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BOOK REVIEWS

Constitutional Firepower: New Light on the Meaning of the Second Amendment

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To Keep and Bear Arms, The Origins of an Anglo-American Right.

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

— U.S. Const. amend. II

That the Subjects which are Protestants may have Armes for their defence Suitable to their Condition and as allowed by Law.

— Section 7, English Bill of Rights, 1689 (1 W.&M., 2d Sess., c.2)

Joyce Malcolm’s careful historical study attempts to shed light on the original understanding of the Second Amendment by presenting the full background of its forerunner, the arms provision in the English Bill of Rights.1 It is a very timely undertaking. The Second Amendment itself has only in very recent years begun to receive serious scholarly attention. The implications of the English background to the Second Amendment have hardly been studied.

Legal scholarship on the Bill of Rights has, in general, had little to say about the Second Amendment. Some scholars have asserted that it is simply “anachronistic,”2 akin to the Third Amendment guarantee against the quartering of troops in private homes.

On this view, the amendment reflects the preoccupations of colonial Americans, particularly their fear of a “standing army”—associated with a distant, unaccountable and oppressive royal authority. The text of the Second Amendment seems to reinforce this notion by linking the “right to keep and bear arms” with the necessity of “a well-

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regulated militia.” At the time the Bill of Rights was adopted, antifederalists may have thought it necessary to guarantee such separate military capabilities within the states as a check on potential abuses by the new federal government (and its constitutional power to maintain a national standing army). But that was long ago.

According to the current prevailing view, this guarantee to the states is, technically, still satisfied by the maintenance of the National Guard, whose units are organized state by state. The Supreme Court noted as much in its most recent major decision on the Second Amendment. This decision, however, was shortly before World War II—the last period when the United States was still content with a merely skeletal national military force. In the decades since then, America has become accustomed to the maintenance of a vast national defense establishment. Colonial cautions about “standing armies” have come to seem as quaint as the muskets of the Minutemen at Lexington.

The Second Amendment, by this reasoning, has no relevance to contemporary debates about gun control because it was never about the rights of individual citizens. At best, it is a monument to eighteenth century ideals about citizen soldiering which are sadly but definitively obsolete in a world of cruise missiles and jet fighters. At worst, it is a relic of an era where “states’ rights” was literally a fighting cause—an era definitively and happily brought to a close by the surrender at Appomattox. To consider a different view of the Second Amendment would simply be, as the title of a famous article in the Yale Law Journal put it, “embarrassing.”

But even the most cursory investigation of the prevailing interpretation, if pursued with any honesty, unavoidably runs into “embarrassing” facts, as some insistent dissidents from the prevailing “collective right” view have begun to point out. For example, the actual text of the amendment is hard to reconcile with the notion that it has no relevance to individual rights—unless one is prepared to say the same thing about the guarantee against unreasonable searches and seizures in the Fourth Amendment, which is also prefaced with an appeal to “the right of the people.” Perhaps more importantly, it is clear that

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3 U.S. Const. amend. II.
7 The “collective right” interpretation is defended, for example, by Cress, supra note 5, at 42, and ably challenged, on textual grounds, by Levinson, supra note 6, at 645. See also United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (“[T]he people” seems to
the Second Amendment was not simply a byproduct of debates over the new Federal Constitution. The language of the amendment echoes provisions in state constitutions from the 1770s. And both the language and the context of the Second Amendment bear obvious analogies to the English Bill of Rights of 1689, the evident source for several other provisions in the Federal Constitution. Yet "states' rights" was of no relevance to the Parliament that reasserted the "ancient and indubitable rights" of Englishmen (as the concluding, summary section of the English Bill of Rights describes them). The English Bill of Rights does not even make reference to county militia.

Some scholars have nonetheless dismissed the relevance of the parallel guarantee in the English Bill of Rights by invoking the same considerations deployed against the Second Amendment. The English guarantee, it is said, was also inspired by fear of standing armies and the power they might afford to oppressive kings. It is also said that the English guarantee was inspired by a concern to maintain an ultimate checking power, diffused among the people in their local militias. Hence the English guarantee is equally irrelevant to modern concerns.

It did not require any great ingenuity or impressive research to launch this argument against the modern relevance of remote English precedent (which may be one reason why modern polemicists have not bothered to deploy either much ingenuity or much research on this point). It did not even require any particular animus against firearms or handguns, nor any partisan zeal, to withdraw the Second Amendment from the eager clutches of contemporary gun enthusiasts.

The argument was already stated in confident terms by that most self-confident of early Victorians, the historian Thomas Macaulay. An

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have been a term of art employed in select parts of the Constitution. . . . [This textual exegesis] suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connections with this country to be considered part of that community."); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED 76-80 (1984) (discussing various historical sources which show that the Bill of Rights was intended to protect the rights of individual citizens).

8 For example, § 9 of the English Bill of Rights asserts that "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." Article I, § 6 of the U.S. Constitution gives a close paraphrase of this language. U.S. CONST. art. I, § 6. The Eighth Amendment to the U.S. Constitution is an even closer paraphrase of § 10 of the English Bill of Rights: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

9 Weatherup, supra note 2, at 974.
armed citizenry had been of great historic importance, he explained in the opening chapter of his *History of England*, in constraining the power of medieval kings and securing the historic liberties of Englishmen. But this historic truth could hardly have much relevance amidst the modern conditions of the nineteenth century:

The people have long unlearned the use of arms. The art of war has been carried to a perfection unknown to former ages; and the knowledge of that art is confined to a particular class. . . . In the meantime, the effect of the constant progress of wealth has been to make insurrection far more terrible to thinking men than mal-administration. . . . It is no exaggeration to say that a civil war of a week on English ground would now produce disasters which would be felt from the Hoangho to the Missouri and of which the traces would be discernible at the distance of a century. In such a state of society resistance must be regarded as a cure more desperate than almost any malady which can afflic the state. . . . As we cannot, without the risk of evils from which the imagination recoils, employ physical force as a check on misgovernment, it is evidently our wisdom to keep all the constitutional checks on misgovernment in the highest state of efficiency. . . .

