Massey, *Elites, Identity Politics, Guns, and the Manufacture of Legal Rights*, 73 Fordham L. Rev. 573, 576-77 (2004).

divergent views about the symbolic meaning of gun control measures and of political rhetoric.

Another problem, especially for the cultural mediators, is that the muted expressive idiom does not tell us what we should advocate. It tells us nothing about the substantive decision we need to make. Why, after all, should ordinary citizens compromise on guns, or on the cultural values underlying their beliefs about guns? Why should they accept middle ground? If it is true, as the cultural mediators suggest, that our cultural values dictate our views on guns, then why would anyone give an inch on those cultural values? They seem to matter! We don't want to resolve the gun debates for the sake of resolution. We want to get them right. It's like the old Starkist Tuna ad: "We don't want tuna with good taste, we want good-tasting tuna." If everything turns on cultural visions, then we should want our cultural visions to prevail.

Fortunately, though, the choice is not simply between culture war and cultural accommodation. There is a third option. Rather than engage in pitched cultural warfare or seek a muted expressive idiom, a more promising strategy is to explore in greater depth the cultural conflicts within shared cultural groups—within those apparently monolithic types. The fact is that our cultural wars tend not to be so simplistically two-sided. There are, within each camp, significant conflicts and tensions. Instead of modeling our culture wars on two-sided military conflict, we should instead think of them as more fluid and shifting patterns of temporary equilibria in a continually interrupted, jarred, and moving medium.

Our sexual culture wars offer a perfect illustration. In the context of *Lawrence v. Texas*,⁶⁵ the Supreme Court's 2003 homosexual sodomy case, many culture warriors model our sexual culture wars on a two-party conflict between homosexual advocates on the one hand and the anti-homosexual mainstream on the other.⁶⁶ Justice Scalia writes, for instance, in his dissenting opinion in *Lawrence*, that "the Court has taken sides in the culture war" against the "[m]any Americans [who] do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home."⁶⁷ The fact is, however, that there has been such a

65. 539 U.S. 558 (2003) (upholding a substantive due process challenge to Texas's criminal statute banning homosexual deviate sexual intercourse, where deviate sexual intercourse is defined as oral sex, anal sex, or penetration with an object of the genitals or the anus of another person.)

66. I explore the multiple positions in our sex wars in great detail in another article. Bernard E. Harcourt, *You Are Entering a Gay-and Lesbian-Free Zone: On the Radical Dissent of Justice Scalia and Other (Post-) Queers*, 94 J. Crim. L. & Criminology 503 (2004).

67. *Lawrence*, 539 U.S. at 602.

fragmentation of sexual projects in the West that it is today far too simplistic—in fact profoundly counterproductive—to even talk about a “homosexual agenda” on the one hand and an “anti-homosexual agenda” on the other. In the *Lawrence* litigation itself, there were surprising coalitions on the libertarian side—with amicus briefs filed in support of John Lawrence by Republican groups,⁶⁸ Baptist ministers and representatives of twenty-five other religious organizations,⁶⁹ a free market think-tank,⁷⁰ the American Bar Association,⁷¹ the American Psychiatric and Psychological Associations,⁷² and NOW⁷³—in addition, of course, to the usual suspects, the ACLU and ACLU of Texas,⁷⁴ Amnesty International,⁷⁵ and gay-rights organizations.⁷⁶ To be sure, the cornucopia of amicus briefs reflects strategy and lobbying on the part of John Lawrence’s lawyers. But, more important, it reflects the kind of political coalition-formation that produced the result in *Lawrence*. The same kind of fragmented politics occur on both sides of sex wars on most issues—same-sex marriage, public sex, sado-masochism for example—and it is what will account for the outcomes in those battles. In order to properly understand *Lawrence*—and other sex and cultural wars—we need a much finer grained understanding of sexual projects and of the fragmentation of those projects within seemingly monolithic groups.

The same is true in the gun culture wars, and here the Nazi-gun-registration argument is the perfect illustration. The fact is, there is tremendous fragmentation internal to the pro-gun community on the specific issue of Hitler and gun registration. Not all pro-gunners buy the Hitler argument. The pro-gun folks at the talk.politics.guns web site,⁷⁷ for instance, debunk the infamous Hitler quote.⁷⁸ They rely

68. See Amicus Curiae Brief of the Log Cabin Republicans and Liberty Education Forum, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102); Amicus Curiae Brief of Republican Unity Coalition and the Honorable Alan K. Simpson, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

69. See Amicus Curiae Brief of the Alliance of Baptists et al., *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

70. See Amicus Curiae Brief of the Cato Institute, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

71. See Amicus Curiae Brief of the American Bar Association, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

72. See Amicus Curiae Brief of American Psychological Association et al., *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

73. See Amicus Curiae Brief of NOW Legal Defense and Education Fund, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

74. See Amicus Curiae Brief of the American Civil Liberties Union (“ACLU”) and the ACLU of Texas, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

75. See Amicus Curiae Brief of Amnesty International U.S.A. et al., *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

