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Guns, Democracy, and the Insurrectionist Idea

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CHAPTER TEN

INSURRECTIONISM AND INDIVIDUAL RIGHTS

For both moral and practical reasons, no democratic government can or should operate under principles of purely majoritarian institutions. Democracies must protect the civil rights of individuals and minority groups in addition to the political rights of all citizens to express their will in elections decided by majority rule. Political theorists, legal scholars, and jurists have long recognized that the majority, acting through the government, cannot tread in certain areas. Government is formed in recognition of the fact that in the state of nature, the strongest party always wins, but the strongest party does not always have a legitimate moral claim to make decisions that harm weaker parties. Moreover, no individual or group can count on remaining the strongest party indefinitely.¹ Individuals give up a degree of autonomy in exchange for equal protection of fundamental rights as well as an equal say on matters to be decided by a majority vote.

For example, a system that allowed members of the winning political party to appropriate the property of members of the losing party would be morally illegitimate because it would deny the members of the losing party the equal protection of their property rights. Even more importantly, no such system could be sustained. Members of the losing party would have no incentive to cooperate with a system that failed to protect their interests against the tyranny of the majority.

In recognition of this problem, democracies take steps to protect the interests of the minority against majority rule.² In the United States, this balance is achieved partly by establishing countermajoritarian institutions such as an independent judiciary and partly by placing some issues beyond the reach of ordinary lawmaking (i.e., by including specific substantive and procedural safeguards for individual rights in the Constitution). No ordinary law passed by Congress can abrogate these rights, and they cannot be altered except by a special process reserved for such weighty decisions.³ For example, under the U.S. Constitution, supermajorities of the Congress and/or the states would be required to exempt flag burning from the First Amendment. Similarly, the Eighth Amendment's restrictions on cruel and unusual punishment and the Sixth Amendment's right to a jury trial are protections for the rights of criminal defendants that cannot be overturned by ordinary statutes enacted by popularly elected legislators. These mechanisms complement democratic institutions by defining the boundaries beyond which majority rule becomes a form of tyranny.

Naturally, the Insurrectionists claim they are dedicated to protecting individual rights in precisely the spirit we have just described. Former National Rifle Association (NRA) president Sandy Froman characterizes the NRA's mission as the defense of individual rights, "with a special focus on protecting the Second Amendment right to keep and bear arms."⁴ It is true that the Second Amendment does offer protection against the majority, working through the federal government, to prevent state governments from maintaining militias composed of citizen-soldiers.⁵ The Insurrectionists, however, have taken this countermajoritarian shield and wielded it like a sword, attempting to cut out other rights and protections that might limit the unfettered access to any firearm at any time in any place.

Property Rights and Guns at Work

Nowhere have the Insurrectionists shown more disregard for the rights of others than in their attempts to usurp private property rights. Despite the respect conservatives usually profess for property rights (at least when it serves their interests), the NRA and its allies have undertaken

a shockingly intrusive campaign to establish a legal "right" to bring guns onto other people's land and into their places of business.

Liberals encountering the term *property rights* often associate this cluster of rights with segregationists barring African Americans from service at lunch counters in the 1960s, with conservatives railing against wetlands protection, or with timber companies confronting defenders of a rare frog's habitat. There can be no doubt that property rights have often been invoked in service of reactionary political goals. However, property rights hold an important place in the protection of individual liberty, and they were considered so essential by our founders that they protected property rights explicitly in the Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The U.S. Supreme Court has held that a property owner's right to exclude others is fundamental. Justice Sandra Day O'Connor, in a 1987 opinion joined by liberal stalwart justices William Brennan, Thurgood Marshall, and Harry Blackmun, among others, called the right to exclude "one of the most essential sticks in the bundle of rights that are commonly characterized as property."⁶ The court has also said that government interference with the right to exclude is more likely to trigger the Fifth Amendment's just compensation requirement than almost any other kind of limit on property rights.⁷ A resolution adopted by the American Bar Association's House of Delegates concluded that "property rights, especially real property rights, 'have always been fundamental to and part of the preservation of liberty and personal freedom in the United States.'"⁸

When three employees of the Ogden, Utah, call center operated by America Online (AOL) brought five guns onto property leased by the company, thereby violating its no-weapons policy, AOL defended its "right to exclude" and fired the employees. Thus began an epic battle against the Insurrectionists, with the NRA in the lead, over the future of this important individual right. The confrontation developed when AOL employees Luke Hansen, Jason Melling, and Paul Carson met in the parking lot of the facility where they worked on September 14, 2000, and prepared to go to a local gun range for some recreation.

Melling and Carlson transferred two rifles and two handguns, all unloaded, to Hansen's truck. Hansen was carrying a loaded .40 Sturm, Ruger pistol in a fanny pack. AOL had a strict no-weapons policy that applied to the entire premises. Unfortunately for the three men, their actions were caught on a security camera. Terminated for violating the policy, they sued AOL for wrongful discharge, arguing that Utah's law permitting citizens to carry concealed weapons, considered one of the most permissive in the nation, prevented AOL from enforcing its workplace rules.

High-profile shootings in schools and workplaces, such as the 1999 Columbine massacre and a 1993 rampage at a San Francisco law firm, led many public- and private-sector employers to adopt or revise rules governing guns at work. These policies generally prohibit the possession and use of firearms by employees (and in some cases adopt measures to detect or prevent the introduction of guns into the workplace) in an effort to minimize the chances of workplace violence and limit liability exposure.

Employers have a common law duty—and an obligation under various state and federal workplace safety statutes—to maintain a safe and secure workplace,⁹ and they may be held responsible for failing to take measures to deny access to gun-wielding attackers if the risk of danger is foreseeable.¹⁰ Recognizing the importance of AOL's right to control its own property, business organizations in Utah, including the Ogden-Weber and Salt Lake City Chambers of Commerce, the Utah Restaurant Association, and the Utah Manufacturers Association, supported the company in a friend-of-the-court brief.¹¹

The Utah Supreme Court ultimately upheld AOL's actions, concluding that the legislature "purposefully declined to give the right to keep and bear arms absolute preeminence over the right to regulate one's own private property."¹² The court acknowledged that the case presented a novel question but concluded that "the mature at-will employment law in the state of Utah rejects the idea that, in the face of a freely entered-into agreement to the contrary, an employee has the right to carry a firearm on his employer's premises."¹³ The court also noted that employees were well aware of the firearms prohibition, that AOL had displayed the policy in the lobby of the call center, and that the call

center workers were at-will employees who could be terminated with or without cause.¹⁴