The complacent mid-Victorian "imagination" might "recoil" before the thought of actual warfare in a modern, industrializing economy—the passage having been written before the American Civil War. Would Macaulay have been more shocked by the systematic horrors of twentieth century warfare, or by the completeness with which devastated nations recovered from them in less than one generation? Perhaps he would have been most of all shocked by the surge of crime and violence in nations which, by Victorian standards, are almost unimaginably wealthy and technologically advanced. No matter. In relatively recent times, the same Victorian outlook could be voiced with almost the same tone of confidence in an article dismissing the contemporary significance of the Second Amendment:

As the policing of society becomes more efficient, the need for armed self-defense becomes more irrelevant; and as the society itself becomes more complex, the military power in the hands of the government becomes more powerful and the government itself more responsive, the right to bear arms becomes more futile, meaningless and dangerous.

Sometimes it requires a good historian to break the delusion that history—or the mere passage of time—is an invincible, protective moat, shielding later eras from the preoccupations of the past. At any rate, Joyce Malcolm's new study of the English antecedents of the Second Amendment turns out to be a far more timely and intriguing work than one would have expected, given the conventional treat-

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Malcolm is a professional historian, and this is a careful history, as much a work of social and political as of legal history. Though she is plainly aware that her subject has some bearing on an emerging debate concerning the Second Amendment, she does not overemphasize the implications of her findings for constitutional constructions in contemporary America. The work is not, in other words, an exercise in topping arguments about “original intent” with learned demonstrations of “primordial intent.” But the book does succeed in clarifying some important misunderstandings about the English roots of the Second Amendment. In the process of doing so, it offers some sobering reminders that the modern world is not so removed from the preoccupations of the past as we may like to think.

In Professor Malcolm’s telling, the arms guarantee in the English Bill of Rights reflects a long history. The book actually begins with medieval practices and does not reach the debates of 1689 until two-thirds of the way to its conclusion. This history demonstrates that the Parliament of 1689 was shading the truth a good deal when it included the right to hold arms among the “true, ancient and indisputable rights” of Englishmen. This right was not mentioned in the Magna Carta. It was not mentioned in the Petition of Right of 1628, with which Parliament set out the claims that later touched off the English Civil War. It was not recognized by any explicit judicial ruling before 1689. And the Parliament that voted the Bill of Rights in 1689 had every reason to know all this. At the very least, this history proves that the arms provision in the English Bill of Rights was not put there because of antiquarian piety.

The Parliament of 1689 set out, quite deliberately, to establish a new legal tradition. In January 1689, a hastily assembled “Convention” (not considered a true Parliament, because not summoned by the king under the traditional forms) agreed on a list of grievances and a statement of rights, which came to be known as the Declaration of Rights. William and Mary accepted the Declaration of Rights, along with the crown of England, at a formal ceremony in mid-February. Thereafter, the “Convention” was reorganized as an official Parliament and before the end of the year, reenacted the rights provisions of the Declaration as a binding statute, which came to be known as the Bill of Rights. Yet Parliament’s motives for including the arms guarantee in the Declaration and the Bill of Rights are not easily discerned from the fragments of debate that have survived from that period.

Professor Malcolm gives due recognition to the assumption that Parliament was most of all concerned about preventing the king’s
army from securing a monopoly of force. More than any other factor, the revolution against King James II reflected the widespread fear that he was building up a force of Catholic professional soldiers to reduce the Protestant, constitutional government of England to a French-style absolute monarchy. Whig parliamentarians were keen to establish the notion that standing armies were dangerous and the people needed to have their own arms as a standing check on princely usurpation. Thus, the Declaration of Rights contains a protest against maintaining standing armies in peacetime without parliamentary consent, along with the guarantee of the subject's right to bear arms. In an earlier draft, the "arms" provision seemed to allude to the militia, declaring that subjects "should provide and keep Arms for their common Defence."\(^\text{12}\)

There is certainly a sound basis for the assumption that the Glorious Revolution of 1688 inspired concerns quite parallel to those attributed to the champions of the Second Amendment, a century later, in the wake of another revolution against royal power. If the actual wording of the English provision is less clear on this point, that may reflect a parliamentary concern to avoid giving needless offense to William of Orange. The Declaration of Rights was drawn up only weeks after William had arrived in England with a body of Dutch troops—saving the country from the tyrannical ambitions of James II. Parliament by then was anxious to have William mount the English throne to safeguard the revolution. But he could not be expected to accept a crown offered to him along with an explicit threat of popular insurrection.\(^\text{13}\) Besides, Tory members of Parliament, nearly equal in strength to the Whigs, were anxious to downplay suggestions of an ongoing right of revolution, which was so hard to reconcile with the doctrines of the Anglican Church.

But the fact is that the Tories did consent to language endorsing a right to hold arms. Moreover, the Whigs in later years readily consented to a standing force of Dutch guards for the new king and voted to direct resources to the maintenance of a sizable, professional military force for William's campaigns in Europe. So the arms guarantee, if not an unreflective bow to tradition, was not simply an expression of protest against standing armies.

Nor was the arms guarantee simply a sentimental cheer for the county militias. The militia system was not simply an alternative to a standing army. It was also, from its medieval origins, an alternative to a centralized police system. And it continued to play this role

\(^{12}\) Malcolm, supra note 1, at 117.

\(^{13}\) Id. at 120-21.
throughout the seventeenth century. Under Cromwell's "commonwealth," militia officers were instructed to "exercise espionage on strangers" in order to detect subversive activities and to keep close watch on government supplies in order "to prevent embezzlement or misconversion" of these "inventories."14 After the Restoration of the monarchy, the militia was deployed on behalf of Charles II to detain "divers persons suspected to be fanaticks, sectaries or disturbers of the peace"15 and the Convention Parliament actually protested abuses of individual rights by the militia. The militia itself was therefore not simply the darling force of parliamentarians fearful of an oppressive central power.

Yet apart from these more specialized or "political" tasks of the militia, local citizens were obliged, from medieval times, to take turns standing night "watch" at town gates and supplying the "ward" at these gates during the day. These duties were imposed on "men able of body and sufficiently weaponed." Households unable to supply such men (those headed by widows or disabled men) were obliged to hire a substitute or suffer criminal penalties.16 Such policing duties occasioned grumbling and resistance, but they were still enforced in the latter part of the seventeenth century; they were still enforced because they were still very much needed. But they remained quite inadequate.

