

## NAZISM, THE SECOND AMENDMENT, AND THE NRA: A REPLY TO PROFESSOR HARCOURT

STEPHEN P. HALBROOK\*

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\* Stephen P. Halbrook received his Ph.D. in philosophy from Florida State University and J.D. from Georgetown University Law Center. In addition to arguing *Printz v. United States*, 521 U.S. 898 (1997), and other firearms cases in the Supreme Court, he is author of the following books: *THE SWISS AND THE NAZIS: HOW THE ALPINE REPUBLIC SURVIVED IN THE SHADOW OF THE THIRD REICH* (2006); *TARGET SWITZERLAND: SWISS ARMED NEUTRALITY IN WORLD WAR II* (in five languages) (1998); *FIREARMS LAW DESKBOOK: FEDERAL AND STATE CRIMINAL PRACTICE* (1995–2007); *FREEDMEN, THE FOURTEENTH AMENDMENT, & THE RIGHT TO BEAR ARMS: 1866–1876* (1998); *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984; reprint Independent Institute 1994, 2000); and *A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES* (1989). *See also* <http://www.stephenhalbrook.com>.

## I. INTRODUCTION

The Second Amendment “right of the people to keep and bear Arms,”<sup>1</sup> controversial enough as a domestic constitutional issue, becomes an extraordinarily provocative enigma when viewed in light of historical experiences of foreign governments. This is particularly the case when the state analyzed is Nazi Germany, which invariably (and justifiably) gives rise to negative comparisons.

A revisionist view now has been boldly asserted that Hitler was friendly to perhaps the most dangerous freedom in the Bill of Rights. The *Fordham Law Review* recently published a provocative Second Amendment Symposium issue which included three articles suggesting that Nazi Germany had liberal policies toward firearm owners and that the National Rifle Association (NRA) promotes a myth of Nazi repression of firearms owners as part of a cultural war.<sup>2</sup> This author is taken to task as a leading perpetrator of this alleged myth.<sup>3</sup>

In response, I wish to suggest why the study of Nazi firearms policies is a legitimate and timely topic of scholarly analysis in the studies of totalitarian legal systems and of the Holocaust. Presumably a justification for the study of tyranny in history is to help ensure that such events never take place again, whether *in toto* or in less oppressive but still not negligible contexts.

## II. “THE PEOPLE” OF THE SECOND AMENDMENT

Professor Bernard E. Harcourt took the lead with his article *On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars (A Call to Historians)*.<sup>4</sup> While we differ on how to characterize the Nazi regime’s policies,<sup>5</sup> at the

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1. U.S. CONST. amend. II.

2. Bernard E. Harcourt, *On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars (A Call to Historians)*, 73 FORDHAM L. REV. 653 (2004); Deborah Homsher, *Response to Bernard E. Harcourt’s “On Gun Registration,”* 73 FORDHAM L. REV. 715 (2004); Robert J. Spitzer, *Don’t Know Much About History, Politics, or Theory: A Comment*, 73 FORDHAM L. REV. 721 (2004).

3. Harcourt, *supra* note 2, *passim*; Spitzer, *supra* note 2, at 727–28; *see also* Homsher, *supra* note 2, at 718 (attributing views to the NRA).

4. Harcourt, *supra* note 2.

5. *See, e.g., infra* Part III.

outset it should be stated that Professor Harcourt has contributed to an understanding of the subject merely by his willingness to address it. He has issued a welcome call to historians to face a topic in Holocaust studies that has been assiduously avoided or neglected.

Professor Harcourt began by pointing to and disputing this author's statements<sup>6</sup> that totalitarian regimes disarm their subjects so as to prevent resistance,<sup>7</sup> that German firearms laws played a prominent role in disarming Jews,<sup>8</sup> and that Germany had no equivalent to the Second Amendment to the U.S. Constitution.<sup>9</sup> The Second Amendment provides: "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."<sup>10</sup>

Recognition of a right such as this anywhere in the world in any historical epoch must acknowledge that "the people" must mean the peaceable populace at large without regard to race, religion, or creed. However, Professor Harcourt embraces American neo-Nazi William L. Pierce, who asserts, "German firearms legislation under Hitler, far from banning private ownership, actually facilitated the keeping and bearing of arms by German citizens . . ."<sup>11</sup> Harcourt asks, "How is it, you may ask, that I . . . would end up agreeing with a white supremacist leader of the National Alliance and National Vanguard?"<sup>12</sup> Harcourt further concluded that "the Nazis were relatively more pro-gun than the predecessor Weimar Republic . . ."<sup>13</sup>

If the Second Amendment's "right of *the people* to keep and bear Arms"<sup>14</sup> is the postulate, the above reference to the

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6. Harcourt, *supra* note 2, at 653 (citing Stephen P. Halbrook, *Nazi Firearms Law and the Disarming of the German Jews*, 17 ARIZ. J. INT'L & COMP. L. 483, 483–84 (2000), available at <http://www.stephenhalbrook.com/article-nazilaw.pdf>).

7. Halbrook, *supra* note 6, at 484 (noting that "German resistance to the Nazi regime was unsuccessful," in part due to the Nazis' general "mistrust [of] civilian firearm owners").

8. *Id.* (recounting that "the Nazi regime disarmed Germany's Jews," who, as a result, lacked "any ability to defend themselves").

9. *Id.* (pointing out that the right to keep and bear arms "was not recognized in the German Reich").

