

Reassessment

Arming America: The Origins of a National Gun Culture

BY MICHAEL COBLENZ

Her words, the prosecutor assures us, make plain beyond any reasonable doubt “the intent and the import of her statements.” (Was there ever any doubt as to her intent?) The prosecutor proffers a “theme analysis” of Fonda’s statements to the media, originally prepared for Congress. From this sizable heap of evidence, the conclusion is reached: she was pro-Communist! Or at least she would willingly parrot whatever her hosts told her to say (as she was too lacking in any understanding of history to form such opinions on her own).

The prosecutor next turns to the connection between Fonda’s conduct and its treasonous impact on America. The POWs return to the stand to testify about how disheartened they were to hear the seductive voice of “Hanoi Jane.” One says:

It’s difficult to put into words how terrible it is to hear that siren song that is so absolutely rotten and wrong. ... It was worse than being manipulated and used. She got into it with all her heart. She wanted the North Vietnamese to win. She caused the deaths of unknown number of Americans by buoying up the enemy’s spirits and keeping them in the fight. That’s not what you’d expect from Henry Fonda’s daughter!

At that, I admit I had to stifle a laugh. Was this her real crime — destroying some Hollywood illusion about the values of Americans? It seemed to pale compared to what these witnesses had already told us about their experiences in captivity. Apparently, Fonda’s taped broadcasts were used as an actual implement of torture. POWs were not swayed by her propaganda, though. No evidence is presented to indicate whether any enemy soldiers were actually aided or comforted, or how many Americans lost their lives because of the broadcasts.

The greatest testimony about the impact of her activities on the war effort, the prosecutor tells us, is the admission

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Common sense can often be an effective tool for evaluating the truth of a claim, but sometimes, particularly when used with limited or inaccurate information, it can be a create misunderstanding and errors. My review (January 2001) of Michael Bellesiles’ book, *Arming America: The Origins of a National Gun Culture*, is an example of such an error.

The National Rifle Association and other gun rights advocates have long claimed that in Colonial America every colonist owned a gun. Common sense indicates that this cannot be true, particularly since large numbers of colonists were religious protestors with a strong moral aversion to killing and owning weapons. Other colonists, undoubtedly, were just too poor to own a gun. There is no way that every colonist owned a gun.

I have done some reading in Colonial history, and I know that Colonial militias were often ill-equipped and usually ineffective. This would hardly be the case if gun ownership had been universal and if every colonist had been a crack shot like James Fenimore Cooper’s character Natty “Hawkeye” Bumppo. As a result of my limited knowledge, I have always been skeptical of NRA claims of universal gun ownership, claims for which the NRA (as far as I know or can find on its Web site) has never offered any evidence to support, beyond simply stating that this is a fact that everyone knows.

As a result, Bellesiles’ book confirmed many of my suspicions. According to *Arming America*, guns at the time were handmade and therefore very expensive. There were also few Colonial gunsmiths, with most weapons being imported and therefore even more expensive. Additionally, guns were generally made of iron (large-scale steel production did not exist until the 1840s), which means that they rusted easily and were difficult to maintain. Therefore, according to Bellesiles, few colonists owned guns. Finally, Bellesiles “proved” his case by showing how there were very few guns in Colonial probate records. His research found that only about 15 percent of estates contained records of guns, and, he claimed, probate records scrupulously recorded every item in an estate.

While that number seemed low, I had never seen any other data beyond the nonsensical NRA claims of universal ownership, so I accepted Bellesiles’ argument. I also presumed that a history professor would not purposefully manipulate the evidence to prove his point.

The book initially received great reviews, and in 2001 won the prestigious Columbia University Bancroft Award for History. The main criticism of the book came, not surprisingly, from pro-gun groups. The NRA’s initial response was typical and predictable, asserting that Bellesiles was an anti-gun zealot¹ and that his research should be ignored. The NRA made no attempt to prove its claims.

Some academics and other experts in colonial history, however, were skeptical of Bellesiles’ claims and decided to check the accuracy of his data. They have found many errors; the most widely reported concern probate records.

One of the most prolific early critics was Clayton Cramer, then a history student in California. Cramer’s first book review compared Bellesiles’ claims against Colonial travel writing and reporting that noted a widespread prevalence of guns.² Unfortunately, this and a longer article³ were never pub-

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turns into an indictment of the government for having failed to act. He gesticulates italics and spits quotation marks to condemn the government's "capitulation" in the matter, revealing a fair amount of venom for what he deems the plainly incompetent Justice Department. He quotes at length from a "glaringly deficient" Memorandum of Law prepared by Assistant Attorney General A. William Olson (or more likely, he opines, some law clerk at DOJ). Especially misleading, he emphasizes, is Olson's interpretation of what two Supreme Court treason cases "made clear." "Every lawyer knows ... that appellate courts don't make 'clear,' they make 'holdings.'" Yet he himself had earlier drawn extensive conclusions from various facts of the cases as well as assorted dicta! Now, suddenly, only the "holdings" are relevant.