Crime remained an acute and pervasive problem for seventeenth century Englishmen. "The extensive operations of highwaymen made arms mandatory for a traveler."17 Robbery was so common in some parts of the countryside that a popular proverb claimed, "[H]ere if you beat a bush, its odds you'd start a Thief."18 Even in the environs of London, Samuel Pepys, a royal official, was delighted to be assigned "three or four armed" bodyguards for an evening stroll as "this walk is dangerous to walk alone at night and much robbery [is] committed here."19 Wealthy travelers generally followed the example of hiring armed guards to accompany them. And it was "not uncommon" in private homes "to place a blunderbuss in a window to warn thieves to keep away."20

Guns, in short, were relied upon for defense against crime and not just for military functions. And by the seventeenth century, the

14 Id. at 26.
15 Id. at 36.
16 Id. at 3.
17 Id. at 84.
18 Id. at 82.
19 Id. at 85.
20 Id.
cost of guns had come down to the point where "firearms were available to a large portion of the population."\textsuperscript{21} Professor Malcolm calculates that a new musket might be purchased in the late seventeenth century for the equivalent of three weeks pay for an agricultural laborer in harvest time.\textsuperscript{22} But older guns might sell for dramatically less and many people had access to stolen guns and to weapons acquired from the army during the Civil War.\textsuperscript{23} Besides, "local blacksmiths were able to manufacture gun and rifle barrels and stocks with their ordinary equipment and fit them with locks from gunshops."\textsuperscript{24}

Professor Malcolm’s history suggests, however, that even beyond their significance as instruments of self-defense, access to firearms had come to be seen, by the late seventeenth century, as a badge of civic equality. This story has much to do with the history of hunting and the class legislation deployed to preserve the special privileges of the great land owners. Professor Malcolm rightly devotes a good deal of attention to it.

From medieval times, both monarchs and great lords had tried to restrict hunting in their forests. Limiting access to hunting devices and impounding weapons used by poachers were standard techniques in this effort to exclude common people from "the gentleman’s game." These measures caused much resentment and, perhaps for this reason, were not often enforced with full rigor. In 1671, only a decade after the restoration of Charles II, Parliament enacted a particularly stringent Game Act, which, in contrast to previous measures, set a very high threshold of land ownership to qualify for hunting privileges: "Wealthy merchants, prosperous lawyers, and others who had a goodly amount of personal wealth but insufficient income from land were instantly deprived of their right to hunt and grouped together with those defined in the law as 'idle and disorderly.'"\textsuperscript{25}

Professor Malcolm speculates that the motives for this enactment included a concern to disarm potential political enemies in the wake of the Restoration.\textsuperscript{26} But she also provides evidence that the Game Act (along with earlier such measures) was not enforced, except against those actually caught poaching. She concludes that "if the ordinary person were moderately discreet, he could keep a handgun or use shot with little fear of arrest or confiscation of his weapon."\textsuperscript{27} But

\begin{itemize}
\item \textsuperscript{21} Id. at 84.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id. at 71.
\item \textsuperscript{26} Id. at 75.
\item \textsuperscript{27} Id. at 81.
\end{itemize}
the legal threat to confiscate the hunting weapons of the non-landed still seems to have stung.

Even more resented were the measures that allowed the disarming of critics of royal power. Most notable among these measures was the Militia Act of 1662, which permitted militia officers to disarm subjects at their discretion. At the Convention Parliament of 1689, this measure—and its application by James II—was protested with special bitterness: “Forcible disarmament was personally humiliating—some members [of Parliament] had been disarmed” and voiced their indignation directly to their colleagues.28 Among the specific “complaints” against the reign of James II in the Declaration of Rights was a protest against the King’s actions “causing several good Subjects, being Protestants, to be disarmed.”29 Laws had long since provided for the disarming of Catholics as suspected enemies of the Protestant state. But by 1689, it had come to seem something of an outrage that Protestants themselves, if not guilty of some definite crime, should also be disarmed.

Still, the provision as finally adopted in the English Bill of Rights asserted the right of Protestant subjects to “have Armes” and then proceeded to qualify this guarantee with the stipulation that such arms be “suitable to their Condition and as allowed by Law.” What was meant by this limiting stipulation? Clearly, the stipulation reserved some role for game laws to limit access to hunting weapons. Did it mean anything beyond this? In acknowledging a previous history of restriction and regulation, it may have reflected no more than an anxiety to make the newly asserted right “to have Armes” seem more plausible as an “ancient right.” Or it may have reflected an accommodation to the cautions of members of the House of Lords who were not so keen at the time on a general right to be armed. The limiting words “suitable to their Condition and as allowed by Law” are known to have been inserted at the prompting of the House of Lords.30 The final language may reflect both haste and the pressure for speedy compromise, as well: “The entire Declaration was very much a compromise measure composed of general statements that the majority of Englishmen could support.”31

But if subsequent actions can shed light on the understanding of 1689, it would seem that the right asserted at that time was, in fact, very broadly conceived. Within a month after enacting the Declaration of Rights, the Parliament turned its attention to disarming

28 Id. at 116.
29 Id. at 119.
30 Id.
31 Id. at 120.
Catholics, who were perceived as likely to side with plotters for the return of the deposed King James II. No mention was made in this context of seeking to disarm citizens of any other "condition" nor those whose possession of guns was not otherwise "allowed by law." On the contrary, members of Parliament openly acknowledged that even Catholics would probably have to be allowed to retain guns for personal self-defense.\(^3\) As finally enacted, the measure prohibited any Catholic from retaining arms, gunpowder, or ammunition beyond what might be "allowed . . . for the Defence of his House or Person."\(^3\) Only three years later, a new Game Act did not even mention guns in its list of prohibited hunting devices.\(^4\)