10. U.S. CONST. amend. II.

11. WILLIAM L. PIERCE, *GUN CONTROL IN GERMANY, 1928–1945*, 3 (1994), *quoted in* Harcourt, *supra* note 2, at 668.

12. Harcourt, *supra* note 2, at 677–78.

13. *Id.* at 671.

14. U.S. CONST. amend. II (emphasis added).

“German citizen,” or more accurately under the Third Reich, the incredibly shrinking “German citizen,” has little bearing on the meaning of “the people” at large. As argued in this author’s article that prompted Professor Harcourt’s reply, immediately upon coming to power in 1933, the Nazis disarmed and arrested their political opponents, invariably labeling them “Communists.”<sup>15</sup> By the time of Reichskristallnacht (Night of Broken Glass) in November 1938, the Nazis had all but completed the disarming of the German Jews, preparing the way for the Holocaust.<sup>16</sup>

Professor Harcourt initially makes the latter point without pulling any punches. He succinctly and correctly states: “The toughest question in all of this is how to characterize the Nazi treatment of the Jewish population for the purpose of evaluating Adolf Hitler’s position on gun control. . . . The Nazis sought to disarm and kill the Jewish population.”<sup>17</sup>

That one undeniable conclusion actually made the question not tough at all. A regime that would disarm and murder an entire segment of the population hardly could be said to support, if the language of the Second Amendment can be applied, “the right of *the people* to keep and bear Arms.”<sup>18</sup> Indeed, that is the very kind of regime this right is meant to provide the means to resist. Yet Professor Harcourt then pulls his punch: “Nevertheless, if forced to take a position, it seems that the Nazis were relatively more pro-gun than the predecessor Weimar Republic, as evidenced by the overall relaxation of the laws regulating the acquisition, transfer and carrying of firearms reflected in the 1938 Nazi gun laws.”<sup>19</sup>

This statement clearly illustrates the ambiguity of the uninformative terms “pro-gun” and “anti-gun,” which have no terminological relevance to the issue of “the right of *the people* to keep and bear Arms.”<sup>20</sup> The Nazis were “pro-gun” for themselves, the Gestapo and other police, the Wehrmacht (armed forces),

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15. Halbbrook, *supra* note 6, at 493–503.

16. *Id.* at 513–27. For an example of the plight of the Jewish targets of Nazi oppression, see also THE HOLOCAUST: VOL. 3, THE CRYSTAL NIGHT POGROM 182–89, 183 (John Mendelsohn ed., 1982) (vividly describing the scene at the American Consulate’s Office in Stuttgart of defenseless German Jews “in whose homes old, rusty revolvers had been found” begging for a way out of the country).

17. Harcourt, *supra* note 2, at 671.

18. U.S. CONST. amend. II (emphasis added).

19. Harcourt, *supra* note 2, at 671.

20. U.S. CONST. amend. II (emphasis added).

and citizens they trusted as having been indoctrinated with the Nazi ideology; they were “anti-gun” for Jews, political opponents, and any and every person who might not march lock step with the National Socialist program.<sup>21</sup>

By contrast, it could be said that supporters of democracy in that epoch would have been “pro-gun” with reference to the peaceable citizenry at large and “anti-gun” regarding members of both the police state—the “public” criminal class constituting the Nazi government—and the much smaller private criminal class.

Professor Harcourt’s suggestion that the Nazis supported Second Amendment-type values assumes as insignificant that the Nazis disarmed, intimidated, threw into concentration camps, or exterminated all of “the people” they identified as inferior by reason of race or religion, or as otherwise untrustworthy by reason of politics or any other reason whatsoever. Other than *that*, Professor Harcourt surmises, Hitler was a disciple of a liberal arms policy.<sup>22</sup>

This calls to mind the morbid joke: “Other than *that*, Mrs. Lincoln, how was the play?” Expecting a critical review of the performance at Ford’s Theater on that fateful day in 1865, while disregarding Lincoln’s assassination, makes about as much sense as implying that—other than “that,” meaning the disarming, incarceration, and killing of major segments of the German population—Hitler was actually a jolly, good fellow toward gun owners at large.

To put it starkly, Hitler supported use of the gun primarily by the police and the military to create a domestic totalitarianism and to support aggression abroad.<sup>23</sup> These are the very acts of inhumanity that originalists claim the Second Amendment was intended either to prevent or to provide a means to resist, an observation based on the intent of the Framers that the Second

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21. Waffengesetz [Weapons Law], Mar. 18, 1938, Reichsgesetzblatt [RBG] I at 265, §§ 3(4), 3(5), 12; Verordnung gegen den Waffenbeitz der Juden [Regulations Against Jews’ Possession of Weapons], Nov. 11, 1938, RGBL I at 270. A reprint of the German text with side-by-side English translation is available in JAY SIMKIN & AARON ZELMAN, “GUN CONTROL”: GATEWAY TO TYRANNY : THE NAZI WEAPONS LAW, 18 MARCH 1938, 54–63, 80–81 (Jews for the Preservation of Firearms Ownership, Inc., Publisher 1993).