76. See Amicus Curiae Brief of the National Lesbian and Gay Law Association et al., *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

77. <http://www.faqs.org/faqs/talk-politics-guns/pro-gun-faq/part1/> (last visited

primarily on the research of Clayton Cramer, a pro-gunner,⁷⁹ in his book, *Firing Back*, which refutes the Hitler reference, and they tend, to a certain extent—at least Cramer does—to minimize the connection between gun registration and the Holocaust.⁸⁰

Even more interesting, though, is that within the pro-gun community there is sharp conflict as to whether Hitler was pro-gun control. As noted earlier, one of the moving forces behind the Nazi-gun-registration argument is the JPFO, which has published two books documenting Hitler's use of gun registration, translated the German laws, and drawn fierce attention to the issue of totalitarian gun control measures.⁸¹ This organization is clearly anti-Nazi and pro-gun. But one of the leading defenders of Hitler on the question of gun control is also pro-gun. It's the National Alliance & National Vanguard, a white supremacist organization. According to a pamphlet published by National Vanguard Books, *Gun Control in Germany, 1928–1945*, by William L. Pierce, Adolf Hitler was actually very much in favor of liberal gun possession. Pierce writes:

A common belief among defenders of the Second Amendment to the U.S. Constitution is that the National Socialist government of Germany under Adolf Hitler did not permit the private ownership of firearms. Totalitarian governments, they have been taught in their high school civics classes, do not trust their citizens and do not dare permit them to keep firearms. Thus, one often hears the statement, "You know, the first thing the Nazis did when they came to power was outlaw firearms," or "The first thing Hitler did in Germany was round up all the guns."

...

Unfortunately for those who would like to link Hitler and the National Socialists with gun control, the entire premise for such an effort is false. German firearms legislation under Hitler, far from banning private ownership, actually facilitated the keeping and bearing of arms by German citizens by eliminating or ameliorating restrictive laws which had been enacted by the government preceding his: a left-center government which had contained a number of Jews.

...

When you have read [and compare the 1928 and 1938 German gun laws], you will understand that it was Hitler's enemies, not

Sept. 20, 2004).

78. See *supra* note 20.

79. Did Hitler Ban Gun Ownership? (June 16, 2000), at <http://www.straightdope.com/mailbag/mhitlrgun.html>.

80. Clayton E. Cramer, *Firing Back* (1994).

81. See Simkin et al., *supra* note 14; Simkin & Zelman, *supra* note 12.

Hitler, who should be compared with the gun-control advocates in America today. Then as now it was the Jews, not the National Socialists, who wanted the people's right of self-defense restricted. You will understand that those who continue to make the claim that Hitler was a gun-grabber are either ignorant or dishonest. And you will understand that it was not until 1945, when the communist and democratic victors of the Second World War had installed occupation governments to rule over the conquered Germans that German citizens were finally and completely denied the right to armed self-defense.⁸²

Now, make no mistake. This argument is from a pamphlet published and promoted by National Vanguard Books and the National Alliance. In order to be a member of National Alliance, you have to be a "[w]hite person (a non-Jewish person of wholly European ancestry) of good character. . . . No homosexual or bisexual person, . . . no person with a non-White spouse or a non-White dependent" need apply.⁸³ This is a white supremacist organization. Yet it is also, perhaps, one of the most vocal opponents of the Nazi-registration argument. And it is vehemently pro-gun. Oddly, JPFO and the National Alliance are bedfellows when it comes to gun regulation—though not, obviously, when it comes to Adolf Hitler.

III. READING THE NAZI GUN LAWS

The challenge, then, is to explore this cleavage in the pro-gun community. The most vocal participants in the debate over the Nazi gun laws are, on one side, the JPFO⁸⁴ and Stephen Halbrook, whose writings, most recently *Nazi Firearms Law and the Disarming of the German Jews*,⁸⁵ most clearly set forth the Nazi-gun-registration argument;⁸⁶ and, on the other side, William Pierce, whose four-page essay *Gun Control in Germany, 1928–1945*, published with the translated texts of the German laws, most clearly sets forth the

82. William L. Pierce, *Gun Control in Germany, 1928–1945*, at 3, 6 (1994). This forty-eight-page pamphlet consists of Pierce's four-page essay and the original and English translations of the 1928 Firearms and Ammunition Act, the 1938 Firearms Act, and the 1938 implementing regulations. Pierce's essay of the same name, *Gun Control in Germany, 1928–1945*, is available at <http://www.natvan.com/national-vanguard/assorted/gunhitler.html> (last visited Sept. 28, 2004).

83. The National Alliance, *Requirements for Membership*, at <http://www.natvan.com/what-is-na/na7.html> (last visited Sept. 28, 2004).

84. The JPFO has published two books which present full English translations of all the relevant German gun laws and regulations. See Simkin et al., *supra* note 14; Simkin & Zelman, *supra* note 12.