By the early eighteenth century, English courts were explicitly rejecting the notion that mere ownership of guns could be prohibited by game laws.\(^5\) By 1780, the right to have arms was so deeply entrenched that there was much indignation when the army sought to disarm an urban mob. Professor Malcolm gives due attention to this remarkable episode, which followed several days of fierce rioting in London, in which some 450 persons died. The senior commander of the British army ordered efforts to disarm the general population of the city, since it was "both improper and unsafe to trust arms in . . . the hands of a rabble or a mob." In the House of Lords, the commander's words and actions were denounced as "a direct violation" of "the sacred and inviolable statute" guaranteeing "that every Protestant subject shall be permitted to arm himself for his personal security, or for the defence of his property."\(^6\) A resolution of censure was ultimately defeated, but only after supporters of the government undertook to demonstrate that the general had only intended the disarming of London to be a temporary, emergency measure.\(^7\)

By taking her account of English practice down to the end of the eighteenth century and then offering a brief sketch of changing patterns in this century, Professor Malcolm lends weight to her claim that the American Second Amendment was influenced by very similar considerations as its English forebear. The American Founders might have been aware of provisions in the English Bill of Rights without grasping the full import of these provisions a century earlier. So, for example, the drafters of the American Bill of Rights do seem to have copied the prohibition in the English Bill of Rights regarding "cruel

\(^{32}\) Id. at 122.

\(^{33}\) Id. at 123.

\(^{34}\) Id. at 126.

\(^{35}\) Id. at 129.

\(^{36}\) Id. at 130-31.

\(^{37}\) Id. at 132.
and unusual punishments" without any clear sense of what this had meant in seventeenth century England or what purpose it might serve in their own circumstances. But in a separate chapter on the American arms amendment, Professor Malcolm offers a good deal of evidence to suggest that, at least in relation to citizen access to firearms, the American founders were operating in what was still a living legal tradition.

Certainly, the fear of standing armies and an attachment to local, citizen militias were important elements in the foreground of this tradition. A number of early state constitutions thus contained explicit provisions regarding the maintenance of a citizen militia, together with warnings against or restrictions upon standing military forces. But some states also acknowledged a separate, individual right to be armed. For example, the "Declaration of the Rights of the Inhabitants of Pennsylvania," adopted in 1776, specified that "the people have a right to bear arms for the defence of themselves and the state." Professor Malcolm argues that more oblique references—such as the preamble to the Delaware Constitution of 1776, including among the "natural, inherent, and unalienable rights" of men, the rights of "defending life and liberty... and protecting property"—constitute an implicit endorsement of an individual right to bear arms for personal self-defense. Similarly, in the state ratification debates over the new federal constitution, several states urged the necessity of amendments for the federal charter and a number of these endorsed an individual right to own guns. New Hampshire, for example, urged the need for an amendment to specify that "Congress shall never disarm any citizen unless such as are or have been in actual rebellion."

There was a keen sense of individual gun ownership as a necessary measure of defense against violence and disorder. Professor Malcolm finds that from the earliest decades of English colonial settlement in America, local authorities not only sought to organize militia units but in many instances issued directives requiring all householders to arm themselves against possible dangers. As late as

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38 At the time the Eighth Amendment was debated in Congress, one member noted of the "cruel and unusual punishment" clause that "the clause seems to express a great deal of humanity... but as it seems to have no meaning to it, I do not think it necessary." 1 ANNALS OF CONG. 782 (J. Gales ed., 1789). For an account of the origins of this clause in the English Bill of Rights and its misunderstanding by the American framers, see Anthony F. Granucci, Nor Cruel and Unusual Punishments Inflicted: The Original Meaning, 57 CAL. L. REV. 839 (1969).
39 MALCOLM, supra note 1, at 147-48.
40 Id.
41 Id. at 149.
42 Id. at 158-59.
43 Id. at 139.
1770, a Georgia law required "for the better security of the inhabitants" that every adult, white male "carry firearms to places of public worship." 44

On the other hand, colonial authorities made continued efforts to disarm Indians, slaves, and even free blacks: "Their inability to legally own weapons merely confirmed their status as outsiders and inferiors." 45 Against this background, the stirring egalitarian rhetoric of the Revolution seems to have fostered a keen sense of the right to bear arms as a mark of full citizenship. Thus, early constitutional commentators, such as Joseph Story and St. George Tucker, were eager to tout the republican equality of America by contrasting the full guarantee of the Second Amendment with what they conceived (wrongly, it seems) as the more restrictive rights to gun ownership in aristocratic and monarchical England. 46

Professor Malcolm offers a number of contemporary sources indicating that the actual language of the Second Amendment as finally adopted, presumed that "the militia" would be composed of nearly all adult, white males—and equally presumed that citizens would have private arms for their own purposes. For example, William Rawle, whom Washington sought to make the first attorney general, insisted that nothing in the Constitution could give Congress "a power to disarm the people," but should either Congress or a state legislature undertake such a venture, "this amendment may be appealed to as a restraint on both." 47

But the strength of this book does not derive from the one chapter in which Professor Malcolm offers a relatively brief overview of the immediate origins of the Second Amendment. The power of this volume comes from its demonstration of the deeper roots of the amend-

44 Id.
46 St. George Tucker, Blackstone's Commentaries [American annotation] 300 (1803) ("This may be considered as the true palladium of liberty. . . . The right of self-defence is the first law of nature. . . . In England, the people have been disarmed generally under the specious pretext of preserving the game: a never failing lure to bring over the landed aristocracy to support any measure. . . ."); 3 Joseph Story, Commentaries On The Constitution of the United States § 1891 (1833) ("A similar provision in favor of protestants (for to them it is confined) is to be found in the bill of rights of 1688 [sic]. . . . But under various pretences the effect of this provision has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege."); William Rawle, A View of the Constitution of the United States of America 125-26 (2d ed. 1829) ("In England, a country which boasts so much of its freedom, the right was secured to protestant subjects only, on the revolution of 1688. . . . An arbitrary code for the preservation of game in that country has long disgraced them.").
47 Malcolm, supra note 1, at 164.
ment. The history of the English Bill of Rights illuminates the thinking behind the Second Amendment, because the America of 1790 was still very much the child of English history and experience. In this area, at least, the conditions of colonial life had only sharpened the inherited lessons of 1689.