Apparently, this prosecutor doesn't believe in prosecutorial discretion. He dismisses as a platitude the government's contention that forcing Jane Fonda to testify at congressional hearings would work to its prejudice. He thinks it obvious that "Fonda's conduct in North Vietnam, had it been exposed for all Americans to see, could have triggered patriotic sentiment and, ironically, helped the government to end that war." Huh? Does that mean that Hanoi Jane and the government were pursuing the same ends all the while?

The great irony is that the government seems to have understood the points our prosecutor misses entirely. The Treason Clause was intended not to protect the government from the people, but to protect the people from the government. It places limits on what the government can punish as treason, reflecting an awareness on the part of its framers of how easily the concept of treason can be extended to punish (and silence) persons who criticize the government. Its heightened evidentiary requirements and restrictions on punishment reflect the framers' understanding that the passions of jurors are more easily inflamed during times of political conflict. Only the government can be said to violate the Treason Clause — whatever Jane Fonda may have done, surely she cannot be tried

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lished, but at least one of his shorter pieces was published in a conservative magazine⁴ and was either ignored or dismissed by the mainstream media as politically motivated.

Other, less obviously biased critics were soon to follow. Perhaps the most prominent critic has been James Lindgren of Northwestern University School of Law, a noted expert on Colonial probate records. Lindgren has conducted extensive research to evaluate Bellesiles' claims, and what he found is disturbing. First, and perhaps most important for the question of gun ownership, he found that Colonial probate records indicated that gun ownership rates varied in the colonies from between 35 and 80 percent.⁵ For example, in 1774, guns were present in 35 percent of estates in New Jersey, and in 77 percent of estates in North Carolina.⁶ More disturbing, however, Lindgren found that he could not find the records that Bellesiles claimed to have analyzed, and found blatant errors in Bellesiles' analyses of most of the records he could find.⁷ Lindgren concluded that Bellesiles intentionally misrepresented his data.

The controversy over the book led the *William and Mary Quarterly*, a leading history journal, to publish a lengthy historical forum analyzing Bellesiles' book.⁸ The forum included four analyses by independent scholars, along with Bellesiles' response. The essays analyze gun ownership and the Second Amendment,⁹ Colonial probate records,¹⁰ the Colonial militia,¹¹ and homicide rates in Colonial America.¹² Of the four, the most relevant is Gloria Main's analysis of Colonial probate records. Main directly contradicts Bellesiles' assertion that probate records "scrupulously record every item in an estate."¹³ This is complete nonsense, she states. "Anyone at all familiar with inventories from the colonial period knows that they are maddeningly inconsistent in organization and detail."¹⁴

Bellesiles' argument, which made sense on cursory review, has been shown by the foregoing analyses to be wrong. As a result, it is inescapable that Bellesiles' book is fundamentally flawed. My previous review of the book was based on a limited knowledge of the actual facts and was to a large degree wrong.

History, like law, is a search for the truth. Evidence must be interpreted and evaluated. When evidence is found to be faulty, it should be discarded. Here the evidence shows that everyone did not own a gun (thus disproving the NRA's position), but it does show that a significant percentage of the population did own guns, somewhere around two-thirds or three-fourths of the population, varying from colony to colony.

This may seem like an esoteric historical argument, but it has an impact on our understanding of the Second Amendment. Gun rights advocates suggest that, if gun ownership was widespread, then the Second Amendment merely codifies a widely accepted and acknowledged individual right. Gun control advocates seized on Bellesiles' book to dispute this assertion and to support the contention that the Second Amendment's right to bear arms applies only to militias (as set out in its preamble), and not to individuals. Bellesiles' work was cited freely in amicus briefs to both the Fifth Circuit Court of Appeals and the U.S. Supreme Court in *United States v. Emerson*.¹⁵ In that case, the Fifth Circuit held that the Second Amendment provides an individual right to own a weapon. The case also held that the right is not unlimited but is subject to restrictions. The Supreme Court denied certiorari.

As noted at the beginning of this essay, things that seem intuitive or commonsensical do not always turn out to be true. The more information we have, the less we need to rely on "common sense." Though to some (like

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ful double counting by plaintiffs' attorneys, to include the price of, say, a wheelchair ramp as a "functional" measure of the nonpecuniary cost. After the introductory material, this "functional" approach mostly drops out of sight, and the three truly non-pecuniary theories remain.