85. Halbrook, *supra* note 1, at 483–535.

86. In fact, none too modestly, Halbrook claims, perhaps rightly, that his article "presents the first scholarly analysis of the use of gun control laws and policies to establish the Hitler regime and to render political opponents and especially German Jews defenseless." *Id.* at 485.

opposing position that the Nazis were not pro-gun control.⁸⁷ Neither Halbrook nor Pierce are historians,⁸⁸ however, and their ideological commitments are so flagrant—Halbrook as a pro-gun litigator and Pierce as a pro-gun white supremacist—that neither can be trusted entirely in these historical and statutory debates.

Nevertheless, if one reads the Nazi gun laws closely and compares them to earlier German gun legislation, as a straightforward exercise in statutory interpretation, several conclusions become clear. First, in 1938, the Nazi regime reenacted strict gun control laws and regulations that required licensing and reporting for the acquisition, transfer, or carrying of handguns, and for dealing and manufacturing in firearms and ammunition.⁸⁹ In this respect, the Nazis had in place stringent gun regulation, including strict reporting requirements. Second, the Nazi gun laws of 1938 specifically banned Jewish persons from obtaining a license to manufacture firearms or ammunition. In this respect, the Nazi gun laws were more restrictive than those under the Weimar Republic. Third, with regard to possession and carrying of firearms, the Nazi regime relaxed the gun laws that were in place in Germany at the time the Nazis seized power. The Nazi gun laws of 1938 reflect a liberalization of the gun control measures that had been enacted by the Weimar Republic with respect to the acquisition, transfer, and carrying of firearms. In this regard, Hitler appears to have been more pro-gun than the predecessor Weimar Republic. Fourth, approximately eight months after enacting the 1938 Nazi gun laws, Hitler imposed regulations prohibiting Jewish persons from possessing any dangerous weapons, including firearms. The Nazi regime implemented this prohibition by confiscating weapons, including guns, from Jewish persons, and subsequently engaged in genocide of the Jewish population.

87. See Pierce, *supra* note 82.

88. Halbrook is an attorney, holds a Ph.D. in philosophy from Florida State University, and previously taught philosophy. See Stephen P. Halbrook, Ph.D., at <http://www.stephenhalbrook.com/profile.html> (last visited Oct. 7, 2004). William L. Pierce is the late leader of the white supremacist organization, the National Alliance, held a Ph.D. in physics, and was a former college instructor in Oregon. See The Nizkor Project, at <http://www.nizkor.org/hweb/orgs/american/adl/paranoia-as-patriotism/william-pierce.html> (last visited Oct. 7, 2004).

89. It is important to remember, when discussing Nazi laws, that none of the laws were “passed” by a legislature, but instead were all decreed by Hitler under the authority of an emergency presidential decree signed by President Hindenburg in 1933. As William Shirer explains in *The Rise and Fall of the Third Reich: A History of Nazi Germany* 274 (1960):

[T]housands of decreed laws—there were no others in the Third Reich—were explicitly based on the emergency presidential decree of February 28, 1933, for the Protection of the People and the State, which Hindenburg, under Article 48 of the constitution, had signed. . . . The decree, which suspended all civil rights, remained in force throughout the time of the Third Reich, enabling the Fuehrer to rule by a sort of continual martial law.

Id.

The toughest question in all of this is how to characterize the Nazi treatment of the Jewish population for the purpose of evaluating Adolf Hitler's position on gun control. The truth is, the question itself is absurd. The Nazis sought to disarm and kill the Jewish population. Their treatment of Jewish persons was, in this sense, orthogonal to their gun-control views. Nevertheless, if forced to take a position, it seems that the Nazis were relatively more pro-gun than the predecessor Weimar Republic, as evidenced by the overall relaxation of the laws regulating the acquisition, transfer and carrying of firearms reflected in the 1938 Nazi gun laws. Let's take this one step at a time.

The history of gun control in Germany from the post-World War I period to the inception of World War II seems to be a history of declining, rather than increasing, gun control. The Weimar Republic gun laws of 1928 represented a liberalization of the draconian post-World War I prohibitions on gun possession. As noted earlier, in January 1919, the Reichstag passed a complete ban on the ownership of firearms, a ban which was in effect in Germany until the Weimar government enacted the Law on Firearms and Ammunition of April 12, 1928 (the "1928 Law"). The 1919 ban—enacted as the Regulations of the Council of the People's Delegates on Weapons Possession—provided that "[a]ll firearms, as well as all kinds of firearms ammunition, are to be surrendered immediately."⁹⁰ According to Halbrook, under the regulation as enforced, "[w]hoever kept a firearm or ammunition was subject to imprisonment for five years and a fine of 100,000 marks. That decree would remain in force until repealed in 1928."⁹¹ On August 7, 1920, the German government also passed a Law on the Disarmament of the People, which put into effect the provisions of the Versailles Treaty regarding the limits on military weapons.⁹²

Against this background, the Weimar 1928 Law on Firearms and Ammunition represented a significant liberalization, admittedly through regulation, of gun possession.⁹³ The law put into effect a system of permits: it provided for the issuance of permits to own or transfer firearms, to carry firearms including handguns, to manufacture firearms, and to professionally deal in firearms and ammunition.⁹⁴ These permit requirements applied to all firearms,

90. Halbrook, *supra* note 1, at 485 (citation omitted); *see also* Simkin et al., *supra* note 14, at 150.

91. Halbrook, *supra* note 1, at 485.

92. *See supra* note 27. These provisions addressed primarily the limitations on military weapons. They were intended to sunset in 1921, but remained in effect until the 1928 laws were enacted.