Professor Malcolm ends her study with the sensible caution of a professional historian: "We are not forced into lockstep with our forefathers. But we owe them our considered attention before we disregard a right they felt it imperative to bestow upon us." While her book limits itself to describing the past, in some ways the most intriguing aspect of the book is its surprising relevance to contemporary conditions. The Whigs of 1689 seem not to have lived in such a distant world, after all.

First, our situation, more than that of almost any other modern western state, resembles that of Stuart England in terms of the wide distribution of firearms. There are over 200 million guns in private hands in contemporary America and guns can be found in more than half of all American households. Guns associated with hunting turn out to be disproportionately in the hands of rural protestants—in the continuation of a social tradition that would not have surprised either the Yankee pioneers of the eighteenth century nor their own forebears in seventeenth century England. A quarter of American households, however, have handguns for self-defense and there is no very clear ethnic or sociological pattern here. Such extensive resort to handguns for self-defense might well have surprised Victorian optimists but probably would not at all have surprised Americans or Englishmen of earlier times. Professor Malcolm devotes much attention to the problem faced by Charles II at the restoration of the monarchy when a large part of Britain was still in arms from the preceeding civil war. Both Charles II and James II struggled to find safe ways of disarming a potentially hostile populace and never succeeded to any great extent. Their problem had special political and religious complications with no ready parallel for contemporary governments in the United States. But the underlying problem, given the scale of existing weapons stocks in private hands, seems strikingly similar and is likely to prove equally intractable for the foreseeable future.

In the second place, the vast scale of crime and disorder in con-

48 Id. at 177.
50 Id. at 38-41.
51 Survey evidence suggests that ownership of handguns does seem to be associated with lack of confidence in the protective capacities of the police. Id. at 32, 47, 55.
52 Malcolm, supra note 1, at 31-52, 94-112.
temporary America invites obvious comparisons with earlier times. The point hardly needs belaboring. Though there are no precise statistics on crime rates through the centuries, it is clear that Englishmen of the seventeenth century believed that they were at constant risk of robbery and assault—and contemporary Americans are also quite fearful. In recent polls, crime control has been listed as a leading public policy concern by more citizens than any other “issue.” Private citizens spend several times more money (and even employ twice as many people) for private “security” efforts than is budgeted for all public police forces in the country put together. Clearly, resort to private gun ownership, particularly in relation to handguns, reflects this continuing unease about crime.

Many people believe that a reduction in the volume of privately owned guns would lead to a corresponding reduction in crime. Significant evidence exists, however, showing that removing guns from crime victims would only compound the crime problem. Burglaries of occupied houses are far less common in America, for example, where many homeowners may be armed, than in otherwise comparable countries (like Canada, Britain and the Netherlands) where burglars have little reason to fear that their victims may be armed. But the important point is that a large segment of the American population is firmly persuaded that guns are a necessary measure of self-protection against crime. Even if they are wrong in this belief, the intensity of their conviction amounts to a severe political problem for those who want to ban guns—as it was in seventeenth century England.

And this suggest a third parallel. Just as in seventeenth century England, efforts to impose measures of disarmament are bound to seem invidious and arbitrary to a sizable part of the population. At one time, the focus of gun control measures was to keep firearms away from blacks in the segregated south. But even in liberal New York City, far more recently, a stringent gun control scheme was administered with striking selectivity. Under a system where ordinary citizens had almost no chance to secure a gun permit, the city was quick to grant special dispensations to the rich and famous—including even some vocal advocates of banning private access to handguns, such as John Lindsay, Nelson Rockefeller, and A.O. Sulzberger, publisher of the New York Times. Exceptions from a stringent gun control system

55 KOPEL, supra note 53, at 335-36.
56 Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amend-
may be inevitable, but this does not mean they will be politically tolerable (if they become better known) in a country inspired by egalitarian principles.

The arguments of earlier times may seem most remote in their insistence that private gun ownership is a necessary check on government oppression. Certainly, the “imagination recoils” at the thought of armed struggle by American citizens against their own government at the end of the twentieth century or decades into the next century. But even on this point, the wisdom of the past should not be dismissed too quickly. The truth is that Parliament triumphed in the English Civil War not with citizen militias but with a drilled “new model army” of professional soldiers. James II was not induced to abandon his throne by citizen militias but by a professional army under William of Orange. Even the American colonists could not have secured their decisive victory over the British at Yorktown without extensive assistance from the professional army and the sizable navy of France. Enthusiasm for armed citizens was not, even in the seventeenth and eighteenth centuries, based on the notion that such citizens could defeat professional armies on their own. The serious argument was always that armed citizens could raise the cost of tyrannical abuse—enough, at least, to give second thought to would-be tyrants.

Clearly, armed citizens continue to give pause to far better armed governments even in the age of nuclear weapons and intercontinental missiles. The most advanced and powerful arsenal in the world was insufficient to provide the United States government with confidence to keep its troops in the field against armed civilians in Somalia. Britain was forced to the negotiating table with terrorists in Northern Ireland and the government of Israel felt obliged to enter negotiations with the terrorist P.L.O., not because these government could not win an all out war against armed civilians but because they did not wish to continue paying the costs of containing their violence.\(^{57}\)

Is it unthinkable that these facts might have relevance to American circumstances? One hopes so. But as the deadly assault on the Branch Davidian compound in Waco, Texas illustrates, even American governments can be tragically reckless in resorting to force when the costs are not carefully calculated. Earlier generations would have taken it for granted that giving government officials more reason to take caution is not a bad thing. It is hard to prove that this reasoning has become entirely anachronistic.