Insurrectionist gadfly Larry Pratt called for a boycott of AOL, proclaiming, "By patronizing AOL you are aiding and abetting the enemy."¹⁵ The former employees' lawyer, well-known Utah gun rights advocate Mitch Vilos, complained to a reporter from the *Deseret Morning News* that AOL and its East Coast values could not fathom Western common-sense gun laws and described the company as "a little bit hypocritical and elitist": "It shouldn't be tolerated by free people. Put that in your paper. . . . And tell them Pancho Villa sent you."¹⁶

At the time the AOL suit was litigated, the NRA and many state-based gun rights activists had already spent several years pressing legislators to liberalize laws governing the carrying of concealed weapons. These legislative efforts were based on a central (but ultimately false) premise of the gun rights movement: that a heavily armed civilian population helps to reduce crime because criminals will be reluctant to assault or rob victims likely to be carrying guns.¹⁷ In many states, gun enthusiasts succeeded in convincing legislatures to adopt statutes permitting the carrying of concealed weapons, but they saw efforts to limit the places where guns could be carried as blunting the impact of the new laws. They sought, for example, to invalidate municipal ordinances barring guns from parks, government buildings, and other public property. In the case of workplace gun policies, gun rights groups argue that prohibitions against bringing guns to work, even when the firearms remain in locked automobiles, impose an important practical limitation on the ability to carry a gun. They point out that most workers are unlikely to have an alternative place to store a firearm while at work, and they assert that employees who feel threatened by carjackers or other violent criminals on the way to and from work should be entitled to carry firearms to defend themselves.¹⁸

In this context, it was perhaps inevitable that gun rights groups would make the issue of workplace limits on firearm possession the centerpiece of a new lobbying campaign. By the time Weyerhaeuser Company fired a group of its Oklahoma employees when guns were discovered in their vehicles during a 2002 drug search, the NRA was ready to act. It persuaded the Oklahoma Legislature to enact a series of

amendments to the state's firearms laws that purport to bar employers from punishing workers who keep firearms in their vehicles while on the job.¹⁹

Whirlpool Corporation responded to the passage of the workplace-firearms amendments by filing a civil rights action in the U.S. District Court for the Northern District of Oklahoma, naming the governor and attorney general as defendants.²⁰ The complaint alleged that the statutory changes violated the company's property rights guaranteed by the Fifth and Fourteenth Amendments and sought relief pursuant to 42 U.S.C. §1983. Whirlpool contended, among other things, that the new provisions of the law prevented the company from exercising its fundamental right to exclude from its property persons of its choosing (i.e., people in possession of guns).²¹

Whirlpool owns property and operates a manufacturing facility in Tulsa, Oklahoma. Since 1996, Whirlpool has had a written policy prohibiting the possession of firearms anywhere on its property, including in personal vehicles.²² The crux of Whirlpool's claim was that the company "possesses a fundamental property right to deny access to, or exclude persons with firearms from, its property. The right to exclude others, like the right to physically occupy real property, are fundamental and natural rights of owners of private property. Indeed, traditionally one of the most fundamental property rights is the owner's right to deny access and exclude others from entering the owner's property."²³ Almost a dozen companies joined the case as plaintiffs, but the NRA pressured some of these companies—including the original lead plaintiff, Whirlpool—to withdraw.²⁴ The new lead plaintiff, ConocoPhillips, contended that the firearms amendments represented a clear-cut violation of the company's property rights by allowing the public an unfettered right to bring firearms onto an employer's premises. These amendments, the argument goes, created a public right of access onto private land over the express objection of the landowner and therefore amounted to an unconstitutional taking of property.²⁵

Conoco has good reason to be concerned about firearms in the workplace. Its Ponca City, Oklahoma, refinery "has a crude oil processing capacity of 194 [thousand barrels per day]. Both foreign and domestic crudes are delivered by pipeline from the Gulf of Mexico, Canada

and local production. The Ponca City refinery is a high-conversion facility that produces a full range of products, including gasoline, diesel, jet fuel, [liquefied petroleum gas] and anode grade petroleum coke."²⁶ The dangers posed by refineries, both from explosions and from release of chemicals such as the deadly hydrofluoric acid used in the production process, are a well-documented and serious public-health risk.²⁷ The discharge of a firearm either intentionally or accidentally in this environment could have catastrophic results.

Unconcerned about the possibility that a wayward gunshot might set loose a cloud of hydrofluoric acid that could cause severe burns and death, the NRA has advanced a novel line of reasoning in the *Conoco* case. The NRA suggests that Oklahoma "has a compelling interest in promoting public safety by reducing violent crime" and asserts that "there is ample evidence that laws promoting the carrying of firearms outside the home, by law-abiding, adult Oklahomans, promote public safety. Further, the State has a compelling interest in encouraging hunting as a source of revenue and a wildlife management tool,"²⁸ and this interest is served by requiring employers to allow workers to keep guns in their cars. To support its public-safety claims, the NRA cites research purporting to show that "guns in the hands of law-abiding citizens equal less overall violent crime in society."²⁹ While acknowledging that this research "has been the subject of heated academic debate," it says, "it ultimately is not for the parties or this Court to determine who has the better empirical argument," because "it is not this Court's place to second-guess the Legislature's judgment on such a fact-bound issue of public policy."³⁰

Conoco says that while the question of

whether more Oklahomans carrying more guns outside the home leads to increased public safety is a viable theory, it remains unexplained how infringing on fundamental property rights advances that goal. The NRA steadfastly ignores the critical aspect of this inquiry: the fundamental rights of private property owners to curtail or exclude activities, including otherwise lawful activities, on their private land. Private property owners are free to make the decision as to whether they and visitors to their property are safer with or without firearms on the property. It sim-

ply does not matter whether private property owners are correct in reaching a conclusion regarding safety and firearms on their property, or if the greater weight of law review articles support such a conclusion. The NRA fails to address the critical issue of private property rights, and its purported conclusions ring hollow.³¹

In November 2004, the court entered a temporary restraining order in *Conoco v. Henry* barring enforcement of the workplace firearms amendments, and in October 2007, the restraining orders were made permanent.³² After the temporary order was issued, however, the NRA took its crusade to undermine property rights to the streets. In 2005, NRA chief Wayne LaPierre called for a boycott of ConocoPhillips. Unveiling a billboard in Idabel, Oklahoma, that read "ConocoPhillips is no friend of the Second Amendment,"³³ LaPierre framed the boycott in the usual terms of gun rights versus the enemies of liberty: "ConocoPhillips went to federal court to attack your freedom. Now freedom is going to fire back." He added that "Idabel, Oklahoma, is a new Concord Bridge. Our forefathers didn't run from the Redcoats in 1775 and we're not going to run from the corporations in 2005."³⁴ Froman got in on the action: "The right to carry saves lives. That's beyond debate. Your constitutional rights don't end where (corporate) parking lots begin. Let's teach them that the Second Amendment is non-negotiable."³⁵ Apparently the "lesson" did not work. ConocoPhillips's corporate profits as of 2008 are robust, and its policy against firearms at its facilities remains in place.³⁶