93. *See* Law on Firearms and Ammunition, sec. II, § 2 [hereinafter 1928 Law](permit to manufacture); sec. III, § 5 (permit to deal); sec. IV, § 10 (permit to acquire or transfer); and sec. IV, § 15 (permit to carry), *reprinted in* Simkin & Zelman, *supra* note 12, at 17–19.

94. *Id.*

whether long guns or handguns.⁹⁵ The 1928 Law spelled out strict requirements about who could obtain such permits, and who was exempt from the permit requirements. So, for instance, firearms acquisition or carrying permits were “only to be granted to persons of undoubted reliability, and—in the case of a firearms carry permit—only if a demonstration of need is set forth.”⁹⁶ Such permits would not, by law, issue to “Gypsies” or “persons who are itinerant like Gypsies.”⁹⁷ On the other hand, firearm acquisition permits were not required by “officials of the central government, the states, as well as the German Railways Company”⁹⁸ or by “community officials to whom the highest government authority has permitted acquisition without an acquisition permit.”⁹⁹

Thus, the 1928 Law put into effect a strict licensing scheme that covered all aspects of firearms—from the manufacture to the sale, including repair and even the reloading of ammunition.¹⁰⁰ It explicitly revoked the 1919 Regulations on Weapons Ownership,¹⁰¹ which had banned all firearms possession, and thereby liberalized firearms regulation. As Halbrook himself notes, based on review of contemporaneous newspaper reports and official commentary, “the 1928 law was seen as deregulatory to a point but enforceable, in contrast to a far more restrictive albeit unenforceable [1919] order.”¹⁰² Halbrook continues: “Within a decade, Germany had gone from a brutal firearms seizure policy which, in times of unrest, entailed selective yet immediate execution for mere possession of a firearm, to a modern, comprehensive gun control law.”¹⁰³

With regard to ordinary gun possession, as opposed to manufacture, the 1938 Nazi gun laws represented a further liberalization of gun control. In fact, most of the changes in the law with regard to possession and carrying reflected a loosening of the regulations, not a tightening. The Weapons Law of March 18, 1938 (the “1938 Law”) is patterned on the 1928 Law. The two laws have the same structure, similar section headings, and broadly similar language.

Section IV of both statutes address the same topic with the same header, “Acquisition, Carrying, Possession, and Importation of Firearms and Ammunition.”¹⁰⁴ The section deals with possession and

95. 1928 Law, sec. I, § 1, *reprinted in* Simkin & Zelman, *supra* note 12, at 17.

96. *Id.* sec. IV, § 16(1), *reprinted in* Simkin & Zelman, *supra* note 12, at 19.

97. *Id.* § 16(1)(3), *reprinted in* Simkin & Zelman, *supra* note 12, at 20.

98. *Id.* § 11(1), *reprinted in* Simkin & Zelman, *supra* note 12, at 19.

99. *Id.* § 11(2), *reprinted in* Simkin & Zelman, *supra* note 12, at 19.

100. *Id.* sec. II, § 2, *reprinted in* Simkin & Zelman, *supra* note 12, at 17 (“The reloading of cartridge cases is considered to be the same as the manufacture of ammunition.”).

101. *Id.* sec. VI, § 34, *reprinted in* Simkin & Zelman, *supra* note 12, at 25.

102. Halbrook, *supra* note 1, at 491.

103. *Id.* at 493.

104. Compare 1928 Law, *reprinted in* Simkin & Zelman, *supra* note 12, at 19, with

carrying of firearms. The first important revision in the 1938 Law significantly narrowed the scope of gun regulations regarding acquisition and transfer permits. The 1928 Law required a license for the acquisition or transfer of any firearm. It applied to all “firearms and ammunition,”¹⁰⁵ which included any and all “weapons from which a bullet or a load of pellets may be driven through a barrel, by means of the development of an explosive gas or air pressure”¹⁰⁶—in other words, rifles, shotguns, handguns, etc. The 1938 Law, in contrast, applied only to “handguns.”¹⁰⁷ In effect, the 1938 revision completely deregulated the acquisition and transfer of rifles and shotguns, as well as ammunition.