The differences among them raise the question: Should such damages be more easily recovered against a defendant who acted intentionally, or even negligently, than against one who ran afoul of a strict liability rule? If we see tort law as a duelist's satisfaction, then the answer will be "yes." Strict liability defendants hardly seem the best targets for vengeance.

Austria follows that line of thought to something akin to that conclusion. Ernst Karner and Helmut Koziol, who wrote the country report on Austria, tell us that "the Austrian legal system restricts compensation for nonpecuniary loss much more than for pecuniary loss: In principle, the tortfeasor has to indemnify nonpecuniary loss only if he acted with gross negligence or intent, whereas he has to compensate pecuniary loss even in the case of slight negligence."

If we see tort law as compensatory rather than punitive, and we are inclined to understand nonpecuniary damages in particular as (subjective) pain and suffering awards, then what attitude will we take toward a comatose patient? Konstantinos D. Kerameus, author of the country study on Greece, answers that, when a plaintiff "suffers permanent brain damage or is otherwise permanently comatose, he or she cannot recover damages for nonpecuniary loss. This has been held by the Athens Court of Appeals on the grounds that the person asking for the restitution of moral damage must have complete moral personality or consciousness, being able to have emotions and to receive messages from the external world."

France takes a more objective view of personal injury than does Greece. In France (according to contributor Suzanne Galand-Carval) the permanently comatose victim will recover damages for a variety of categories of loss: "the physiological loss, loss of amenities, sexual loss, and so

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me) it was not obvious, guns did exist in large numbers in Colonial America, even though they were expensive, difficult to maintain, and proved to be poor military weapons. **TFL**

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Endnotes

¹Bellesiles claims that he was a longtime NRA member but quit because of the controversy and acrimony over his book.

²Clayton E. Cramer, *Gun Scarcity in the Early Republic?* (Aug. 6, 2002), at www.claytoncramer.com/GunScarcity.pdf. Cramer has updated the article since its original posting in 2001.

³Clayton E. Cramer, *Firearms Ownership & Manufacturing in Early America* (Aug. 6, 2002), at www.claytoncramer.com/ArmingAmericaLong.pdf. Cramer has updated the article since its original posting in 2001.

⁴Clayton E. Cramer and Dave Kopel, *Disarming Errors*, NATIONAL REVIEW, Oct. 9, 2000.

⁵James Lindgren and Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777 (2002).

⁶*Id.*, Chart 6, 1804.

⁷See, James Lindgren, *Fall From Grace: Arming America and the Bellesiles Scandal*, 111 YALE LAW JOURNAL 101 (2002), both Lindgren articles are available online at his faculty home page, www.law.northwestern.edu/faculty/fulltime/Lindgren/Lindgren.html.

⁸Forum, *Historians and Guns*, 59 WM. & MARY Q. 203 (January 2002), available online at www.historycooperative.org/journals/wm/59.1.

⁹Jack N. Rakove, *Words, Deeds, and Guns: Arming America and the Second Amendment*, 59 WM. & MARY Q. 205.

¹⁰Gloria L. Main, *Many Things Forgotten: The Use of Probate Records in Arming America*, 59 WM. & MARY Q. 211

¹¹Ira D. Gruber, *Of Arms and Men: Arming America and Military History*, 59 WM. & MARY Q. 217.

¹²Randolph Roth, *Guns, Gun Culture, and Homicide: The Relationship between Firearms, the Uses of Firearms, and Interpersonal Violence*, 59 WM. & MARY Q. 223.

¹³Bellesiles, *Arming America*, pg. 109.

¹⁴Main, 59 WM. & MARY Q. at 211.

¹⁵270 F.3d 203 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2362 (2002).

on." Under a thoroughly objective system, the comatose patient would receive damages equal to those of an immobile but awake patient lying nearby. Each patient has, as a matter of objective fact, lost the full range of normal human capacities, from playing the piano to controlling one's bladder. The subjective fact that one feels pain in this situation need not enter into the calculation.

The comatose patient is one of the hypotheticals employed for this survey; the "employee from Ruritania" is

another. The policies of Ruritania are unpopular in a certain Western European country. A Ruritanian native living there is dismissed from his job because he has publicly defended his homeland. The dismissal is a violation of local anti-discrimination laws and a breach of contract. But is it a tort? And, if so, what is the measure of damages? If we assume further that the plaintiff quickly obtained a better job, so that there was no pecuniary

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