Many on the Insurrectionist blog sites adopted the NRA's line and tried to characterize the ConocoPhillips policy as equivalent to Nazism. Commenter "Mulder" on the site Free Republic spewed, "It's about korporate Amerika, that doesn't give a damn about their employees, and would rather see them robbed, raped, and left for dead, than have a gun in their *private* automobile. It's also about a bunch of HR busybodies who brought in dogs (likely *German* shepards [*sic*]) to sniff around the private vehicles of their employees. If nothing else, this alone is creepy and un-American."³⁷ Some gun rights advocates, however, opposed the NRA on this issue, as did many conservative commentators—and with good reason. Using the government to force prop-

erty owners to admit people toting guns to their places of business or homes is an affront to basic conceptions of privacy as well as private property. Under the NRA's stunted theory of property rights, a homeowner would be unable to bar a delivery person with a gun from the front porch or ask a gun-toting party guest to leave the house.

While the NRA often characterizes itself as a guardian of basic freedoms, its zealous advocacy on behalf of expansive theories of gun rights seems to have blinded it to competing claims involving other rights. As Jacob Sullum, an editor of *Reason*, a leading libertarian publication, and vocal gun control critic, wrote in commenting on the Conoco litigation, "The NRA's single-minded determination to defend its own understanding of the right to keep and bear arms can lead it to chip away at other pillars of a free society." Sullum observed that LaPierre's call for a boycott on Second Amendment grounds makes "no sense, since the Second Amendment is a restraint on government. The Second Amendment does not mean a private employer has to welcome guns in its parking lot, any more than the First Amendment means I have a right to give speeches in your living room."³⁸ Understanding that the NRA's willingness to restrict individual property rights threatens other individual rights, Sheldon Richman, senior fellow at the Future of Freedom Foundation, writes, "If the NRA wants to urge its members to boycott ConocoPhillips in order to pressure the company into reversing its policy, it should be free to do so. But the NRA goes further: It supports the law that limits employers' freedom to set the rules on their own property. The danger of such a move lies in the fact that an attack on one right is an attack on all rights. The rights of gun owners will not be secure if the rights of other kinds of owners are insecure. It is ownership per se that needs a consistent defense."³⁹

The American Bar Association has termed the Oklahoma statute and other similar enactments "forced-entry laws" and found that they "violate the traditional rights to exclude others from one's private property, as well as the liberty to decide how, whether and when to do so." The association quotes Professor Thomas W. Merrill: "The right to exclude others is more than just 'one of the essential' constituents of property—it is the sine qua non. Give someone the right to exclude others from a valued resource, i.e. a resource that is scarce relative to the hu-

man demand for it, and you give them property. Deny someone the exclusion right and they do not have property."⁴⁰ The bar association ultimately was so shocked by the NRA's "guns at work" campaign that its House of Delegates adopted a resolution supporting "the traditional property rights of private employers and other private property owners to exclude from the workplace and other private property, persons in possession of firearms or other weapons and oppos[ing] federal, state, territorial and local legislation that abrogates those rights."⁴¹

Undeterred, the NRA has taken its legislative crusade to additional states, although it has met opposition from business interests otherwise closely aligned with conservative political causes. As the Florida Legislature considered an NRA-backed "guns in parking lots bill," the Florida Chamber of Commerce sounded the alarm:

Businesses and their employees have been deciding this issue for themselves for hundreds of years and now, shockingly, the rifle association wants government to decide for us. The rifle association's national campaign is a direct assault on the employer-employee relationship. Individual businesses and their employees should be allowed to decide what is best for their home and their workplace—just like they do now. The "Guns At Work" legislation creates a new right that does not exist and wrongly strips private property rights from millions of Floridians, creates unnecessary government intrusion into basic property rights afforded by the Constitution and is a big-government solution in search of a problem.⁴²

After a multiyear battle, the NRA finally got the Florida Legislature to enact a "guns at work" bill in 2008 that prevents employers from prohibiting employees and customers from having firearms in their cars on their employers' property.⁴³ Many of Florida's tourist-oriented businesses, including the state's biggest employer, Walt Disney World Corporation, and the Florida Retail Federation, opposed the law.⁴⁴ The Chamber of Commerce and the Retail Federation immediately challenged the measure in federal court. The NRA intervened as defendant to support the state. At a hearing on a plaintiff's motion for a preliminary injunction, Judge Robert Hinkle went so far as to call the law "stu-

pid."⁴⁵ Unfortunately, the Florida and Oklahoma statutes represent only the initial stages of what the NRA has promised will be a multi-year effort to force property owners to allow guns on their premises.

No matter how the courts ultimately resolve this controversy, the NRA is clearly willing to cast aside its professed commitment to the protection of individual rights when they come into conflict with its wildly grandiose vision of the freedom to own and use guns at any time and in any place, whether public or private. In the battle over guns at work, the NRA and the Insurrectionists have been exposed as utterly unprincipled in their approach to individual liberties. The Insurrectionists apparently are happy to use the government to intrude on other people's rights as long as unfettered access to guns at all times and all places is preserved, even if those places happen to be other people's private property. Hypocrisy is not really the organization's worst sin, though. The willingness to subvert the rights of others in the name of protecting "freedom" is fundamentally inconsistent with democratic values because it is based on the assumption that the rights of some people—gun owners—are entitled to more respect than the rights of others. This contempt for the political and legal equality of those who do not share their views on the benefits of bringing guns into the workplace speaks volumes about the Insurrectionists' selective view of the importance of individual freedom.

The Right of Redress and Immunity for the Firearm Industry

"Movement conservatives" have devoted a great deal of energy in recent years to denigrating judges they don't like as "judicial activists," notwithstanding evidence that "conservative" judges are actually more inclined than their "liberal" colleagues to countermand the politically accountable branches of government by striking down acts of Congress, which is arguably the best nonideological measure of judicial activism.⁴⁶ Under the guise of remedying judicial activism and "runaway juries," Insurrectionists have enthusiastically supported right-wing ideologues' and businesses' efforts to attack the legitimacy of the judicial system. Insurrectionists recently convinced Congress to pass a law that

attempted to immunize the gun industry from civil liability. At the same time, Insurrectionists have sought to shield would-be vigilantes from criminal prosecution by working to pass “shoot-first” statutes. These laws, already adopted in Florida and a handful of other states, have allowed vigilantes to decide, without benefit of jury trials, lawyers, or the presumption of innocence, who is guilty and deserves punishment. Shoot-first laws entitle anyone who witnesses what he or she believes to be a violent crime in progress to use deadly force to stop it. Never mind calling the police, and never mind the consequences if the putative do-gooder turns out to be mistaken or accidentally shoots the wrong person—these laws confer immunity from criminal prosecution for the use of force in an effort to stop a violent crime, even if a judge or jury would view the use of force as unreasonable or even reckless.