22. Harcourt, *supra* note 2, at 678–80.

23. See, e.g., Weapons Law, *supra* note 21, at §§ 3(5), 12; SIMKIN & ZELMAN, *supra* note 21, at 54–63.

Amendment would promote an armed citizenry that could deter or resist tyranny.<sup>24</sup>

One hardly can characterize Nazi policies toward firearm owners, whether domestic or foreign, as *laissez faire*, but in the occupied countries, armed citizens nonetheless participated in heroic resistance activities.<sup>25</sup> Thus, the Nazi decree that Poles and Jews were subject to the death penalty for mere possession of a firearm<sup>26</sup> failed to prevent Jews from resisting deportation in the Warsaw Ghetto Uprising of 1943.<sup>27</sup> Nazi Propaganda Minister Joseph Goebbels grudgingly acknowledged, “The Jews have actually succeeded in making a defensive position of the Ghetto. . . . [I]t shows what is to be expected of the Jews when they are in possession of arms.”<sup>28</sup>

While Professor Harcourt might argue that the Nazi regime disproved the viability of an armed citizenry to resist tyranny, the statist model was not so great at resisting Nazi aggression, as the quick defeats of the governments and standing armies of Poland, Denmark, Norway, France, and Greece from 1939 to 1941 attest. The argument that armed citizens are worthless in resisting tyranny, even when many engaged in partisan activities throughout World War II, disregards that the entire governments of these nations collapsed within days or weeks of the Nazi Blitzkrieg.

Ignoring this broad picture, Professor Harcourt avers that the Weimar Republic in the 1920s restricted firearms ownership more strictly than did the Third Reich in the 1930s.<sup>29</sup> Instead of a comprehensive analysis of original sources, he argues that “within the pro-gun community there is sharp conflict as to whether Hitler was pro-gun control.”<sup>30</sup> (This again ignores the question: “pro-gun” for whom?) Professor Harcourt groups this

24. See STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* ch. 3 (1984).

25. E.g., SIMHA ROTEM (KAZIK), *MEMOIRS OF A WARSAW GHETTO FIGHTER: THE PAST WITHIN ME* 118–19 (Barbara Harshav ed. & trans., Yale University Press 1994).

26. *Verordnung auf der kriminellen Gerechtigkeit betreffend ist Polen und Juden in enthaltenen östlichen Gegenden* [Decree on Criminal Justice regarding Poles and Jews in Incorporated Eastern Territories], Dec. 4, 1941, RBGl. I at 759.

27. E.g., ROTEM, *supra* note 25.

28. JOSEPH GOEBBELS, *THE GOEBBELS DIARIES: 1942–1943*, 350–51 (Louis P. Lochner ed. & trans., Doubleday & Company, Inc. 1948).

29. Harcourt, *supra* note 2, at 671 (concluding that “the Nazis were relatively more pro-gun than the predecessor Weimar Republic . . .”).

30. Harcourt, *supra* note 2, at 668.

author and the Jews for the Preservation of Firearms Ownership (JPFO),<sup>31</sup> which are admittedly anti-Nazi, with neo-Nazi William Pierce, who has no scholarly credentials on this subject, reiterating the latter's claim in his self-published four-page essay that "Adolf Hitler was actually very much in favor of liberal gun possession."<sup>32</sup> Again the question is: by whom?<sup>33</sup> By the police state and its approved cronies, or by the populace at large, without regard to a racial, ethnic, or political trustworthiness<sup>34</sup> criteria?

Use of the term "pro-gun community"<sup>35</sup> to include Nazis with Second Amendment supporters is rather dubious. The former wish to restrict firearm ownership to those the Nazi Ideal State would recognize. The latter favor the right of firearm ownership by the populace at large, without regard to race, religion, or national origin. There is much more of a "community" among those who would limit possession of arms to those approved by the Ideal States of whatever kind.

### III. COMPARING THE WEIMAR REPUBLIC GUN CONTROL LAW WITH THE NAZI GUN CONTROL LAW

Professor Harcourt argues that the 1928 Weimar Republic law was more stringent and that the 1938 Nazi law liberalized firearms ownership.<sup>36</sup> This part of his article poses interesting insights and is worthy of close study. However, restriction of the analysis to the texts of these two laws fails to settle the issue.

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31. JPFO translated and reprinted the firearms laws and regulations of the Weimar Republic and Nazi Germany. SIMKIN & ZELMAN, *supra* note 21. In another publication, JPFO translated and published the firearms laws of governments that committed mass murder, including Ottoman Turkey (1915–1917), Soviet Russia (1929–1953), Nazi Germany (1933–1945), China (1949–1952, 1957–1960 and 1966–1976), Guatemala (1961–1981), Uganda (1971–1979), and Cambodia (1975–1979). LETHAL LAWS: "GUN CONTROL" IS THE KEY TO GENOCIDE (Jay Simkin et al. eds., Jews for the Preservation of Firearms Ownership, Inc., Publisher 1994).

32. Harcourt, *supra* note 2, at 668 (citing WILLIAM L. PIERCE, GUN CONTROL IN GERMANY, 1928–1945 (1994)).

33. Harcourt calls the National Alliance "vehemently pro-gun." *Id.* at 669. Yet this neo-Nazi organization believes that Jews, non-whites, and everyone with whom it disagrees should not possess guns. This again illustrates the bizarre usage of the term "pro-gun" to mean in favor of gun possession by persons the social engineer in question approves and against gun possession by persons the social engineer disapproves.

34. Gesetz über Schulwaffen und Munition [Law on Firearms and Ammunition], Apr. 20, 1928, RGBl. I at 143, § 16; SIMKIN & ZELMAN, *supra* note 21, at 18–21.

35. Harcourt, *supra* note 2, at 660, 667–69.

36. *Id.* at 662–77.

In the first place, each law contained restrictions not in the other. For instance, the 1928 law required a license to possess an ammunition “arsenal,”<sup>37</sup> while the 1938 law banned the entire class of .22 caliber hollow point ammunition altogether.<sup>38</sup> This was (and is) one of the most popular cartridges of all time. In addition, the Nazi law banned Jews from the firearms industry,<sup>39</sup> while the Weimar law included no restrictions against Jews.