One of the curious developments in the most recent debates

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\(^{57}\) Id. at 270-71. See also, Levinson, supra note 6, at 657.
about the Second Amendment has been the concern of some commentators to determine whether a “right to bear arms” is consistent with a “civic republican tradition” of communitarian values. Professor Sanford Levinson suggested that the right of gun ownership might indeed be a logical corollary of “civic republican tradition.”58 The point was heatedly denied by a feminist critic who was assigned to escort Professor Levinson’s ruminations in the *Yale Law Journal*.59 A subsequent writer equally insisted that a true understanding of republican principles would lead to the conclusion that private gun ownership must be entirely suppressed. He argued that the republican principles of the American founders would be better served by redistributing property, extending popular participation in government and requiring young people to perform public service in aid of the community.60

Professor Malcolm’s study performs a useful service in reminding us that the right to bear arms was originally a right of subjects contending with the harsh necessities in a world they could not refashion at will. It is useful to recall these origins before the debate on guns becomes entirely absorbed in speculations of what is required, in ideological terms, by a supposed “republican tradition” of the American founding. The founders themselves, while proclaiming a *novus ordo seclorum*, took pains to recall the legal landmarks of earlier times. Current debates on gun control might do well to follow their example.

58 Levinson, supra note 6, at 650. The fashion for interpreting the American Founding in the light of a supposed tradition of “civic republicanism”—supposedly at odds with a more individualist and acquisitive “Lockean tradition”—is displayed in the symposium on *The Republican Civic Tradition*, 97 YALE L.J. 8 (1988). For a useful corrective by a trained intellectual historian see ISAAC KRAMNICK, REPUBLICANISM AND BOURGEOIS RADICALISM, POLITICAL IDEOLOGY IN LATE EIGHTEENTH CENTURY ENGLAND AND AMERICA ch. 6 (1990).


OF GENOCIDE AND DISARMAMENT

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The thesis of Lethal Laws is that, as a practical matter, governments cannot commit genocide except on effectively disarmed populations. However one appraises the success of the book in developing this theme, one must concede the book’s contribution to our knowledge of foreign firearms regulation, which is among the most frequently mentioned, and muddled aspects of our own gun control debate. Pulled together for the first time are lengthy English translations of historical firearm laws from Germany, the USSR, the People’s Republic of China, Ottoman Turkey, Guatemala, Uganda and Cambodia—all places in which, during the past 100 years, infamous acts of genocide were perpetrated by agents of the state. There are also facing-page originals of these statutes in their own language. The laws are set in their historical context by brief but illuminating commentaries which often include information on enforcement practices. This commentary, as far as it goes, is balanced.¹ Far from overdramatizing the scale of various genocides, Lethal Laws inclines to settle on the lowest reasonable number of victims.² Despite the authors’ expressly

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¹ For instance, Lethal Laws notes that among the targets of the Cambodian genocide are “all Khmer Muslims (Chads).” Jay Simkin et al., Lethal Laws 314 (1995). Professors Harff and Gurr note that this genocide has been little recognized because it amounted to only about 200,000 deaths (about one-half of the whole Chad people) out of a Cambodian body count that may be as much as 15 times greater. Barbara Harff & Ted Robert Gurr, Toward Empirical Theory of Genocides and Politicides: Identification and Measurement of Cases Since 1945, 32 Int’l Stud. Q. 359, 366 (1988).

² Compare Lethal Laws, supra note 1, at 315, (“It seems safe to conclude that Pol Pot murdered about one million Cambodians, some 14% of the population.”), to Professor Leiser’s estimate of “some two to three million” Cambodian deaths. Burton M. Leiser,
Jewish connection, they bend over backwards to avoid demonizing the German people for the Holocaust (blaming the rise of Nazism exclusively on adverse world and local economic conditions and on the post-World War I Versailles Treaty, which they appear to consider harsh and unfair to Germany).

*Lethal Laws* is the second book from Jews for the Preservation of Firearms Ownership (JPFO) to champion a proposition that is central to the argument against firearms prohibition: that the inclination of sovereign governments to abuse power, including the infliction of geno-politicide upon racial, ethnic and other minorities, constitutes a sound basis for sanctioning an armed population capable of at least rudimentary self-defense. Granting this thesis implicates an extraordinary roster of political sensitivities and cannot judiciously be dismissed out of hand in the closing years of a century that has been the golden age of genocide. Yet it is safe to predict that *Lethal Laws* will not become the vehicle through which this important public conversation is carried on. The reason for this state of affairs is not to be found in the book but in its authors’ inexcusable bad manners, portrayed, for example, in their penchant for renting billboards or placing advertisements in magazines that equate President Clinton, or gun control activists like Sarah Brady, to Hitler. In the best of times this kind of behavior would contribute nothing useful to public debate. In the wake of the Oklahoma City bombing and especially in light of the ensuing press coverage, in which libertarians, firearms hobbyists, members of the National Rifle Association, survivalists, skinheads, and neo-Nazis were all jumbled together as a modern version of the Red Victims of Genocide, in Diane Sank & David I. Caplan, To Be a Victim: Encounters with Crime and Justice 278 (1991). See also Harff & Gut, supra note 2, at 364, (listing the death toll at 800,000 to 3,000,000).

3 The first book was Jay Simkin & Aaron Zelman, “Gun Control”: Gateway to Tyranny (1992) [hereinafter “German Gun Control”].


5 One such advertisement, featuring pictures of Hitler and Mrs. Brady, appears in German Gun Control, supra note 3, at 133. Another is reported in USA Today, Mar. 11, 1994, at A10, depicting Hitler rendering the Nazi salute and bearing the caption: “All in favor of gun control raise your right hand.”
Menace, such bombastic comparisons accomplish nothing apart from gravely undermining the credibility of those who are guilty of them. It is unfortunate that this confusion exists because the foreign experience with firearms regulation and armed populations has much to inspire reflection as Americans try to reach some sort of admissible solution for the problem of crime and violence in our society. And on its own merits, Lethal Laws makes a worthwhile contribution to that endeavor.

Arguments about firearms policy often fall back into the fashion of oracular interpretation, in which statistical entrails are examined and pronounced to imply (or not to imply) that gun control laws can lead to lower rates of homicide or suicide or that regional or national differences in patterns of firearms possession explain differences in the incidence of violent crime. The large question that tends to get lost in these minute inquiries is that of the ideal distribution of firearms in a society. Supposing we had a magic spell that allowed us to have whatever world we would like as regards firearms: what world would we choose? No firearms at all? Police and soldiers armed but no one else? Brinks truck drivers also armed? Upon what principles should we draw the line?