The second set of revisions effectuate an enlargement of the exceptions to the acquisition permit requirement. The 1938 Law effectively extended the number of groups of people who were exempt from the acquisition permit requirement. Whereas the 1928 Law exempted primarily “officials of the central government, the states, as well as the German Railways Company,”¹⁰⁸ “business owners” dealing in guns,¹⁰⁹ and holders of a “firearms carry permit,”¹¹⁰ the 1938 Law included these exemptions, but extended them to include holders of “annual hunting permits,”¹¹¹ as well as a larger group of government workers and Nazi party members.¹¹² The effect of these changes meant that anyone with an annual hunting permit did not need a permit for the acquisition or transfer of any firearm, whether long gun or handgun. Moreover, an additional provision in the 1938 Law states that “a hunting license entitles the holder to carry firearms and handguns,”¹¹³ suggesting that the hunting license also extends an exemption for handgun carrying. Under the 1928 Law, the hunting permit only entitled its holder to acquire “handguns as noted on it”¹¹⁴ and to carry handguns during the hunting activity.¹¹⁵

A third revision lowered the age for the acquisition of firearms. Whereas the 1928 Law did not allow acquisition or carry permits to

1938 Law, *reprinted in* Simkin et al., *supra* note 14, at 165.

105. 1928 Law, sec. IV, § 10(1), *reprinted in* Simkin & Zelman, *supra* note 12, at 19.

106. *Id.* sec. I, § 1(1), *reprinted in* Simkin & Zelman, *supra* note 12, at 17.

107. 1938 Law, sec. IV, § 11(1), *reprinted in* Simkin et al., *supra* note 14, at 165.

108. *Id.*

109. 1928 Law, sec. IV, § 11(3), *reprinted in* Simkin & Zelman, *supra* note 12, at 19.

110. *Id.* § 12, *reprinted in* Simkin & Zelman, *supra* note 12, at 19.

111. 1938 Law, sec. IV, § 12(7), *reprinted in* Simkin et al., *supra* note 14, at 165.

112. *Id.* § 12, *reprinted in* Simkin et al., *supra* note 14, at 165. In § 19(2), the law set forth the exact members of the National Socialist party who were exempt from the acquisition and carrying permit requirement: these included “deputy-leaders of the Nazi Party” from the head of the local Nazi party organization upwards, and Hitler Youth from regiment leader upwards, and S.A. and S.S. members to whom firearms were supplied. *Id.* § 19(2), *reprinted in* Simkin et al., *supra* note 14, at 166.

113. 1938 Law, sec. IV, § 21, *reprinted in* Simkin et al., *supra* note 14, at 169.

114. 1928 Law, sec. IV, § 21, *reprinted in* Simkin & Zelman, *supra* note 12, at 21.

115. *Id.* § 21(2), *reprinted in* Simkin & Zelman, *supra* note 12, at 23.

issue to persons under twenty years of age, the 1938 Law did not allow “juveniles under 18 years of age” to “buy” firearms; the 1938 Law also allowed “the competent authority [to] make exceptions.”¹¹⁶ A fourth revision extended the period that a permit to carry was valid. Under the 1928 Law, a firearms carry permit was valid for one year from the date of issue. Under the 1938 Law, the permit was valid for a period of three years.¹¹⁷

With regard to the manufacture of firearms and ammunition, the 1938 Law was similar to the 1928 Law with the major exception that the 1938 Law banned Jewish persons from the manufacture business. Under both statutes, a license was required to manufacture firearms or ammunition. The 1938 revisions, however, stated that the license would only be granted to German citizens who have permanent residence in German territory, and would not be issued “if the applicant—or if one of the persons proposed for the commercial or technical management of the business—is a Jew.”¹¹⁸ With regard to dealing in firearms and ammunition, the 1928 and 1938 statutes are for all practical purposes similar. They both require a license, they both exclude itinerants and dealers in second-hand goods, and they both require serial numbers on firearms.¹¹⁹

The regulations implementing the laws of 1928 and 1938 are substantially similar—with the exception, of course, of the above noted revisions incorporated in the 1938 Law. On July 13, 1928, the Minister of the Interior imposed Implementing Regulations of the Law on Firearms and Ammunition.¹²⁰ Those regulations required manufacturers and dealers of firearms to maintain a “Firearms Book” and “Firearms Dealer’s Book” respectively, which were to contain the following types of information: seq. no.; quantity; type; stamped signature; manufacturer’s number; name and address of acquirer

116. Compare 1928 Law, sec. IV, § 16(1), *reprinted in* Simkin & Zelman, *supra* note 12, at 19, with 1938 Law, sec. IV, § 13, *reprinted in* Simkin et al., *supra* note 14 at 165.

117. This is actually a tricky point. The English translation offered by the JPFO actually mistranslates the period of validity for the right-to-carry permit under the 1928 law. It states that the validity of the permit is “three years.” 1928 Law, sec. IV, § 15(3), *reprinted in* Simkin & Zelman, *supra* note 12, at 19 (English translation). The original German text, though, reads “eines Jahres” or one year. See 1928 Law, sec. IV, § 15(3), *reprinted in* Simkin & Zelman, *supra* note 12, at 18 (original German version). Here, Pierce’s translation is more faithful and does not make the error: “A Weapons Permit is valid for a period of one year from the date of issue.” Pierce, *supra* note 82, at 15. In contrast, the 1938 law extended the period of validity of the right-to-carry permit to three years. See 1938 Law, sec. IV, § 14(3), *reprinted in* Simkin et al., *supra* note 14, at 166 (original German version, stating “drei Jahren” or three years).