Both the immunity law and the push to enact shoot-first statutes prevent criminal and civil defendants from being evaluated (or, in the Insurrectionist view, from being second-guessed) by a jury of their peers. And both have resulted in grievous harm to the judiciary’s power to vindicate individual rights, a development that does serious damage to the rule of law. The possibility that some innocent people are likely to be killed or that some guilty people will suffer injury far out of proportion to the gravity of their crimes seems not to concern the “nation’s oldest civil rights organization.” In fact, the NRA, which so often emphasizes the trust it places in regular folks to use firearms responsibly, apparently does not trust these same people to exercise common sense when they serve on juries. The major gun rights groups are quick to complain that the rights to a jury trial contained in the Fifth and Sixth Amendments, unlike the right to bear arms in the Second Amendment, are antiquated relics ill suited to the needs of a modern society. In his book-length polemic, *Guns, Freedom, and Terrorism*, LaPierre decries the inequity of the jury system, complaining that “alone among Western democracies, the United States still provides for juries in civil cases.”⁴⁷ The NRA, normally quick to pose as the defender of the values and judgment of ordinary Americans, drops its populist pose when it comes to access to the courts and the right to a jury trial.

As the Constitution was being framed, the rights of litigants were hotly debated. All eleven state constitutions ratified prior to 1787 con-

tained protections for the right to a jury trial in criminal and civil cases, as did the royal charters still in effect in Rhode Island and Connecticut. As originally proposed, the U.S. Constitution protected the right to a jury trial in the new federal courts for criminal defendants but did not specify how civil trials were to be conducted. The Antifederalists, fearing the “potentially anti-democratic role” that the federal judiciary might play, insisted that the jury be safeguarded in civil cases as well. This demand was met in the Bill of Rights, which of course includes the Seventh Amendment protection for the right to trial by jury to resolve legal claims where the amount in controversy exceeds twenty dollars and the Sixth Amendment right to a jury in criminal cases.⁴⁸

Paul Carrington, a Duke University law professor, invokes noted political scientist Francis Lieber to make the point that juries are essential to the political system:

[Lieber] observed that it makes the judge “a popular magistrate looked up to with confidence and favor.” And that it “makes the administration of justice a matter of the people” and thereby “awakens confidence” in the law. By giving the citizen “a constant and renewed share in one of the highest public affairs,” he noted, it “binds the citizen with increased public spirit to the government of his commonwealth.” Thus, he thought, it is a great institution for the development of the “love of the law” that Montesquieu and others had identified as the essential spirit of a republic. Tocqueville had expressed the same thought in describing the civil jury as a “gratuitous public school, ever open” that elevates the political good sense of jurors.⁴⁹

In late 2005, the major gun rights groups delivered a gift to their friends in the firearms industry: they convinced Congress and the president to extinguish the rights of victims of gun violence to sue gun makers and sellers for negligent and even reckless conduct that allows criminals to obtain firearms. The Protection of Lawful Commerce in Arms Act (PLCAA, or the Immunity Act)⁵⁰ was an attempt to strip innocent victims of their ability to obtain relief in the courts for the traditional torts of negligence and nuisance, causes of action recognized by the common law for hundreds of years. This bill sought to prevent the

courts from adjudicating cases alleging negligence or recklessness in the distribution and sales practices of firearms makers and sellers.

The NRA claims that the Immunity Act simply protects lawful businesses from being overwhelmed by frivolous lawsuits. Apart from the complete absence of evidence that litigation expenses posed any serious threat to the financial viability of any gun maker, the tort system has never been simply about whether a particular defendant or group of defendants has broken the law. The law of torts is a civil justice system, offering citizens the opportunity to air grievances against each other. It serves purposes different from those of the criminal justice system, where the government prosecutes wrongdoers with penalties including loss of freedom through incarceration. A gun dealer who is unable to account for hundreds of firearms missing from his or her inventory may not be in violation of any criminal statute, but the failure to keep track of firearms sold may constitute evidence of negligence that has the foreseeable consequence of allowing guns to fall into the hands of criminals. When the missing guns are later recovered by police investigating violent crimes, as was the case of the rifle used in the D.C. sniper killings, a jury might reasonably conclude that the dealer whose store originally stocked the gun failed to exercise due care when the gun is among many others reported "missing" from the store.

Likewise, firearms manufacturers that continue to supply gun dealers who are under indictment may not be violating any statutory requirement, but the decision to keep selling assault weapons to such dealers may well be negligent. As we noted in chapter 7, compared to other democracies the United States has only weak statutory restrictions on the ownership and sale of guns. The civil justice system provided a way for victims to exercise their rights and hold negligent sellers and marketers accountable for their irresponsible behavior. Moreover, in total there were never more than a few dozen lawsuits that challenged gun sellers' distribution practices, and a number of these cases were thrown out on jurisdictional grounds. Apparently this was too much pressure for the firearms industry, which needed legal protection afforded no other industry to put its actions beyond the reach of the courts unless and until they were caught committing a crime.

One of the sponsors of the immunity legislation, U.S. Representa-

tive Cliff Stearns (R-Florida), claimed that his proposal would immediately stop "predatory" lawsuits such as, among others, *Ileto v. Glock* and *Hernandez v. Kahr Arms*.⁵¹ Tom DeLay (R-Texas), House majority leader at the time, expressed unintentionally ironic support for the bill by arguing that it protected "our constitutional freedoms in an honest and legitimate fashion."⁵² And the NRA's LaPierre added, "This is an historic victory for the NRA. Freedom, truth and justice prevailed."⁵³ LaPierre and his allies in Congress did not explain how denying litigants with otherwise meritorious claims access to the legal system serves the causes of freedom, truth, and justice.