The “no firearms at all” option is too swiftly chosen by members of the urban upper-middle and professional classes, for on the one hand, they—that is, we—seldom encounter problems for which firearms would appear an obvious counter; and on the other hand, as we read in the newspapers every day, firearms—handguns and assault rifles especially—have become the vectors of one of the major public health problems of our time. Why then should we behave any differently toward firearms than toward the variola virus, which, thanks to a century of unceasing effort, has been extirpated from the earth?

The analogy is seductive but misleading. Without variola there can be no smallpox, but without firearms there can be plenty of violence. For example, the world before firearms was hardly a pacific place. It is unrealistic to expect criminals to become less predatory once their fear of potentially lethal confrontations with firearms is removed. At a minimum, then, it would seem that one should want a police force with access to firearms and for the same reasons (mutatis mutandis) a soldiery is similarly armed. At this point, one has what might be called (with some imprecision) the European paradigm:

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armed government and a disarmed population. The question is whether over the long pull this prototype is inherently more irenic with respect to social violence than one in which firearms are more popularly distributed.

Most American gun-phobes clearly prefer the European paradigm for two reasons. First they consider it ludicrous that their own government might become the origin of a secular danger commensurate with armed resistance.\(^8\) Massacres and atrocities have occurred in American history, along with a civil war that was sanguinary even by the standards of its time; but literal genocides have been fairly remote from American history. Second, gun-phobes do not give credence to the prospect that individual precautions, such as being armed, could prove to be cost-effective (in the broadest sense), given that any hypothetical, assumed-to-be pathological government would command a heavily equipped modern army, against which small arms would certainly be helpless.

Such reasons, though they have persuaded many fair-minded people, are unconvincing when looked at closely. It is self-deluding to deliberate the European paradigm without also recognizing its liability—repeated dozens of times in living memory—to tip into genocidal extremity. Genocide is a singular event; as *Lethal Laws* argues, there are no obvious demographic or socio-psychological predisposing factors, and no reason to suppose that Americans are immune from the craziness that has overtaken countries both rich and poor, urbane and agrarian. Most of the people who were murdered by their own governments in this century would undoubtedly have said, before the fact, that their becoming the victims of any such wholesale mass-atrocities was a simply unthinkable eventuality.

Neither is it necessarily futile for irregular troops to oppose conventional armed forces. Guerrillas have often held their own against regular military formations; and even if their record were significantly weaker than it is, an armed population might possess a sort of general deterrent utility by complicating the calculations and increasing the expected costs of any aspiring junta or intended putsch. Of course this is not to suggest that tyranny inevitably follows from banning civilian firearms possession or that past episodes of genocide would not have occurred, or for that matter that future episodes will not occur, were the victim population armed.

The policy question, rightly considered, is whether the benefits of civilian firearms possession—including their effect in discouraging overreaching by government—are great enough in comparison with

the costs to justify allowing (or for that matter compelling) the civilian population to be armed. The answer to this question, though very far from obvious, is crucially important to the long-term welfare of society. Yet giving it detached consideration has been complicated by the airy dismissal of the entire issue by our culture’s principal agencies of conventional wisdom. Because low murder rates and restrictive gun control laws have been consecrated as a chain of cause-and-effect by every major newspaper in the country (to say nothing of network television, *Time* and *Newsweek*, and so on), it should not be surprising that the foreign experience, especially that in Japan and England, where murder rates are exceptionally low\(^9\) and gun controls strict,\(^10\) should figure prominently in debate. Such ingenuous analogical reasoning persists in newspaper accounts despite the availability since 1992 of David Kopel’s prize-winning book, *The Samurai, the Mountie and the Cowboy*.\(^11\) Examining the experience of England, Canada, Australia, New Zealand, Jamaica, Switzerland and Japan, Kopel’s work raises critical doubts of whether the connection between firearms availability and crime has in fact been uniform enough to allow the standard inference that one leads to the other. *Lethal Laws* adds further, much needed historical perspective to a different phase of the same question, namely what the foreign experience implies with respect to the contingent costs of firearms non-availability.

Public conversation about firearms policy has not only been vexed by the fascination this subject seems to hold for a number of evidently unstable characters, but also by the tendency of argument in a polemical environment sometimes to substitute facility for precision in setting forth relevant information. Zimring and Hawkins, for example, have made the point that few Israelis own handguns (which they illustrate with a table indicating that handgun ownership is far less in Israel than in Austria or Canada),\(^12\) and that Israel and Switzerland have strict handgun laws and report negligible deaths by handguns. This line of argument, though, says very little about the availability of firearms to the general population. Indeed, as Israeli criminologist Abraham Tennenbaum has written, “the homicide rate in Israel has always been very low . . . much lower than in the United States . . . despite the greater availability of guns to law-abiding [Israeli] civil-

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ians. Relatively few Israelis own guns because any law-abiding Jew who needs an Uzi, or a handgun, may borrow it, like a library book, from an Israeli police armory. In the U.S., far from the state giving firearms to those in need, fully automatic firearms like the Uzi have been stringently controlled since the 1930s, and now the purchase of semi-automatic versions of the Uzi—mere, cosmetic lookalikes of the military weapon—has been banned.

Israelis (including Arabs) who want to own a personal firearm must obtain a license; but this is available, on demand, to any trained, responsible adult. Unlike the United States, where carrying a concealed handgun is illegal in most places and circumstances, in Israel, a permit to possess a firearm is also a permit to carry it, concealed or unconcealed, on one’s person. Indeed, authorities recommend that people who own guns should carry them, the better to secure them from thieves or children. As a consequence, any good-sized crowd of people is sure to contain some number of citizens carrying personal weapons, usually concealed. American-style massacres, in which numbers of unarmed victims are shot down before police can arrive, astound Israelis, who note what occurred at a crowded venue in Jerusalem some weeks before the California McDonald’s massacre: three terrorists who attempted to machine-gun the throng managed to kill only one victim before being shot down by handgun-carrying Israelis. Presented to the press the next day, the surviving terrorist complained that his group had not realized that Israeli civilians were armed. The terrorists had planned to machine-gun a succession of crowd spots, thinking that they would be able to escape before the police or army could arrive to deal with them.

