CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC
†
DEUELING, SOUTHERN VIOLENCE, AND MORAL REFORM

Clayton E. Cramer
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ACKNOWLEDGMENTS

Many people have generously offered their time and direction in the course of this research. Stephen Mintz at the University of Houston provided some very useful guidance and suggestions when I first started to research this topic. Robert J. Cottrol at George Washington University School of Law provided substantial encouragement to this effort as well. Eugene Volokh at the University of California Los Angeles School of Law was also of assistance in tracking down some obscure early decisions.

Two significant influences on this work are Sonoma State University’s LeVell Holmes and Daniel Markwyn, my thesis committee chair. Scheduling problems dropped me into Professor Holmes’s black history class. I had previously considered black history a minor and not terribly interesting part of the American pageant; but because of Professor Holmes’s efforts, I began to see the sometimes central role that the struggle over slavery and the status of the freedmen played in the development of American law and institutions. Professor Markwyn continually directed me through the maze of existing scholarly work on the early Republic, and kept me examining alternative explanations for how the back country culture was chronicled by travelers.

Bruce Baird of the University of Alabama at Huntsville generously provided a draft of his chapter “The Social Origins of Dueling in Virginia” from Michael Bellesiles’s forthcoming book, Lethal Imagination: Violence and Brutality in American History, which
provided some useful theoretical models for the rise of dueling in the early Republic. Michael Bellesiles of Emory University was also helpful in directing me to sources concerning the 1837 Georgia law.

David Roberts Lewis became aware of my research topic, and by one of those fortuitous accidents that seem to happen at least once in every such project, he provided me a copy of his 1984 thesis on dueling that pointed me towards a solution to this historical question. I am also grateful for the assistance of Lloyd Cohen at George Mason University School of Law and Gary Kleck of Florida State University. Both gave generously of their time at the American Society of Criminology conference in 1997 to help me to understand the power and limitations of statistical techniques for solving historical problems. Mark Gibson at the University of Illinois was also kind enough to read through the 1812-13 Kentucky newspapers that were unavailable to me. Mark Fuller, G. S. Ozburn, and Berkley Bettis read through a late draft of this work, providing a fresh set of eyes when my own were no longer able to see missing words, excess commas, and clumsy constructions.

While I do not know their names, the staff at the Georgia Department of History and Archives were friendly and helpful beyond my expectations in locating materials about the 1837 Georgia law. The staff at the Historic New Orleans Collection also provided exceptional assistance in finding materials about policing in early New Orleans. Sonoma State University library and the Sonoma County public library system staffs pleased me with their ability to borrow books of great age and rarity from university libraries and state archives across the country.

Finally, there are two people whose assistance was extraordinarily helpful, without whom this work would be much less certain in its conclusions. One is Billie J. Grey, librarian at the Hamilton County, Ohio, Law Library. She has carefully preserved an impressive collection of antebellum session laws, some of which are scarce even in the largest law school libraries. Her willingness to locate and copy these first drafts of the criminal codes saved me an enormous amount of work. The other person who helped to make this work what it has become is my wife, Rhonda Thorne Cramer. She located and helped put into context the Romantic literature that involves dueling and the culture of honor. Most importantly, she talked me through the challenging task of structuring this work into a form that was not merely accurate, but that also told a story. She also provided substantial assistance in critiquing my writing, as well as providing two key illustrations. My eagle-eyed editor at
Greenwood Publishing Group, Lynne Ann Goetz, also caught many typos and inconsistencies that had already slipped by ten or more sets of eyes.

While many people have provided valuable assistance in the writing of this book, the conclusions I have drawn about the motivations for the concealed weapon laws of the early Republic are purely my own.
WHAT IS THE MYSTERY?