Secondly, various restrictions aside from the 1928 and 1938 laws were imposed by the Nazis. One cannot glean from the texts of the 1928 and 1938 laws alone that in 1933 the Nazis imposed a ban on the import of handguns,<sup>40</sup> a ban that had not existed under the Weimar Republic. All one would find relevant to this question is that the 1928 law required acquisition permits for all firearms,<sup>41</sup> while the 1938 law required acquisition permits only for handguns.<sup>42</sup>

Thirdly, the Nazis made clear that the 1928 law could not be “liberalized” until all opponents of Nazism were eliminated from society.<sup>43</sup> While Professor Harcourt claims that the 1938 Nazi law “represented a slight relaxation of gun control,”<sup>44</sup> this is belied by his next two sentences:

To be sure, the Nazis were intent on killing Jewish persons and used the gun laws and regulations to further the genocide. But it appears that the Nazis aspired to a certain relaxation of gun laws for the “ordinary” or “law-abiding” German citizen, for those who were not, in their minds, “enemies of the National Socialist state.”<sup>45</sup>

As with the inapt “pro-gun/anti-gun” terminology, it makes no sense to say that firearms laws were liberalized when one entire ethnic group was disarmed and marked for eradication, and all

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37. Law on Firearms and Ammunition, *supra* note 34, § 23; SIMKIN & ZELMAN, *supra* note 21, at 16–25.

38. Weapons Law, *supra* note 21, at §§ 3(5), 25; SIMKIN & ZELMAN, *supra* note 21, at 54–55, 60–61.

39. Weapons Law, *supra* note 21, at § 7; SIMKIN & ZELMAN, *supra* note 21, at 56–57.

40. See Verordnung über ein vorübergehendes Verbot der Einfuhr von Faustfeuerwaffen [Decree of a Temporary Prohibition on Importation of Handguns], June 12, 1933, RBGl. I at 367.

41. Law on Firearms and Ammunition, *supra* note 374, at § 16(1); SIMKIN & ZELMAN, *supra* note 21, at 18–21.

42. Weapons Law, *supra* note 21, at § 11; SIMKIN & ZELMAN, *supra* note 21, at 56–57.

43. See *infra* notes 46–49 and accompanying text.

44. Harcourt, *supra* note 2, at 676.

45. *Id.* (quoting Halbrook, *supra* note 6, at 505 (internal citations omitted)).



other “enemies” of the state were also disarmed and eliminated in one form or another. The enemies of National Socialism included major segments of the intelligentsia, Catholic and Protestant religious leaders, artists, the working class, professionals, and decent people of every kind. Those remaining of the “ordinary” people included the cowed, the intimidated, and the brainwashed.

Fourthly, the Nazis administered the Weimar law to disarm anyone they pleased, with or without a legal justification.<sup>46</sup> Immediately upon coming to power in 1933, they evoked the Weimar “Emergency Decrees” and executed massive search and seizure operations against firearm owners who were political opponents, Jews, or otherwise suspect.<sup>47</sup> Beginning in 1935, the Gestapo decreed that Jews should be denied firearms permits<sup>48</sup> under the Weimar criteria mandating denial to persons lacking “undoubted reliability.”<sup>49</sup>

Fifth, and of ultimate significance, in March 1938, the Nazis adopted the new firearms law;<sup>50</sup> in October, they disarmed Berlin’s Jews using the Weimar firearm registration records;<sup>51</sup>

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46. See, e.g., *Nazis Hunt Arms in Einstein Home*, N.Y. TIMES, Mar. 21, 1933, at 10 (describing the failed Nazi hunt for a cache of weapons in Albert Einstein’s home; the hunt revealed nothing more dangerous than a bread knife).

47. A flurry of emergency decrees were issued shortly after Hitler assumed the Chancellorship on January 30, 1933. The first of these ordinances allowed the Nazis to “protect” the people and the state from those labeled “Communists,” thus opening the door to the massive search and seizure operations. E.g., Reichsverordnung zum Schutz von Volk und Staat [Ordinance of the Reich President for the Protection of the People and the State], Feb. 28, 1933, RGBl. I at 83, § 1.

48. See *Erteilung von Waffenscheinen an Juden*, Preußische Geheime Staatspolizei [Issuance of Firearm Permits to Jews, Prussian Gestapo], Dec. 16, 1935, Bundesarchiv [Federal Archives] Berlin document reference number BA R 58/276.

49. Law on Firearms and Ammunition, *supra* note 374, at § 16; SIMKIN & ZELMAN, *supra* note 21, at 18–21.

50. Weapons Law, *supra* note 21; SIMKIN & ZELMAN, *supra* note 21, at 54–63.

51. See *Entwaffnung der Berliner Juden* [Disarmament of the Berlin Jews], DER VÖLKISCHE BEOBACHTER [THE PEOPLE’S OBSERVER], Nov. 9, 1938 (“a general disarming of Berlin’s Jews by the police . . . has been carried out *in recent weeks*” (emphasis added)). Firearm owners were known to the police not only through the police records mandated by the 1928 Weimar law, Law on Firearms and Ammunition, *supra* note 374, § 23(1); SIMKIN & ZELMAN, *supra* note 21, at 22–23, but also under a 1931 decree authorizing registration of all persons in possession of firearms and hand weapons, Vierte Verordnung des Reichspräsidenten zur Sicherung von Wirtschaft und Finanzen und zum Schutze des inneren Friedens [Fourth Regulations of the President on the Protection of the Economy and Finance, and on the Defense of Civil Peace], Dec. 8, 1931, RGBl. I at 742.