To illustrate the kinds of claims targeted by the new immunity law, we turn to the case of *Ileto v. Glock*. The *Ileto* lawsuit arose from events that took place on August 10, 1999, when Buford Furrow, a white supremacist with seven guns in his possession, entered the North Valley Jewish Community Center in Los Angeles, California, where he shot and injured three children, one teenager, and one adult. After fleeing, Furrow came upon Joseph Ileto, who was delivering mail, and shot and killed him. At the time of the shootings, Furrow was prohibited by federal law from possessing, purchasing, or using any firearm because he had been committed to a psychiatric hospital in 1998, indicted for a felony the same year, and convicted of second-degree assault in 1999.⁵⁴

The plaintiffs, represented by, among others, the Educational Fund to Stop Gun Violence, an organization that is the current employer of one author and a former employer of the other, filed suit against the known manufacturers, distributors, and sellers of the weapons possessed by Furrow. The plaintiffs alleged that the defendants were negligent because their deliberate and reckless marketing strategies caused their firearms to be distributed and obtained by Furrow and that they intentionally produced more firearms than the legitimate market demands with the intent of marketing their firearms to illegal purchasers who buy guns on the secondary market without background checks.⁵⁵ Although the trial court dismissed the action, the U.S. Court of Appeals for the Ninth Circuit reversed that decision and reinstated the lawsuit against Glock, its distributor RSR, and China North Industries, the companies that marketed the two weapons that Furrow actually discharged during his rampage. The Ninth Circuit noted in its November

20, 2003, decision that under the facts alleged in the complaint, "it is reasonably foreseeable that this negligent behavior and distribution strategy will result in guns getting into the hands of people like Furrow."⁵⁶ Defendant China North petitioned the U.S. Supreme Court for a writ of certiorari, asking the Court to review the Ninth Circuit's decision to reinstate the case. On January 10, 2005, the Supreme Court denied without comment China North's petition. A month later, the case was remanded back to the federal district court.

As the litigation was proceeding, the NRA and its allies in the firearms industry worked vigorously to persuade Congress to adopt the immunity bill. President George W. Bush signed it while the discovery process in the case was under way. Two weeks after the Immunity Act was signed into law, Glock and RSR sought dismissal of the suit based on the immunity conferred by the new law.⁵⁷ More than six years after Furrow committed his crimes and more than five years after the case had been filed, the district court dismissed the case against Glock and RSR.⁵⁸ (The court did not dismiss China North as a defendant because, as a foreign manufacturer without a federal firearms license, it is not covered by the immunity statute.)⁵⁹ As of this writing, *Ileto* is back on appeal in the Ninth Circuit.

The case of *Hernandez v. Kahr Arms* also shows the kinds of claims that gun rights groups and the firearms industry wanted to eradicate with the immunity statute. The *Hernandez* litigation stemmed from a 1999 incident in which an innocent bystander, Danny Guzman, was shot and killed by a criminal wielding a 9 mm Kahr Arms handgun outside a Worcester, Massachusetts, nightclub. The gun used to kill Guzman was later found by a four-year-old who lived nearby. The handgun had been stolen from the Kahr Arms factory by Mark Cronin, a company employee, before it had even been imprinted with a serial number. Cronin had stolen several other guns from the company and traded them for drugs and money. Cronin had a long, sordid past that included alcohol and drug abuse and a criminal record for assault and battery.

A law enforcement investigation of Kahr Arms revealed that another employee with a criminal history, Scott Anderson, was also stealing guns from the company. Kahr Arms did not conduct criminal background checks on employees to weed out job applicants such as Cronin

and Anderson, and it failed to undertake rudimentary security precautions at its plant. It performed no employee drug screening, and employed no metal detectors, security cameras, or security guards. The company had no inventory control system. The investigation showed that weapons were missing from the plant and that as many as sixteen shipments to customers had never arrived at their destinations. The results of the company's disregard for basic safety procedures were devastating: convicted criminals working out of its factory supplied drug dealers and other criminals with firearms free of background checks, paperwork, and even serial numbers, making the guns effectively untraceable when recovered from crime scenes.

In 2002, Guzman's heirs filed suit against Kahr Arms (as well as other individuals involved in the distribution scheme), alleging that the company was negligent and had created a public nuisance. In 2003, a state court denied the company's motion to dismiss the claims. As the case was proceeding to discovery, the Immunity Act was passed, and Kahr Arms immediately invoked the new law in an attempt to get the case dismissed. At the time of this writing, a decision is still pending. Again, seven years after the shooting that sparked the litigation and more than four years after the suit was filed, the plaintiffs may be forced out of court after investing time, energy, and emotion in the case. Worse still, they may find themselves with no remedy even if they can establish with certainty that Kahr Arms acted irresponsibly.⁶⁰

Ileto and *Hernandez* are among a series of cases, starting in the mid-1990s, that attempted to show that manufacturers and distributors of firearms were negligent and had created a public nuisance by the manner in which they distributed their products. The firearms industry complains that these lawsuits seek to hold them accountable for the actions of criminals over whom they have no control, but the claims raised in *Ileto* and *Hernandez* are based on specific actions—and failures to act—that a reasonable jury might well conclude were responsible for the killings of innocent Americans. *Ileto* and similar cases challenge the marketing practices and lack of care that the defendants took in their businesses. The allegations in these cases are grounded in well-established principles of civil liability, not some novel legal theory that attempts to hold law-abiding businesses accountable for the actions of

others outside their control. The standards of care allegedly violated by the defendants in suits such as *Ileto* and *Hernandez* are clearly established in state law. For example, in one of these cases, brought by the National Association for the Advancement of Colored People (NAACP), Judge Jack Weinstein found that

the NAACP has demonstrated the great harm done to the New York public by the use and threat of use of illegally available handguns in urban communities. It also has shown that the diversion of large numbers of handguns into the secondary illegal market, and subsequently into dangerous criminal activities, could be substantially reduced through policies voluntarily adopted by manufacturers and distributors of handguns without additional legislation.⁶¹

While Weinstein ultimately dismissed the suit on the grounds that the NAACP was not entitled to bring the action, his and other court rulings have clearly shown that firearms manufacturers were going to have to change the way they did business or face liability in suits such as *Ileto* and *Hernandez* where the plaintiffs were individuals asking for damages to compensate them for the severe harm caused to them by shoddy distribution practices, as opposed to municipalities or organizations seeking sweeping judicial intervention in the way the firearms industry operates.

The ability to seek damages for injuries caused by fellow citizens is a right that dates back hundreds of years and was a staple of English common law. John Locke incorporated the right of redress into his social contract theory. According to Jonathan Goldberg, "Locke maintained that an individual's delegation of governing power to the state does not include a renunciation of his right to obtain redress from one who has wrongfully injured him. Instead, the individual consents only to channel the exercise of that right through the law, and, in return, the government is placed under an obligation to provide such law." Locke recognized that the state must provide an avenue to vindicate the right to redress because that right, like the right to self-defense, did not disappear after sovereignty was established. In Goldberg's words, "Locke's

social contract theory claims that victims of wrongs possess a natural right to reparations from wrongdoers, and that government, as custodian of individuals' rights, owes it to them to provide a law of reparations." Moreover, Goldberg explains, William Blackstone also identified "the right to apply to the courts of justice for redress of injuries" as the third of the five subordinate rights guaranteed by the unwritten English constitution. Blackstone saw an "affirmative duty on the part of the King to provide law and courts. At least for those wrongs 'committed in the mutual intercourse between subject and subject,' he 'is officially bound to [provide] redress in the ordinary forms of law.'"⁶²