It is one of the great ironies of American history that the states commonly thought of today as “redneck country” (areas where gun ownership, hunting, and rifle racks in pickup trucks are unremarkable) were in the forefront of laws regulating the concealed carrying of deadly weapons. Another common characteristic is that all were slave states when they first passed these laws. Seven of the fifteen slave states (Kentucky, Tennessee, Georgia, Alabama, Arkansas, Louisiana, and Virginia) adopted statutes before the Mexican War that regulated concealed carrying of arms.1 Even Indiana, nominally a free state because of the Northwest Ordinance of 1787, still held slaves in 1820 when it adopted its first concealed weapon law.2

Why did the slave states take an early lead in regulating the carrying of concealed weapons, and why is this question interesting today? In the last few years, in response to rising public anxiety about crime, more than twenty states have liberalized their con-


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These states had previously either completely prohibited concealed carrying of handguns by civilians, or arbitrarily licensed concealed handgun carrying permits. These new laws clearly define who is eligible for a license—and the vast majority of adults qualify, or can qualify with a little training. In the course of political debate about these changes, opponents of liberalization have argued that the existing restrictive laws regulating concealed carrying of handguns were in place for good reason. But why are the existing state laws in place?

Answering this question is not easy. Unlike many other areas of criminal legal history, few scholars have published work examining the history of concealed weapon laws. Those who have researched this topic are like spelunkers entering an unexplored cave of immense proportions, armed only with a candle. The size of the cave is unknown, because the candle fails to illuminate the far walls. Every explorer makes new discoveries, because there is so much that remains unexplored.

In the same way, each new work published about concealed weapon law history can dramatically expand our body of knowledge, because the existing base is so small. Even such fundamental facts as the date that each state adopted its first concealed weapon law remain uncertain. The adoption date for the state laws prohibiting or regulating the concealed carrying of deadly weapons in the early Republic would appear to be: Kentucky, February 3, 1813; Louisiana, March 25, 1813; Indiana, January 14, 1820; Georgia,


December 25, 1837; Tennessee, January 27, 1838; Virginia, February 2, 1838; Alabama, February 1, 1839. Arkansas remains somewhat mysterious, but its legislature definitely banned the carrying of concealed weapons sometime during the 1837-38 legislative session, though this may have been simply a restatement of a preexisting territorial statute.

As an example of the considerable uncertainty on this subject, George D. Newton, Jr., and Franklin E. Zimring claim that Massachusetts had antebellum restrictions on the carrying of handguns. A more recent detailed history of Boston’s police department indicates that there were no laws prohibiting the carrying of firearms, openly or otherwise, at least through the Civil War, except while committing an arrestable offense. Massachusetts did prohibit any possession of a slungshot or brass knuckles from 1850 onward, but does not appear to have prohibited concealed carrying of a deadly weapon.

While many historical issues about concealed weapon laws remain uncertain and unresearched, most scholars (even those who
agree on little else in this politically sensitive area) accept the following facts. The courts have generally recognized concealed weapon laws as legitimate uses of the police power of the state.\textsuperscript{14} While acknowledging the legitimacy of this form of regulation, the courts have sometimes struck down particular concealed weapon licensing strategies because they violated the equal protection or due process guarantees of the Fourteenth Amendment, adopted after the period under examination.\textsuperscript{15}

Still, the decisions of the courts have not been unanimous about the constitutionality of laws regulating the carrying of concealed weapons. A few state supreme courts have struck down such laws as incompatible with the right to keep and bear arms provision of their particular state’s constitution.\textsuperscript{16} Other state supreme courts have implied that their state constitution’s arms provision protected the concealed carrying of deadly weapons.\textsuperscript{17} As recently as 1950, the Illinois Supreme Court suggested that a concealed weapon statute that was not narrowly “aimed at persons of criminal instincts, and for the prevention of crime” might be a violation of the Second Amendment.\textsuperscript{18}

Why have all states except Vermont adopted concealed weapon laws? To many readers, this seems like an absurd question, rather akin to asking why all states have prohibited drunk driving. The answer would seem self-evident—yet laws regulating the carrying of concealed weapons are surprisingly recent in the United States. Many northern states passed no laws regulating concealed carrying of weapons until the 1920s.\textsuperscript{19}