118. 1938 Law, sec. II, § 3(5), *reprinted in* Simkin et al., *supra* note 14, at 163.

119. Compare 1928 Law, sec. III, *reprinted in* Simkin & Zelman, *supra* note 12, at 18–19, with 1938 Law, sec. III, *reprinted in* Simkin et al., *supra* note 14, at 165.

120. See Implementing Regulations of the Law on Firearms and Ammunition 13 July 1928 [hereinafter “1928 Implementing Regulations”], *reprinted in* Simkin & Zelman, *supra* note 12, at 29.

(seller).¹²¹

According to the regulations, the “Firearm-and Firearms Dealer’s Book” were to be “durably bound and provided with consecutive page numbers.”¹²² In fact, “[b]efore it can be put into use, the police authority is to certify the page numbers by stamping.”¹²³ At the end of each year, the book is to be “closed out” and “delivered to the police authority for verification of the closure.”¹²⁴ Moreover, the book “is to be produced with the required documents on demand by the police authority or their agents.”¹²⁵

The implementing regulations issued by the Minister of the Interior, Wilhelm Frick, pursuant to the 1938 Law were substantially similar, with the exception naturally of the above-referenced revisions to the 1938 Law. There were some minor changes. For instance, whereas the 1928 implementing regulations required dealers to keep the book “until twenty years have elapsed after the date of the last entry,”¹²⁶ the 1938 implementing regulations only required dealers to keep their books for ten years.¹²⁷ Also, while the 1928 implementing regulations limited the number of guns and ammunition covered by the relevant permits, the 1938 implementing regulations did not contain any such limitation. The 1928 regulations stated that “the firearms acquisition permit entitles the holder to acquire one firearm, so long as the right to acquire a higher number is not marked on it,” and similarly that “the ammunition acquisition permit entitles the holder to acquire 50 jacketed cartridges or 50 ball cartridges for handguns, so long as the right to acquire a higher or a lower number is not marked on it.”¹²⁸ In contrast, the 1938 implementing regulations are devoid of such limitations on the number of guns or ammunition.

Finally, with regard to disarming the Jewish population, there is no dispute that the Nazis did disarm Jewish persons aggressively—of all firearms, as well as “truncheons or stabbing weapons.”¹²⁹ The Minister of the Interior, Frick, enacted Regulations Against Jew’s Possession of Weapons on November 11, 1938, which effectively deprived all Jewish persons of the right to possess firearms or other weapons. It was a regulation prohibiting Jewish persons from having any dangerous weapon—not just guns. Under the regulations, Jewish

121. *Id.*

122. *Id.* § 10(1), reprinted in Simkin & Zelman, *supra* note 12, at 31.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* § 10(2), reprinted in Simkin & Zelman, *supra* note 12, at 31.

127. Implementing Regulations of the Weapons Law, 19 March 1938, sec. II, § 18, reprinted in Simkin & Zelman, *supra* note 12, at 177.

128. 1928 Implementing Regulations, sec. III, § 12, reprinted in Simkin & Zelman, *supra* note 12, at 31.

129. Regulations Against Jews’ Possession of Weapons, 11 November 1938, reprinted in Simkin et al., *supra* note 14, at 183.

persons “are prohibited from acquiring, possessing, and carrying firearms and ammunition, as well as truncheons or stabbing weapons. Those now possessing weapons and ammunition are at once to turn them over to the local police authority.”¹³⁰ Moreover, prior to that, the German police and Nazis used the 1938 firearms law as an excuse to disarm Jewish persons. In Breslau, for instance, as Halbrook reports, the city police chief decreed the seizure of all firearms from Jewish persons on the ground that “the Jewish population ‘cannot be regarded as trustworthy’”—using the language from the 1928 and 1938 firearms laws.¹³¹

It is fair to conclude, then, that the 1938 Nazi gun laws represented a slight relaxation of gun control, at least with regard to general gun acquisition, transfer, and carrying. To be sure, the Nazis were intent on killing Jewish persons and used the gun laws and regulations to further the genocide. But it appears that the Nazis aspired to a certain relaxation of gun laws for the “ordinary” or “law-abiding” German citizen, for those who were not, in their minds, “enemies of the National Socialist state.”¹³² Stephen Halbrook, in fact, seems to acknowledge as much. Halbrook reviews in some detail the proposed reforms of the firearms laws that Minister of the Interior Frick began preparing in 1933 and that he continuously proposed in 1933, 1935, and 1937, before enacting in 1938. What is clear from Frick’s memos to Hitler’s cabinet and from the section-by-section analysis of the proposed reforms, is that Frick intended some deregulation of firearms laws, but was concerned about implementing these and more deregulatory initiatives until Nazi ideology had more pervasively permeated the general population and until the “enemies of the state”—namely, those opposed to National Socialism and the Jewish population—were eliminated. Frick’s section-by-section analysis states, for instance, that “[i]f these provisions guarantee that no enemies of the National Socialist state possess any weapons, then it is justifiable and appropriate to relax the current limiting provisions of the Weapons Law for the population faithful to the state.”¹³³

Halbrook offers contemporaneous news accounts, including reports from the German paper, *Völkische Beobachter*, Adolf Hitler’s newspaper, which seem to reflect that the Nazis considered the 1938 gun laws as liberalizing gun control measures in Germany. Halbrook discounts these news reports on the ground that “the Nazis were masters of propaganda.”¹³⁴ That, of course, is true. But the question

130. *Id.*

131. See Halbrook, *supra* note 1, at 502 (quoting *Permission to Possess Arms Withdrawn from Breslan Jews*, N.Y. Times, Apr. 23, 1933, at 1).