The Insurrectionists are fond of citing Blackstone's "fifth auxiliary right," the right of individuals to bear arms for self-defense, as the basis for the Second Amendment. According to Blackstone, as we discussed earlier, the five auxiliary rights protect the three primary rights of life, liberty, and property. But Blackstone saw the auxiliary rights not as absolute individual rights that could be invoked by individual citizens without qualification but rather as rights subject to precise definition and limitation by the government or they would revert to the individual. For example, just as Saul Cornell argues that the Second Amendment protects the individual right to participate in well-regulated militias organized by the state governments, the right to redress requires that the state provide an avenue to vindicate this right—that is, a court of competent jurisdiction. Goldberg notes that "the rights to access common law courts, petition, and bear arms are presented on the same plane as the right to be governed by King-in-Parliament [the first auxiliary right]. Each is a 'structural' right that Englishmen possess so that they can enjoy their primary rights."⁶³

Early American law recognized the principle that the government must provide a right to redress. As discussed previously, the Sixth and Seventh Amendments not only recognized the need for a strong court system capable of protecting individual rights but also acknowledged that these rights should be understood to include findings of fact by juries made up of community members. Professor Carl Bogus shows that antimajoritarian protections were important to colonial Americans. The trick for them, as it remains for us today, was to find the right bal-

ance between majority rule and protection for individual rights. Courts played an indispensable role in striking the right balance. In *Why Lawsuits Are Good for America*, Bogus writes,

It is impossible to overstate how important it was to the development of American government and law that the colonies were established by dissidents attempting to escape pressures to conform to religious, political, and social orthodoxy. This gave them an ambivalence toward authority, including majoritarian authority. On the one hand, many colonialists were members of sects that had been disdained or mistreated by the dominant culture and its government and therefore had reason to find ways to limit government's role. But at the same time survival in an often hostile, new world required colonialists to create an effective social order. Weak government was not an option. They needed effective governments that worked the majority's will while respecting—indeed, even protecting—minority rights.⁶⁴

Without courts, juries, and the availability of legal remedies enforced by the courts, individual rights cannot be protected. This means not that every plaintiff is entitled to prevail but that the legal system, through its common law heritage, has been designed to weigh the interests of the parties and that even wealthy and powerful defendants should not be able to avoid the judgment of the community.

According to many historians, this idea was enshrined in American jurisprudence by Justice John Marshall's famous Supreme Court opinion in *Marbury v. Madison* (1803). In *Marbury*, Marshall quoted Blackstone to prove the point: "It is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded. . . . [F]or it is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress."⁶⁵ Historian Tracy Thomas reflects that in a democracy, the ability to seek remedies for wrongs in a court of law is "central to the concept of ordered liberty because [the remedies] define abstract rights by giving them meaning and effect in the real world."⁶⁶ Goldberg finds that the right to redress embodied as American tort law is an important democratic pillar:

Tort law involves a literal empowerment of victims—it confers on them standing to demand a response to their mistreatment. In this sense it affirms their status as persons who are entitled not to be mistreated by others. It also affirms that a victim is a person who is entitled to make demands on government. A tort claimant can insist that government provide her with the opportunity to pursue a claim of redress for the purpose of vindicating basic interests even if government officials are not inclined to do so. . . . As such, tort law contributes to political legitimacy. As a forum that is in principle available to anyone who has been victimized in a certain way, tort law demonstrates to citizens that the government has a certain level of concern for their lives, liberties, and prospects.⁶⁷

Of course, over the past thirty years, the states have enacted a variety of “tort reform” initiatives (e.g., caps on damage awards in medical malpractice cases), and the federal government has also done so (e.g., limiting liability for vaccine and small-aircraft manufacturers). Some of these restrictions even have been tested in court and found to be constitutional. In a law review article comparing the Immunity Act to other areas of tort reform, Patricia Foster argues persuasively that the right to due process established by the U.S. Constitution includes at least a limited right to judicial relief for injuries caused by another and that the “right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.”⁶⁸ In its case law, the Supreme Court has not fully endorsed a due process right to redress but has held that any effort to limit access to the courts must be scrutinized to determine that it provides “a reasonable just substitute for the common law or state tort law remedies it replaces.”⁶⁹

The Immunity Act is unique in that it provides no substitute for the common law and state tort law remedies it purports to extinguish. As Albany law professor Timothy Lytton notes,

PLCAA is not the first federal law to grant a particular industry immunity from tort liability, and other industry immunity laws have survived constitutional challenges. Examples include the National Childhood

Vaccine Injury Act of 1986, granting vaccine manufacturers immunity from tort liability, and the Air Transportation Safety and System Stabilization Act of 2001, granting the airline industry immunity from tort liability following the 9/11 terrorist attacks. But PLCAA is different. In the cases of vaccine manufacturer and airline industry immunity, Congress replaced tort liability with alternative compensation schemes. By contrast, PLCAA simply prohibits certain kinds of tort claims against the gun industry without providing plaintiffs any alternative means of pursuing their claims.⁷⁰

Gun companies have used the Immunity Act to sweep away pending litigation and to prevent any new cases from going forward. The plaintiffs in these cases have asserted a number of constitutional challenges based on the notion that completely and retroactively eliminating a cause of action violates the due process and takings clauses of the Fifth Amendment as well as the ex post facto clause of Article I, Section 9 and the right to equal protection of the law.⁷¹ A number of law review articles argue both for and against the constitutionality of the law,⁷² and the few courts that have thus far examined the issue have issued conflicting opinions.⁷³ These matters will continue to be litigated in both federal and state courts of appeals for at least the next several years. As the plaintiffs in these suits include both individuals and municipalities, it is conceivable that the constitutional provisions in question could apply differently to each class of plaintiffs. One of the first courts to consider these issues identified the damage that the Immunity Act inflicted on the Constitution and the rule of law. In its lawsuit, the city of Gary, Indiana, alleges that certain firearms manufacturers engaged in, among other things, the negligent distribution of guns to criminals and high-risk gun dealers and that the manufacturers failed to take reasonable steps to control the distribution of their handguns. After the Immunity Act was passed, defendant manufacturers asked for dismissal, even though the case had been pending for six years. The trial court found that to dismiss the case would violate the city's constitutional rights:

Under the PLCAA gun manufacturers would not have any responsibility for foreseeable harm caused by negligence in producing and distrib-

uting weapons and those harmed, past, present, and future would be wholly without a remedy in state and federal court. Under the Fifth Amendment, the City had a substantial, protectable interest in its tort claim. Inherent in the Due Process Clause, is a "separate and distinct right to seek judicial relief for some wrong." *Christopher v. Harbury*, 536 U.S. 403 (2002). It is acknowledged that Congress may regulate remedies or even limit state court remedies. Due Process is violated when Congress abolishes an existing remedy and provides no alternative. To deprive the City of its right in interest deprives the City of a vested cause of action without just compensation; thereby, the PLCAA is violative of the Due Process Clause and, therefore, unconstitutional.