Of course one should not impulsively jump to the conclusion that Israeli firearms policy is applicable in detail to the United States, where massacres are fairly uncommon events. Our point is rather that a society that is considering the problem of firearms—whose distribution is, after all, one of the most basic questions of social policy—cannot afford to surrender to the cataracts of misinformation and, one regrets to say, even disinformation that this subject seems almost uniquely to attract.

15 Tennenbaum, supra note 13, at 248.
Last year’s dispiriting congressional debate concerning “assault weapons” furnishes an example. Compared to their proportion of the firearm stock, “assault weapons” are actually under-utilized in crime; even Handgun Control, Inc. has conceded that such firearms are practically never used for criminal purposes. Counterfactual claims to the contrary (in which assault weapons were repeatedly referred to as “the preferred weapons of criminals [or dope dealers, etc.]”), which were made to bolster the proscription of assault weapons, were allowed to pass from the publicity desks of activist groups or their congressional adjuvants directly into conventional wisdom without having to endure so much as a quizzical smirk from the press corps, let alone the acid bath of skepticism with which they ordinarily greet each new proposed orthodoxy. The New York Times quoted the author of the federal assault weapon ban, Senator Dianne Feinstein, as pointing “out the [Steyr] AUG, for instance as the ‘favorite of drive-by shooters because of its light weight and firepower.’” But California law enforcement officials told Daniel Gifford, a free-lance journalist, that there were no more than 10,000 of these weapons in the entire country, mostly owned by peace officers, serious collectors and the movie industry. Subsequent calls to other police agencies across the nation found no one who had ever heard of an AUG being used in a drive-by shooting.

The melodrama of crime stories come-to-life has furnished an irresistible lime-light that even people who know better cannot seem to resist stepping into. Colonel Leonard Supenski of the Baltimore County Police Department, for example, knew exactly how to market his appeal for the enactment of an assault weapons ban a few years ago. He told reporters: “We’re tired of passing out flags to the widows of [Baltimore] officers killed by drug dealers with Uzis.” The FBI, however, reports that only one officer has ever been killed with an Uzi and that was in Puerto Rico, not Baltimore. Less than 1.5% of police officers killed in the 1980s were killed with any “assault-type

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weapon."20 Chicago police department statistics have consistently shown rifles and shotguns of all kinds (not just "assault weapons") involved in less than 3% of the city's murders.21

The case for banning military-appearing firearms cannot be made on the basis of their liability to actual criminal misuse. The real basis for banning them lies elsewhere. Though statutory assault weapons are essentially indistinguishable from sporting rifles in terms of how they work, their rate of fire, the class of ammunition they use (and so forth), legislators seem to find something specifically loathsome about a civilian—perhaps one ought to say "mere" civilian—wanting a firearm that is even cosmetically similar to the weapons used by soldiers. Cosmetics lie at the heart of this law. For example, one statutory criterion of an assault rifle is that the weapon possesses a bayonet mount. Yet there seems to be no record of bayoneted rifles ever having been used for crime, at least in this country. Another differentiating criterion is whether the rifle has a pistol grip. But on what theory do pistol grips make a rifle more suited to crime? The concern with bayonet mounts and pistol grips, far from being instrumental, is meant simply to burden the brazenness of people who would dress their rifles in military panoply. In fact, it is a nearly immaculate example of legislation as a form of pure cultural spite—a point that has hardly been lost on those who have been subjected to its strictures.

The important contribution of Lethal Laws is its reminder that the public sector has been by far a greater source of murder in the past 100 years than the private. Not that it is necessarily easy to compare the lives lost because of civilian disarmament and those lost because of the relatively easy availability of firearms, but the raw statistics are admonitory. It is a standard argumentative ploy of gun-phobic legislators to point to the disproportion between lives lost in warfare and civilians back at home shot down by malice or accident. For example, "in the last 25 years more American civilians have died by gunfire murders than were killed in the Vietnam War, the Korean War and World War I combined."22 Does it not matter to the policy of a liberal state that by far the majority of these deaths were self-inflicted, and a very large proportion involved elderly people?23 Well and good, per-

20 Letters from J. H. Wilson, Chief, Uniform Crime Reporting Program to Paul H. Blackman, Research Coordinator of the NRA (June 20 and Sept. 5, 1990).
21 Chicago Police Department Murder Analysis Reports, Detective Division Murder Analysis (on file with the Chicago Public Library).
23 STATISTICAL ABSTRACT OF THE UNITED STATES, 1994 NAT'L DATA BOOK 96, Table 128 (1994); see also Garren J. Wintemute, Firearms as a Cause of Death in the United States, 1920-
haps one might think, to deprive despairing people of the means of suicide. But of course firearms bans do not accomplish that; they only place impediments in the way of a preferred means of suicide, obliging the subject to find alternative, perhaps more terrible means. As a preferred public policy, that state of affairs must be argued, not assumed or established by stealthy elision or germane if inconvenient facts—even in a legal system in which suicide has always been disfavored. If one confines one's gaze simply to firearms murders, what one finds is not "gun owners," but rather a small number of aberrant individuals, risk-takers whose life histories are filled with violence, crime, substance abuse, and even serious accidents. On the other hand, genocide has cost the lives of more innocents this century than all the soldiers killed on all sides in all the world's wars in the same period, including not only the two world wars, Korea, Vietnam, and the Gulf War, but the India-Pakistan Wars, the gruesome Iran-Iraq War, all the Arab-Israeli wars, the Falkland War, and the Russo-Afghan fiasco. Likewise, Lethal Laws calculates the total number killed by the Nazi murder machine (exclusive of World War II military casualties) at thirteen million Jews, Gypsies, political opponents, and Polish, Russian and other innocent civilians over the thirteen years from 1933 to 1945—compared with roughly 13,300 Americans murdered annually with guns.

Whether the presence of an armed population would genuinely
ameliorate this sort of evil—which is the principal contention of *Lethal Laws*—is fairly debatable. Unfortunately, fair debate is one thing it almost certainly will not receive, thanks in part to its authors' reputation for personal shrillness. They have nevertheless placed a great deal of new and thought-provoking material at the disposal of a public that has distinct need of reflecting upon it. Perhaps such reflection will occur in a quieter time.