132. Halbrook, *supra* note 1, at 505 (quoting a Nazi document discussing reform of firearms regulation).

133. *Id.*

134. *Id.* at 512.

is, were the Nazis engaging in propaganda on the question of gun control? On this point, Halbrook offers no evidence. Hitler's paper reported the following about the 1938 Law:

The new law is the result of a review of the weapons laws under the aspect of easing the previous legal situation in the interest of the German weapons industry without creating a danger for the maintenance of public security.

In the future, the acquisition of weapons will in principle require a police permit only when the weapons are pistols or revolvers. No permit will be required for the acquisition of ammunition.

...

Compared to the previous law, the statute also contains a series of other alleviations. From the remaining numerous new provisions, the basic prohibition to sell weapons and ammunition to adolescents below the age of 18 should be emphasized. Further, the issuing of permits for the production or commerce with weapons is linked to the possession of German citizenship and to the personal reliability and technical fitness [of the applicant]. No permits may be given to Jews.¹³⁵

Again, Halbrook argues that these reports are propaganda, but it is simply not clear that they are. These and other passages are transparent: Frick and Hitler intended to liberalize gun control laws in Germany for "trustworthy" German citizens, while disarming "unreliable" persons, especially the Jewish population. In order to disarm Jewish persons, the Nazi government used both the "trustworthiness" requirements originally legislated in 1928, as well as more direct regulations denying Jews the right to manufacture or possess firearms. It is absurd to even try to characterize this as either pro- or anti-gun control. But if forced to, I would have to conclude, at least preliminarily from this straightforward exercise in statutory interpretation, that the Nazis favored less gun control for the "trustworthy" German citizen than the predecessor Weimar Republic, while disarming the Jewish population and engaging in genocide.

IV. A CALL TO HISTORIANS

How is it, you may ask, that I—the faithful and loving son of a Jewish refugee who escaped his native France in June 1940 thanks to the magnanimity of a Portuguese consul who illegally signed thousands of visas for Jews and other refugees¹³⁶—would end up

135. *Id.* (quoting *Ein neues Waffengesetz*, *Völkische Beobachter*, March 22, 1938).

136. The Portuguese consul was Aristides de Sousa Mendes, stationed in Bordeaux, France. Defying direct orders from his superiors and at great peril to himself and his family, Sousa Mendes granted thousands of visas to Jewish and other refugees fleeing occupied France in the summer of 1940. The history of Sousa

agreeing with a white supremacist leader of the National Alliance and National Vanguard? This is the truly bizarre, surprising, and somewhat uncomfortable product of culture war. It is the often unexpected, but utterly fascinating result of the fragmentation and fracturing of apparently monolithic identity groups and world views—or what might be called “cultural orientations.” It reflects both the strange alliances and the unanticipated conflicts between and within identities. Here, in effect, is the ultimate irony: some pro-gunners are probably right, the Nazi-gun-registration argument is probably wrong. Or, as a recent letter to the editor in the *Arizona Republic* reads, though I suspect not fully appreciating the irony of the statement: “I agree. . . that gun control is a bad idea, but in this Hitler was on our side, not on the side of the gun-grabbers.”¹³⁷

Why even participate in these debates, you may ask. Why not ignore such dubious historical claims? Alternatively, why not mute the tone and the expressive idiom? Why not coax the two cultural factions to a shared space “expressively rich enough to enable all parties to find their cultural visions affirmed by the law”?¹³⁸ The reason, very simply, is that our culture wars are more complex, multi-dimensional, fragmented, internally divided, and for all these reasons far more intriguing than we tend to think. The odd alliances and bizarre conflicts need to be explored precisely in order to push the debate forward. A lot is at stake. Our deepest cultural values are in the balance. What we need today more than anything—in this particular debate as in other cultural debates—is not cultural warfare, nor cultural accommodation, but critical thought, more research, and new scholarship.

The history of Weimar and Nazi gun laws has not received enough critical attention by historians. The classic historical studies of the Weimar Republic and the Third Reich—Erich Eyck’s multi-volume *A History of the Weimar Republic*,¹³⁹ William Shirer’s *The Rise and Fall of the Third Reich*,¹⁴⁰ Alan Bullock’s *Hitler: A Study in Tyranny*¹⁴¹—do not mention the gun laws, nor do they discuss Hitler’s relationship to firearms. More specialized historical research on the Nazi state (such as Karl Bracher’s *The German Dictatorship: The Origins, Structure, and Effects of National Socialism*¹⁴² or Martin Broszat’s *The*

Mendes’ heroic acts, and of my father’s escape from France with his sister, Alix Deguise, and mother, Helena Hamburger, is recounted in José-Alain Fralon, *Aristides de Sousa Mendes: Le Juste de Bordeaux* 65–66 (1998).