Further, our Supreme Court has long recognized laws that are applied retroactively and/or laws that serve as a deprivation of existing rights are particularly unsuited to a democracy such as ours. . . . Our founding fathers were very aware of the pit-falls of retroactive legislation and have safe guarded the Republic with various provisions of the Constitution, including the *Ex-Post Facto* clause, the Fifth Amendment's Takings Clause, prohibitions on Bills of Attainder and our Due Process Clause. . . .

In the case at bar, the retroactive legislation may not be a means of retribution against unpopular groups or individuals; however, it is clearly an act which was passed in response to pressure from the gun industry. Further, it is clear that the PLCAA destroys the City's cause of action and valid state court remedies. These vested rights may not be destroyed by legislative fiat without violating our Constitution.⁷⁴

The Immunity Act has pushed the envelope of "tort reform" to an unprecedented level that would leave innocent victims in the cold. Moreover, if this is appropriate for the firearm industry, why not the pharmaceutical industry or the auto industry? Ultimately, as Lytton writes, "The implications of PLCAA are likely to extend far beyond gun litigation. If the act succeeds in ending litigation against the gun industry, it may serve as a precedent for future efforts by other industries seeking statutory immunity from liability. If the act fails to protect the industry, it may reveal constitutional limits on using statutory immunity as a defense tactic in tort litigation."⁷⁵

Whether the Immunity Act violates the constitutional rights of people such as Joseph Iletto and Danny Guzman will ultimately be decided by the courts. The authors believe that the Constitution requires and justice demands that one industry not be exempted from the government's age-old role, passed on from our common law tradition, of providing a forum for redress for a wrong. Democracy demands that rich and poor, strong and weak, be accountable equally for their actions. Open access to the adjudicatory process that courts provide is the best way we know not to guarantee a particular outcome but to provide an opportunity to be heard and grievances to be aired in a nonviolent manner. Colonialists viewed fair and impartial courts as an essential check on abusive power and a key ingredient to individual liberty, and they remain so to this day. While Wayne LaPierre may believe that stripping individuals of the fundamental right to redress is a victory for "freedom, truth and justice," the rest of us should see it for what it is: an unvarnished assault on individual rights.

Due Process and "Shoot First" Laws

Legislation recently passed in Florida and now being advanced in other states with the backing of the Insurrectionists fundamentally alters the law of self-defense by giving unprecedented rights and legal immunities to the shooter. Hailed by the Insurrectionists as a needed remedy to stop criminals, the enhanced rights of the shooter come at the expense of the rights of the person shot. This may be all well and good if the person is indeed a criminal, but the law is so broad that innocent people are being injured and left with no recourse. At the same time, shooters with criminal intent have a new defense to use to avoid criminal responsibility. The Insurrectionists refer to the Florida statute and similar measures as "stand your ground" provisions, while the gun control community has taken to calling them "shoot-first" laws, as in, "Shoot first, ask questions later."

Laws and statutes dictating appropriate responses to criminal danger have been around since biblical times. The Hebrew Bible describes a duty to retreat from violence if possible. However, there were exceptions to the rule, such as when one's home was burglarized at night.

There was never any glory in taking another life, even if the killing were not criminal in intent. Under Jewish law, even the justifiable or accidental taking of another life was viewed with shame, and the Bible mentions special cities reserved for these "manslayers."⁷⁶

In his famous treatise on the common law, Blackstone makes the point that while in the home, the dweller has special rights: "And the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity."⁷⁷ However, if courts are functioning and a government is in existence, the

right of natural defense does not imply a right of attacking: for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defense, but in sudden and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defense, it must appear that the slayer had no other possible means of escaping from his assailant. . . . [T]he law requires, that the person, who kills another in his own defense, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that, not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow subjects the law countenances no such point of honour: because the king and his courts are the *vindices injuriarum* [the avengers of wrongs], and will give to the party wronged all the satisfaction he deserves.⁷⁸

Blackstone's commentary reflects the fundamental truth that people are fallible (especially in stressful situations such as armed confrontations) and that a neutral third party such as a judge or a jury is in a better position to arrive at a just decision about whether and how to punish a criminal than a victim is likely to occupy in the heat of the moment. Vigilante justice was disfavored because the accused had

rights, too—most fundamentally, that he or she should not be punished until proven guilty according to the law.

The policy against legitimizing vigilantism forms a fundamental part of the American legal system, but over time, the concept of a duty to retreat fell out of fashion in some states. As an Ohio court opined in 1876, “A true man, who is without fault, is not obliged to fly from an assailant, who by violence or surprise maliciously seeks to take his life or to do him enormous bodily harm.”⁷⁹ In the words of one commentator, “State law reflects the division between the ‘true man’ privilege of non-retreat and the ‘honorable man’ duty of retreat to avoid deadly confrontation.”⁸⁰ At the urging of the NRA, Florida changed its law in 2005 to eliminate the duty to retreat, but the new statute included some additional wrinkles that have never been incorporated into U.S. law. First, the right to use deadly force was permitted even where no crime involving the threat of death or grave bodily injury was involved, including such crimes as “unlawful throwing [and] any other felony which involves the use or threat of physical force or violence against any individual.”⁸¹ Second, the right to use deadly force to stop a violent crime was not subject to scrutiny by prosecutors or courts, making it virtually impossible to challenge self-defense claims in criminal trials and wrongful death suits.⁸²

As a consequence, Florida’s gun owners have received the privilege of deciding for themselves when deadly force is necessary. A would-be vigilante can use deadly force whenever he or she has a good-faith belief that a felony may be occurring. If the shooter is wrong and an innocent person is injured or killed, the victim has no recourse. Prosecutors are not entitled to put to a jury the question of whether the force used was reasonably necessary, and the courts are required to dismiss any civil suit filed by the victim of the shooting. This means that deadly force is now allowed even where simply walking away from a confrontation could have stopped the crime. Deadly force can be an appropriate and proportionate response to the threat of a violent attack, but when vigilantes have free rein to decide when killing a suspected criminal is justified, the dangers to public safety and to the principle of due process are not trivial.