As an example of a Jewish firearm owner who duly registered under the 1931 decree, Alfred Flatow was arrested on October 4, 1938. Noting that he surrendered one revolver, two pocket pistols, and various hand weapons, the police report stated: “Arms in the hands of Jews are a danger to public safety.” Bericht über einen Polizei [Police Report], Anhalten von Alfred Flatow [Arrest of Alfred Flatow], Polizeistation [Police Station] 106,

and in November, the Nazis instigated Reichskristallnacht (the infamous pogrom involving massive search and seizure operations for firearms against Jews), Gestapo Chief Himmler decreed that any Jew with a weapon would face twenty years in a concentration camp,<sup>52</sup> and Interior Minister Frick promulgated a regulation making it a five-year offense for a Jew to possess a weapon.<sup>53</sup>

Rather than addressing every point of contention between Professor Harcourt and myself, the reader should compare our two articles. Yet that is only the beginning. Based on further research in German archives, this author will be publishing substantially more on the subject. Scholars who deny this author's thesis are challenged to do the same.

Indeed, Professor Harcourt concludes his essay with a decidedly constructive note with that same challenge: a call to historians to stop ignoring the topic and to generate scholarship.<sup>54</sup> He rightly points out, "Apparently, the historians have paid scant attention to the history of firearms regulation in the Weimar Republic and the Third Reich."<sup>55</sup> He cites several standard references which fail to mention the subject altogether, states that this author "makes it seem as if the primary purpose of Kristallnacht was to search for weapons," and concludes, "[f]urther historical research on this question would be enlightening as well."<sup>56</sup>

While a few secondary sources do include the Nazi imperative of disarming Jews as a feature of Kristallnacht, such references are primarily limited to original sources, from the accounts of Jewish victims who were disarmed themselves or who recorded

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Berlin, SW 68, Oct. 4, 1938, *available at* Landesarchiv [Regional Archives] Berlin, A Rep PrBrRep. 030/21620 Bd. 5 Haussuchungen bei Juden [House Searches of Jews] 1938-39 (FB Bd. 5). The report further noted that the arms were registered during the Weimar epoch: "The arms were registered at Police Station 13 on January 26, 1932." *Id.* This was the one and same Alfred Flatow who won the gymnastics competitions for Germany at the 1896 Olympics. His story may be found in an article by a sports historian entitled *Alfred Flatow—From Olympic Champion to Enemy of the Reich*. Hajo Bernett, *Alfred Flatow—vom Olympiasieger zum Reichsfeind*, SOZIAL- UND ZEITGESCHICHTE DES SPORTS [SOCIAL AND CONTEMPORARY HISTORY OF SPORT] 2, 94-102 (1987); *see also* JOSEPH SIEGMAN, JEWISH SPORTS LEGENDS: THE INTERNATIONAL JEWISH SPORTS HALL OF FAME 101 (4th ed. 2005).

52. Otto D. Tolischus, *Bands Rove Cities*, N.Y. TIMES, Nov. 11, 1938, at 4.

53. Verordnung gegen den Waffenbeitz der Juden [Regulations Against Jews' Possession of Weapons], Nov. 11, 1938, RGBl. I at 270, § 4; SIMKIN & ZELMAN, *supra* note 21, at 80-81.

54. Harcourt, *supra* note 2, at 677-80.

55. *Id.* at 679.

56. *Id.* at 678 n.142.

that Nazis ransacked their homes in search for weapons, to the records of the Nazis who carried out the searches and confiscations and of the Gestapo that ordered inventories and delivery of all Jewish arms.<sup>57</sup>

#### IV. SERIOUS AND THOUGHTFUL SCHOLARLY ENDEAVORS SHOULD BE PURSUED

Despite this dearth in the secondary sources about the history of firearms prohibitions in that era, the accompanying article in the *Fordham Law Review* by Professor Robert J. Spitzer asserts that one of this author's "glaring omissions [is] the failure to cite, with a handful of exceptions, any of the standard secondary historical and political literature on the era . . . ."<sup>58</sup> He notes, "Out of 290 footnotes, Halbhook cited barely a dozen secondary sources, an especially alarming fact . . . ."<sup>59</sup> Given that everything in secondary sources ultimately must be based on primary sources, this author takes that as an "alarming" compliment.

Professor Spitzer admits that once Hitler took power in 1933, "he surely did take steps to confiscate guns as part of the larger campaign to disarm and render powerless opponents of the state . . . ."<sup>60</sup> He then contradictorily denies the "Halbrook thesis" that "strict gun laws facilitate . . . authoritarian regimes"; he claims the German example "support[s] the opposite proposition."<sup>61</sup> To the contrary, the example of Nazi Germany—not to mention the Soviet Union, Communist China, Cambodia under the Khmer Rouge, and Sudan today<sup>62</sup>—starkly demonstrates how authoritarian regimes disarm major segments of the population in order to eradicate them. It is frivolous to suggest that true democracies repress firearms ownership by the populace at large and that tyrannies support it.

By contrast, Professor Harcourt presents a sincere and serious call to examine the original sources, stating, "What we really

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57. See Halbhook, *supra* note 6, at 513–27.