\begin{itemize}
\item \textsuperscript{14} Cramer, \textit{For the Defense of Themselves and the State}, 72ff.
\item \textsuperscript{15} Kellogg \textit{v. City of Gary}, 462 N.E.2d 685 (Ind. 1990); Rabbitt \textit{v. Leonard}, 36 Conn. Sup. 108 (1979); City of Princeton \textit{v. Buckner}, 377 S.E.2d 139 (W.Va. 1988); Application of Metheney, 391 S.E.2d 635 (W.Va. 1990). The list of decisions recognizing a right to open carrying of deadly weapons (especially firearms) for self-defense is considerably larger and beyond the scope of this work. See Cramer, \textit{For the Defense of Themselves and the State} for a general examination of judicial interpretation of the right to keep and bear arms provisions.
\item \textsuperscript{16} Bliss \textit{v. Commonwealth}, 2 Littell 90, 13 Am. Dec. 251 (Ky. 1822); \textit{State v. Rosenthal}, 75 Vt. 295, 55 Atl. 610 (1903).
\item \textsuperscript{17} \textit{State v. Huntly}, 3 Iredell 418 (N.C. 1843); Wright \textit{v. Commonwealth}, 77 Pa. St. 470 (1875).
\item \textsuperscript{18} \textit{People v. Liss}, 406 Ill. 419, 94 N.E.2d 320, 322, 323 (1950).
\item \textsuperscript{19} Don B. Kates, Jr., “Handgun Prohibition and the Original Meaning of the Second Amendment,” \textit{Michigan Law Review} 82 (November
This previously laissez-faire approach to concealed weapons was not peculiar to America. Great Britain, the primary source of the American legal tradition, did not license the carrying of concealed handguns until 1870. Even then, the licensing was purely a revenue measure, and any adult would receive a license upon payment of a fee. Only the Firearms Act of 1920 restricted law-abiding adults from buying and carrying concealed handguns.

Nor was this a peculiarity of Anglo-American law. A British Parliamentary report of 1889 found that a number of European countries had no restrictions on the carrying of concealed handguns. Even those nations that did have such laws seldom enforced them. It is tempting to assume that the ethnic and cultural homogeneity of these societies played some part in the absence of such laws, especially since race has often played a part in the development of American gun control laws, as this work will discuss in the next chapter.

Why did most of western Europe and the United States have so few restrictions on the concealed carrying of deadly weapons so late into the modern period? Cesare Beccaria, the eighteenth-century father of Enlightenment criminology, explained classical liberalism’s problem with laws regulating the carrying of arms in *On Crimes and Punishments* (1764):

False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm only those who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less...

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important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty—so dear to men, so dear to the enlightened legislator—and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man [emphasis added].

Beccaria was a significant influence on the fledgling American Republic and its leading men, in his general view of criminology and specifically his notion of the counterproductive effects of laws regulating the carrying of arms. Many aspects of modern America would surprise a traveler visiting us today from 1790. Our apparent return to medieval and Renaissance practice—where the law allowed only aristocrats, knights, and a few other privileged commoners to carry deadly weapons—would be startling indeed.

This subject carries enormous public policy implications for today and, for that reason, carries considerable emotional baggage. Many interpretive hazards await the historian who studies the origin of laws regulating the concealed carrying of deadly weapons, but perhaps the most important risk is overgeneralization. Eight states passed concealed weapon laws in the early Republic (1776-1846), going upstream against the current of American tradition. There is no reason to presume that every state passed its law with

the same motivation. As is often the case when a state legislature passes a law, we may find a mixture of purposes within one state, or even within one statute. We must also accept the troubling possibility that because of a lack of records, we may not be able to determine why a particular state passed its first concealed weapon law.

Another hazard is that we must distinguish the proximate cause of these laws from the underlying cause. As we will see when we examine the statutes themselves and the newspaper coverage of their passage, the stated intent was always to reduce unnecessary bloodshed. But why did some states have enough deadly violence—or believe that they had enough deadly violence—to justify passing such laws, while other states did not? Why did some states pass laws banning concealed carrying of deadly weapons instead of some other strategy for dealing with their misuse? In the following chapters, we will explore why this culture of violence developed and why concealed weapon laws seemed like a solution to this problem—contrary to Beccaria’s logic.

It would appear that the reason that Beccaria’s powerful theory was ignored is that concealed weapon laws in the early Republic were not intended as a solution to a general problem of violence. Instead, concealed weapon laws were a solution to one very specific type of violence—and that category of violence was in turn a side effect of a well-intentioned effort at reforming American society.