Defending his assertion that Blackstone’s *Commentaries* lend sup-

port to an individual right to raise arms against the government, Nelson Lund says, "The relevance of Blackstone may therefore lie more in his prominence as an expositor of the implications of the natural right of self-defense than in his role as an authority on English law."⁸³ Blackstone, however, would never have supported the new Florida law. Blackstone wrote that

legal obedience and conformity is infinitely more desirable, than that wild and savage liberty which is sacrificed to obtain it. For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases; the consequences of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. Political therefore, or civil, liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick.⁸⁴

The new Florida law has disrupted the age-old understanding, recognized by Blackstone, that courts should decide and mete out punishment—and determine who has a legitimate claim to self-defense and who does not—unless there is no practical alternative.

When the Texas legislature passed a similar bill in 2007, the NRA issued a press release in support of the effort: "I want to thank the Texas Legislature for working together to pass this vital legislation and take further steps in protecting the people of this great state," said Chris W. Cox, NRA's chief lobbyist. "Law-abiding citizens now have the choice to defend themselves and their families in the face of attack knowing their decision will not be second-guessed by the State of Texas."⁸⁵ Since when should anyone be able to shoot another person to death and *not* be "second guessed"? Gun owners talk frequently about the awesome responsibility of carrying and using a weapon,⁸⁶ but shoot-first laws relieve the shooter of the responsibility for making a bad decision, even if someone dies as a result. Protections for individual rights such as the right to trial by jury or the presumption of innocence are discarded as inconsistent with the way "real men" react when confronted by a criminal.

The shoot-first laws, in their few years of existence, have already allowed criminals to escape responsibility for egregious wrongdoing. Despite Insurrectionists' protests that these laws are a simple codification of the doctrine that no one should be forced to retreat in the face of aggression, the law has been asserted as a defense in a series of grievous slayings. In 2006, the *Orlando Sentinel* reported on at least thirteen shooting incidents in Central Florida where the law had been invoked, resulting in the death of six people and the injury of four more.⁸⁷ Only one of the ten people shot was armed. In South Florida, the law has sparked outrage as two thugs, Damon "Red Rock" Darling and Leroy "Yellow Man" Larose, invoked the protection of the law after participating in a gunfight that resulted in the death of a nine-year-old as she played on her front porch.⁸⁸ The president of the Florida Prosecuting Attorneys Association called the law "unnecessary" and said that it has given hotheads "another defense" against criminal charges. In addition, the law has created confusion among police as law enforcement agencies try to discern their responsibilities in investigating claims of self-defense.⁸⁹

In states that followed Florida, the law is causing confusion and benefiting dangerous criminals. For example, in Kentucky, another early convert to the "stand your ground" law, James Adam Clem used the provision to escape a murder sentence for the killing of Keith Newberg. Clem had let Newberg into his apartment so that Clem could repay a drug debt. Prosecutors believe that Clem then assaulted and killed Newberg by beating him to death with a bronze lamp. Clem originally was charged with murder, but after the Kentucky shoot-first law was passed, he asserted the "stand your ground" defense. Prosecutors were then forced to accept a plea to second-degree manslaughter, and instead of spending the rest of his life in jail for murder, Clem almost immediately became eligible for parole. Commonwealth's attorney Ray Larson explained that the new law gave Clem a real chance of acquittal and that he had accepted the plea deal because some jail time was better than none. Fayette County circuit judge Sheila Isaac said, "I'm not quite sure that the drafters [of the shoot-first law] had even a marginal knowledge of criminal law or Kentucky law."⁹⁰

The state's foremost authority on criminal law, University of Ken-

tucky law professor Robert Lawson, called the measure “the worst legislation I have ever seen in 40 years.” As the Texas law neared passage, one prosecutor railed against the bill: “‘There will be a presumption that [the vigilantes’] actions were reasonable, and 99.99 percent of the people that’s going to apply to are going to be murderers, capital murders, shootings at the bar, aggravated robberies and that sort of thing,’ said Randall Sims, a district attorney whose jurisdiction includes Amarillo. ‘They can’t give me one example of someone who’s been wrongly convicted under the current self-defense laws. . . . They’re trying to fix a series of laws in Texas that aren’t broken.’”⁹¹ Law enforcement in many states has organized in opposition to “shoot-first” laws, and legislators are starting to reconsider their rash votes to strip innocent victims of their rights.⁹²

To get these poorly conceived laws enacted, the Insurrectionists are willing to use advocacy tactics that most people should find repulsive in a democracy. For example, legislators considering gun legislation often receive threatening letters or phone calls from gun rights activists, and gun rights groups recently have organized grassroots lobbying events where they bring their firearms to legislative hearings or other government-sponsored meetings. At a recent “lobby day” in the Virginia statehouse complex, members of the Virginia Citizens Defense League wore their sidearms during legislative committee hearings (after being waved through metal detectors at the door even as others carrying keys, cell phones, and loose change were forced to empty their pockets and submit to searches).⁹³ And at a pro-gun rally outside the Pennsylvania Statehouse, demonstrators, some of them armed, protested the introduction of a bill to register firearms by unfurling a banner that said that the sponsor, State Representative Angel Cruz, should be “hung from the tree of liberty for his acts of treason against the Constitution.”⁹⁴

In July 2008, *Mother Jones* magazine disclosed that an NRA mole had for years been embedded in the gun control movement.⁹⁵ Under the name “Mary McFate,” Mary Lou Sapone had pretended to be a dedicated volunteer at several gun control organizations but in fact had been working for a firm that specialized in corporate espionage and was being paid by the NRA. On more than one occasion, the mole had plied the authors for information, and she even appropriated documents for her

NRA spymasters. This type of behavior does not set a tone for civil discourse and mutual respect among legislators and advocates representing different sides of public-policy controversies. It signifies a deliberate effort to intimidate policymakers and to bully opponents. Moreover, it represents exactly the kind of tactic that the Insurrectionists are worried that the government will use. Private groups cannot throw their opponents in jail, but their efforts to bully and intimidate anyone who disagrees with them are nonetheless an odious affront to reasoned political discourse. The NRA may want to rethink its self-characterization as the "nation's oldest civil rights organization," especially since its behavior has more in common with J. Edgar Hoover than Martin Luther King Jr.

The gun rights movement's approach mirrors the mind-set of the leaders of the "conservative movement." Just as President George W. Bush adopted the formulation "You are either with us or against us" to express the idea that anyone opposed to his conception of how to fight terrorism is by definition unpatriotic, the NRA portrays opponents as anti-American statists bent on chipping away at individual freedoms. Instead of a debate about how to prevent kids from being killed by guns, the debate is now about freedom. Who among us opposes freedom? When Charlton Heston declared that he would give up his guns only when they were pried out of his "cold, dead hands," he wasn't preparing to shoot it out with the government. But he was saying something almost equally radical: that as a gun owner he occupied a special status and that his views should carry more weight than those of other citizens. When gun owners assert that they are ready to use their firearms to vindicate their political views, they are really saying that they are unwilling to abide by the American political tradition that the people without guns can tell people with guns what to do.