58. Spitzer, *supra* note 2, at 727–28. Presumably Spitzer intends the arrogant title of his article to belittle those with whom he disagrees. Yet his essay cites no original sources and only a handful of secondary sources, and consists largely of his own personal opinion.

59. *Id.* at 728 n.35.

60. *Id.* at 727.

61. *Id.* at 728. Actually, long before this author was born, authoritarians well knew that strict gun laws would facilitate their regimes.

62. See David Kopel, Paul Gallant & Joanne D. Eisen, *Is Resisting Genocide a Human Right?* 81 NOTRE DAME L. REV. 1275 (2006).

need now is more historical research and serious scholarship.”<sup>63</sup> This author entirely agrees with that assertion and hopes that these neglected topics in the study of totalitarian legal systems and the Holocaust will in the future receive the attention they deserve.

Such studies must not be limited to domestic Nazi policy in Germany, but also must include Nazi policy in the occupied countries. Professor Harcourt states that he is the “son of a Jewish refugee who escaped his native France in June 1940 . . . .”<sup>64</sup> He notes the irony that he would “agree[ ] with a white supremacist leader of the National Alliance,”<sup>65</sup> and also agree with another “pro-gunner” that “in this Hitler was on our side, not on the side of the gun-grabbers.”<sup>66</sup> This mention of Nazi-occupied France calls for further points about whose “side” Hitler was on.

First, in France and every other occupied country, the Nazis decreed that the entire population must surrender all firearms within twenty-four hours or face the death penalty.<sup>67</sup> Second, despite such penalties, some citizens kept firearms and used them to help Jews hide or escape from Nazi police.<sup>68</sup> Third, Jews were prominent in armed resistance movements, their finest hour being the Warsaw Ghetto Uprising of 1943.<sup>69</sup>

Some favor a world in which all private individuals, not just disfavored groups, are disarmed and only the military and police are armed. The Nazi-occupied countries were a laboratory for this experiment. Firearms prohibitionists in all epochs only disagree on the penalty; for example, while some may favor execution, others may favor prison.

Besides Professor Harcourt, Professors Homsher and Spitzer seem to suggest that it is illegitimate even to compare contemporary criminal prohibitions involving firearms with

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63. Harcourt, *supra* note 2, at 680.

64. *Id.* at 677 n.136 (citing a description of his father’s and grandmother’s escape in JOSÉ-ALAIN FRALON, *A GOOD MAN IN EVIL TIMES* (Peter Graham trans., Viking 2000 (1998))).

65. *Id.* at 678.

66. *Id.* (quoting Kevin Walsh, Letter to the Editor, *Hitler Not a Gun-Grabber*, THE ARIZ. REPUBLIC, Oct. 25, 2003, at B9).

67. *E.g.*, *Tout Détenteur D’armes non Déclarées Sera Puni de la Peine de Mort* [Anyone Possessing Undeclared Weapons Will be Punished by Death], LE MATIN, June 27, 1940, at 1.

68. *E.g.*, Samantha Levine, *Marion Pritchard: She Shot a Nazi to Save Jewish Children*, U.S. NEWS & WORLD REPORT, Aug. 20, 2001, at 36.

69. *E.g.*, ROTEM, *supra* note 25.

those of Nazi Germany.<sup>70</sup> Comparisons of various subjects with Nazism may be overstated, even grossly so, or not warranted at all, but a rule that reference to one of history's greatest tragedies should never be made in connection with a current issue would mean that no lessons can be learned from the tragedy.

Justice Felix Frankfurter thought otherwise when he wrote, “[i]t is not only under Nazi rule that police excesses are inimical to freedom.”<sup>71</sup> More recently, Third Circuit Judge Marjorie O. Rendell wrote in a civil rights case that the action of marshals terrorizing a family and ransacking their home “could be described as Gestapo-like.”<sup>72</sup> And then-California Supreme Court Justice Janice Rogers Brown (now a judge on the D.C. Circuit) wrote, regarding proposals to ban all private arms, that among those who “would vehemently disagree” were “the embattled Jews of the Warsaw Ghetto in 1943.”<sup>73</sup>

#### V. DEFENDING THE NATIONAL RIFLE ASSOCIATION

The symposium authors do not criticize comparisons like the above, but focus their attacks on the NRA. Professor Harcourt devotes considerable attention reprimanding the NRA for allegedly creating the myth that firearm registration facilitates dictatorship, averring that “the NRA has been at the forefront of this historical argument . . . at least as far back as 1968.”<sup>74</sup> Actually, as explained below, the NRA's interest precedes World War II, when it saw the rising threat of Nazism and became an early voice arguing for preparedness.

Professor Harcourt blames “the Nazi-gun-registration argument” for “penetrat[ing] the American consciousness” to the extent that fifty-seven percent of Americans “believe that handgun registration will lead to confiscation.”<sup>75</sup> Could it be that this “argument” had its roots partly in actual historical experience, including Hitler's Germany?

Professor Harcourt attributes the fact “that gun registration would trigger images of Adolf Hitler and the Holocaust” to the

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70. *E.g.*, Homsher, *supra* note 2, at 718–19; Spitzer, *supra* note 2, at 727–28.

71. *Davis v. United States*, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting).

72. *Mellott v. Heemer*, 161 F.3d 117, 127 (3d Cir. 1998) (Rendell, J., dissenting).

73. *Kasler v. Lockyer*, 2 P.3d 581, 605 (2000) (Brown, J., concurring).

74. Harcourt, *supra* note 2, at 654 (citing ROBERT SHERRILL, *THE SATURDAY NIGHT SPECIAL* 179 (1973)).

75. *Id.* at 659.