137. Kevin Walsh, Letter to the Editor, “*Hitler not a Gun-Grabber*,” *The Arizona Republic*, Oct. 25, 2003, at B9.

138. Kahan & Braman, *supra* note 55, at 1322 (emphasis omitted).

139. (Harlan P. Hanson & Robert G. L. Waite trans., 1963) (1962).

140. (1960).

141. (1962).

142. (Jean Steinberg trans., 1970) (1969). Of particular relevance to these gun debates is Bracher’s discussion of Kristallnacht. *Id.* at 366. In his article on Nazi gun

*Hitler State: The Foundation and Development of the Internal Structure of the Third Reich*¹⁴³), on German resistance to Nazi power (such as Peter Hoffman's *The History of the German Resistance, 1933–1945*¹⁴⁴), or on the economic aspects of the Nazi regime (such as Arthur Schweitzer's *Big Business in the Third Reich*¹⁴⁵) also fail to discuss the Nazi gun laws. Moreover, searches of the main databases for historical research and history journals produce no additional reference regarding the 1928 or 1938 German gun control laws.¹⁴⁶ Apparently, the historians have paid scant attention to the history of firearms regulation in the Weimar Republic and the Third Reich.

Yet the topic is rich. *Mein Kampf*,¹⁴⁷ for instance, though of course written before either the Weimar or Nazi gun laws, reflects a complex and intriguing relationship to guns—mediated as it is through conceptions of the folkish state, physical excellence, and national security. Hitler expressed in *Mein Kampf* a curious fascination with boxing as opposed to a mild disrespect for firearms.¹⁴⁸ Boxing, Hitler suggested, is the better sport: “There is no sport that, like [boxing], promotes the spirit of aggression in the same measure, demands determination quick as lightening, [and] educates the body for steel-like versatility.”¹⁴⁹ In contrast, firearms training is far less beneficial. “To me,” Hitler wrote, “boxing and jiu-jitsu have always appeared more important than some inferior, because half-hearted, training in shooting.”¹⁵⁰ In addition, the strength of the state, Hitler argued, depended on physical prowess, not on arms.

laws, Stephen Halbrook makes it seem as if the primary purpose of Kristallnacht was to search for weapons. See Halbrook, *supra* note 1, at 516. Bracher's discussion suggests that there were several purposes—“to intensify the psychological combative mood; to exclude the Jews from economic life, the last area of curtailed activity; and to enrich a state treasury depleted by the costs of war preparation,” Bracher, *supra*, at 367, but nowhere does he mention the confiscation of weapons as a reason. Further historical research on this question would be enlightening as well.

143. (Longman 1981) (1969).

144. (MIT Press 1977) (1970).

145. (1964).

146. Halbrook does refer at several points in his article to William Sheridan Allen's *The Nazi Seizure of Power: The Experience of a Single German Town 1922–1945* (Franklin Watts 1984) (1965). While Allen does briefly discuss weapons searches in some passages, see, e.g., Allen, *supra*, at 138, 161, and 243, and while Allen suggests that weapons searches were used to prove the existence of a threat to the Nazi party in 1933, see *id.* at 184–86, Allen does not really address the relationship of the Nazi party toward gun control, gun registration, or firearms ownership more generally.

147. Adolph Hitler, *Mein Kampf* (Alvin Johnson trans., 1939) (1925).

148. *Id.* at 616–17.

149. *Id.* at 616.

150. *Id.* at 801. These sentiments are similar, in many respects, to the attitudes of some contemporary male youths who prefer to fight with their hands than to use guns. In my research exploring the symbolic dimensions of guns and gun carrying among incarcerated male youths, several of my informants indicated that they had no respect for people who fight with guns. These statements all reflect a privileging of self-reliance and hand combat over guns—similar in many ways to Hitler's discussion of

The folkish State will have to fight for its existence. . . . [T]he best protection will not be represented in its arms, but in its citizens; not fortress walls will protect it, but the living wall of men and women, filled with highest love for the country and with fanatical national enthusiasm.¹⁵¹

Naturally, training in arms was an important element of Hitler's program.¹⁵² But Hitler's writings do reflect a complex and intriguing relationship to firearms—as do the successive gun laws enacted in Germany during the period 1919–1938. What we really need now is more historical research and serious scholarship.

the virtues of boxing and martial arts. See Bernard E. Harcourt, “‘Hell No, You Can’t Jack that Fool. He Stays Strapped. He’s Strapped All the Time’” *Talking About Guns at an All-Boy Correctional Facility in Tucson, Arizona*,” in *Guns, Crime, and Punishment in America*, *supra* note 55, at 74–75; see also Bernard E. Harcourt, *Guns, Youths, and Incarceration* (forthcoming 2005).

151. Hitler, *supra* note 147, at 634–35.

152. See, e.g., *id.* at 620.