“culture wars,” claiming that “these debates are not about history, nor are they about truth.”<sup>76</sup> Surely he does not mean to suggest that no legitimate historical inquiry may exist into the nature of Nazi firearms laws and policies, as his article is itself a preliminary foray into that topic. Scrutinizing a legal system or one aspect of its legal regime—in this case, the criminal law involving firearms—is fully within the scholarly endeavors of comparative law and legal history. To characterize views with which one disagrees as mere propaganda in some “cultural war” demeans the scholarly enterprise.

Similarly, Professor Homsher alleges that “the NRA in effect claims that its members have also been victimized, or could easily become victimized, even threatened with genocide, if they lost their means for self-defense.”<sup>77</sup> But in her citation for this claim, she refers to no NRA source, but instead to a law review article by Professors Daniel Polsby and Don Kates who “contend that Americans underestimate their own susceptibility to tyrannical government and genocide,” falsely believing in American exceptionalism and self-conceit.<sup>78</sup>

Professor Homsher thereby essentially argues that no injustice could ever occur in the United States leading to tyranny and genocide that should be resisted by the populace at large with arms. If she believes that Anglo-Saxons genetically are immune to government-sponsored murder, she does not state any reason for the assumption.

In seeming to presume that persons associated with the NRA are not entitled to mention the Nazi experience, the above authors fail to exhibit any knowledge of the NRA’s historic and core involvement in its warning of the Nazi threat and helping to defeat it. The NRA began raising the alarm about the Nazi menace well before America’s entry into World War II, and before and during the war the NRA trained countless persons in marksmanship, many of whom would use these skills in combat against the German and Japanese armed forces.<sup>79</sup>

Hitler’s disarming policies were not NRA inventions, but were reported by the mainstream media. For instance,

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76. *Id.* at 663.

77. Homsher, *supra* note 2, at 718.

78. *Id.* at 718 n.18 (quoting Daniel D. Polsby & Don B. Kates, Jr., *Of Holocausts and Gun Control*, 75 WASH. U. L.Q. 1237, 1255 (1997)).

79. See *The NRA and National Defense*, AM. RIFLEMAN, Sept. 1941, at 7.

Reichskristallnacht in November 1938 was reported by the *New York Times* to include the following: “One of the first legal measures issued was an order by Heinrich Himmler, commander of all German police, forbidding Jews to possess any weapons whatever and imposing a penalty of twenty years’ confinement in a concentration camp upon every Jew found in possession of a weapon hereafter.”<sup>80</sup>

When France fell to the Nazi Blitzkrieg, the *New York Times* reported the German occupation decree: “All firearms . . . must be turned over to the military authorities. Any one not obeying the order is liable to death, hard labor or a prison term.”<sup>81</sup> The *Times* put it in perspective as follows:

The best way to sum up the disciplinary laws imposed upon France by the German conqueror is to say that the Nazi decrees reduce the French people to as low a condition as that occupied by the German people. Military orders now forbid the French to do things which the German people have not been allowed to do since Hitler came to power. To own radio senders or to listen to foreign broadcasts, to organize public meetings and distribute pamphlets, to disseminate anti-German news in any form, *to retain possession of firearms*—all these things are prohibited for the subjugated people of France, as they have been verboten these half dozen years to the people of Germany.<sup>82</sup>

Was the *Times* mistaken in reporting that many Germans were forbidden to possess firearms, or has Professor Harcourt overlooked what was common knowledge in 1940? And given that the death penalty was the ultimate punishment for possession of a firearm by a French citizen, perhaps Professor Spitzer might wish to qualify his denial of the “Halbrook thesis” that “strict gun laws facilitate . . . authoritarian regimes” and his claim that the German example “support[s] the opposite proposition.”<sup>83</sup>

Nazi occupation authorities would execute numerous citizens in France and the other occupied countries for mere possession of firearms, and the American media would report Nazi decrees

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80. Tolischus, *supra* note 52.

81. *Severe Penalties Faced by French*, N. Y. TIMES, July 1, 1940, at 3.

82. *Topics of the Times: Their Common Fate*, N. Y. TIMES, July 2, 1940, at 4 (emphasis added).

83. Spitzer, *supra* note 2, at 728.

threatening and carrying out this penalty, and even naming the victims.<sup>84</sup> The NRA was hardly inventing lies when it reported in its magazine in early 1942:

From Berlin on January 6th the German official radio broadcast—"The German military commander for Belgium and Northern France announced yesterday that the population would be given a last opportunity to surrender firearms without penalty up to January 20th and after that date anyone found in possession of arms would be executed."

So the Nazi invaders set a deadline similar to that announced months ago in Czecho-Slovakia, in Poland, in Norway, in Roumania, in Yugo-Slavia, in Greece.

How often have we read the familiar dispatches "Gestapo agents accompanied by Nazi troopers swooped down on shops and homes and confiscated all privately-owned firearms!"

What an aid and comfort to the invaders and to their Fifth Column cohorts have been the convenient registration lists of privately owned firearms—lists readily available for the copying or stealing at the Town Hall in most European cities.

What a constant worry and danger to the Hun and his Quislings have been the privately owned firearms in the homes of those few citizens who have "neglected" to register their guns!<sup>85</sup>

Before the United States entered World War II, the NRA promoted preparedness and rifle marksmanship training at a time when many just wanted to stay out of yet another European war.<sup>86</sup> The Japanese sneak attack on Pearl Harbor and Hitler's declaration of war that soon followed proved the NRA right. Between 1941 and 1945, fifty-five to sixty percent of all civilian NRA members served in the Armed Forces, and others trained millions in marksmanship, reloaded ammunition for plant guards, and contributed to the war effort.<sup>87</sup>

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84. *E.g.*, *Another Frenchman Executed*, N. Y. TIMES, Oct. 14, 1941, at 12 (Jean Labragere executed); *Germans Execute 20 in Paris and Belgium*, N. Y. TIMES, Jan. 29, 1942, at 9 (Marcel Liabour, Rene Palmier, Amar Zebbouddi, and Jean Marie Le Corre among those executed); *Nazis Execute 200th Frenchman*, N. Y. TIMES, Jan. 27, 1942, at 7 (Henri Bouabout executed).

85. *The Nazi Deadline*, AM. RIFLEMAN, Feb. 1942, at 7.

86. In response to the NRA's attempt to volunteer resources, the National Director of Civilian Defense replied that "the Office of Civilian Defense is not prepared to initiate a Federal program for rifle training at this time." *The NRA and National Defense*, *supra* note 79, at 7 (internal quotations omitted).

87. *1941-45*, SHOOTING SPORTS USA, Mar. 2001, at 45.



Commander in Chief Dwight D. Eisenhower wrote as the war raged in 1943 about civilian marksmanship training: “Any young man that has ahead of him prospective service in the armed forces will do well to learn all he can about the American military rifle.”<sup>88</sup> Once in service, “he will find the time all too short to learn the many things he should know, for his own self-preservation, before he is called upon to meet the enemy.”<sup>89</sup> President Harry S. Truman averred in 1945 about the NRA:

During the war just ended, the contributions of the Association in the matter of small-arms training aids, the nation-wide pre-induction training program, the recruiting of experienced small-arms instructors for all branches of the armed services, and technical advice and assistance to Government civilian agencies aiding in the prosecution of the war—all contributed freely and without expense to the Government—have materially aided our war effort.<sup>90</sup>

General George C. Marshall also expressed his “appreciation for the service rendered the Army by the Association during World War II.”<sup>91</sup> General Omar N. Bradley would later write: “In training more than one-and-three-quarters million Americans during World War II, and in providing instructors, instruction techniques and technical knowledge to the armed forces during that conflict, your organization [the NRA] made another great contribution to defense.”<sup>92</sup>

By helping to defeat Nazism, the NRA surely earned the right to speak on the subject. By contrast, what contribution to the anti-Nazi effort was made by those who wished to ban civilian ownership of firearms, to the extent they even existed in that epoch? In a war waged against aggression, tyranny, and genocide, who would best help resist or defeat the enemy: persons who possess and know how to use firearms, or pacifists who disdain firearms and eschew their use? For the French

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88. *Federal Firearms Legislation: Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Committee on the Judiciary, United States Senate*, 90th Cong. 485 (1968) (letter marked by subcommittee as exhibit number 54).

89. *Id.*

90. *Id.* at 484 (letter marked by subcommittee as exhibit number 52).

91. *Id.* at 485 (letter marked by subcommittee as exhibit number 53).

92. General Omar N. Bradley, *A Message to the National Rifle Association*, AM. RIFLEMAN, May 1951, reprinted in *id.* at 485–86 (letter marked by subcommittee as exhibit number 55).

partisans, the Jewish resistance fighters, and the ordinary American soldiers in foxholes the answer would be obvious.

Professor Harcourt otherwise attempts to associate ordinary firearm owners who adhere to the Second Amendment with Nazis, but the effort appears based more on misunderstanding and innuendo than fact:

The Nazi-gun-registration argument is also a bit disorienting because, at least whenever I have been to a gun show, there are always displays of Nazi paraphernalia. The fringe pro-Nazi element in this country has far more ties to the pro-gun community than it does to the anti-gun community, and you are far more likely to see a swastika at a gun show or a pro-gun rally than you are at the anti-gun Million Mom March on the Washington Mall.<sup>93</sup>

Perhaps Professor Harcourt should stop and talk with those who have World War II items on display at gun shows. He would learn that many are veterans who personally killed Nazis during the war. (Sadly, their numbers are rapidly decreasing.) Historical artifacts of both Allied and Axis origins are displayed. German and Japanese memorabilia and firearms were captured and brought back here by members of what justly has been called America's "Greatest Generation."<sup>94</sup> Gun shows generally prohibit any display of a swastika in an offensive manner. It is beyond the pale to suggest that a person who collects historical relics from American wars—relics that were frequently taken as war booty from killed enemies—somehow sympathizes with the enemy.

And if he has ever seen a swastika at a "pro-gun rally," Professor Harcourt should be more specific, for otherwise his comment appears fabricated. If that ever happened, one can be sure that any persons expressing Nazi sympathies would have been expelled, and that the media would have broadcast the presence of such persons.

## VI. CONCLUSION

While we diverge in our conclusions, this author joins in Professor Harcourt's "Call to Historians" not to continue ignoring the history of and lessons to be learned from the

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93. Harcourt, *supra* note 2, at 660.

94. See TOM BROKAW, *THE GREATEST GENERATION* (1998).

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firearms laws and policies of Nazi Germany. If the slogan “Never Again!” is to be taken seriously, then no single aspect of the Holocaust can be relegated to the Orwellian Memory Hole for denial—including Nazism’s brutal repression of the right of the people to keep and bear arms in order to dominate the populace at large and to eradicate disfavored members and groups.