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The Second Amendment: The Right to Bear Arms (Program)

Institute of Bill of Rights Law at the William & Mary Law School

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THE SECOND AMENDMENT: THE RIGHT TO BEAR ARMS

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.

**Third Annual Student Symposium
Thursday, February 13, 1992**

Student Division, Institute of Bill of Rights Law

*--All are invited to attend and to contribute to the discussion.
Admission is free. No registration is required. Sponsored by the
Marshall-Wythe School of Law at the College of William and Mary.--*

THE SECOND AMENDMENT: THE RIGHT TO BEAR ARMS

KICKOFF

SOAPBOX/OPEN MICROPHONE

Noon, Student Lounge

An opportunity for the public-at-large to express views

THE SECOND AMENDMENT ON TRIAL

MOOT COURT EXERCISE: GUN PURCHASE RESTRICTIONS

6:00 p.m., McGlothlin Moot Court Room

JUDGES--

The Honorable Abner J. Mikva, Chief Judge, United States Court of Appeals for the District of Columbia Circuit, *Presiding*

Neal Devins, Professor of Law, College of William and Mary

Michael Gerhardt, Professor of Law, College of William and Mary

Stephanie Cangin, 3L

Nicholas Sylvain, 2L

ADVOCATES--

Representing Kelly Jameson

Brendan Shannon, 3L

Susan Reiners, 1L

Representing the Government

Mychal Schulz, 3L

Charles Griffith, 1L

JAMESON V. UNITED STATES--STATEMENT OF FACTS AND PROCEDURAL HISTORY

Kelly Jameson is a 36-year-old black woman living and working in Washington, D.C. In November of 1989, Jameson was raped in her own home by an unknown assailant. Several weeks later, Jameson purchased a handgun. In April of 1990, Jameson used the gun to defend against another assault. She was arrested and charged with unlawful possession of a handgun.

Thomas Brown is a 24-year-old white male from Detroit. In January of 1990, Brown was arrested in connection with a drug-related incident. One of the charges was unlawful possession of a handgun.

The statute under which both defendants were charged and convicted is the federal Handgun Prohibition Act of 1990, which makes it unlawful for citizens to possess handguns in certain high-crime areas. The areas are designated by the U.S. Department of Justice and re-evaluated every two years. Washington and Detroit were designated areas when the above offenses occurred.

Both defendants challenged the constitutionality of the statute. On appeal, the Court of Appeals for the District of Columbia upheld the law, but the Court of Appeals for the Sixth Circuit found it unconstitutional. The United States Supreme Court granted Petitioner's writ of certiorari to resolve the conflict.

Petitioner argues that the second amendment grants the individual a fundamental right to bear arms and that the statute impermissibly restricts that right. The Government responds that the amendment only protects rights arising from other sources and only to the extent that exercise of rights is militia-related.

KEYNOTE

THE SECOND AMENDMENT: SETTING THE RECORD STRAIGHT

7:00 p.m., McGlothlin Moot Court Room

Sarah Kemp Brady, Chairman of the Boards of Handgun Control, Inc. and Center to Prevent Handgun Violence (*Event co-sponsored by Speakers Forum*)

VIEWPOINTS

TOWN MEETING/PANEL DISCUSSION:

STRICT LIABILITY LEGISLATION FOR THE SALE OF FIREARMS

7:30 p.m., McGlothlin Moot Court Room

PANEL--

Richard E. Gardiner, Legislative Counsel, National Rifle Association

Dennis A. Henigan, Director, Legal Action Project, Center to Prevent Handgun Violence

Sonny Stallings, Former Virginia State Senator

Paul LeBel, Cutler Professor of Law, College of William and Mary

Role of Michelle Anderson (portrayed by Robin Vogel, 1L)

Role of Chris Sanford (portrayed by Susan Sieger, 1L)

Role of George Edelman (portrayed by David Pernini, 1L)

MODERATOR--Paul Marcus, Haynes Visiting Professor of Law, College of William and Mary

STRICT LIABILITY FOR FIREARMS ACT: Proposed Legislation for the State of Wythe

This proposed legislation has four major purposes.

(1) It reflects a [simulated] legislative judgment that, while firearms in and of themselves are not inherently dangerous, firearms which are loaded, unlocked and available to minors are inherently dangerous. This classification of an inherently dangerous condition allows for strict liability to be imposed against the party who causes the condition to exist.

(2) The Act legislatively alters previous judicial interpretations of proximate cause. Many courts have declared that the act of the minor in discharging a weapon serves to insulate the owner from liability, even where the owner was negligent in allowing access to the weapon. In contrast, this Act says that causing a firearm to be stored without this type of safety device will automatically be considered a proximate cause of an "accidental" shooting.

(3) Safety in general is promoted by the Act. While "thumb safeties" provide some security, it is very easy for a child (as well as an adult) to release such a device unknowingly. Here, the safety device is much less fallible because gun owners must perform an affirmative act (unlocking and removing the trigger lock) before they are subject to the Act.

(4) The Act, through its provisions, serves to reallocate the costs associated with this type of accidental shooting. Courts currently tend to impose the losses on the victims in these cases by refusing to declare that firearms are so dangerous that strict liability should be imposed, or by declaring that the negligent storage of a firearm is not sufficiently linked to accidental shootings to justify the imposition of liability. The reallocation in this Act places the costs on the parties who are more easily able to avoid the condition that causes the harm, to both disperse the costs and serve as a deterrent to allowing the condition to exist.

It is also important to note what this Act does not do.

(1) This Act does not establish any sort of a criminal penalty for leaving loaded and unlocked weapons within the reach of children. In addition, it does not deal with situations involving intentional shootings by minors, or situations in which the safety device is removed by a minor.

(2) The Act does not offer any exclusions. It would, in practice, not affect anyone who stores firearms without ammunition in them, and law enforcement officers, etc., are covered by the law.

(3) The Act does not force individuals to be without loaded weapons. If a person believes that he or she must have a loaded weapon easily accessible, the only penalty assessed by the Act is to subject that party to bearing the full costs of the harm caused if the weapon should be found and accidentally discharged by a minor.

Over for Legislation

Strict Liability for Firearms Act, continued

Section 1: Any seller of any firearm shall be held strictly liable for all harm caused by the "accidental" discharge of that firearm by a minor when the firearm is not sold with an "active restraint device" (such as a "trigger lock" or similar device) that prohibits the discharge of the firearm unless unlocked and removed. A seller shall have a defense against this type of liability if he can show that the firearm in question was in compliance with this Act at the time that the firearm passed from his control.

Comment: The term "seller" as used in this section includes both manufacturers and dealers in the normal course of business. The section, therefore, establishes strict liability for manufacturers who do not make their firearms with this safety precaution, and for dealers who, in the normal course of business, sell a firearm without this safety device. If the manufacturer, the seller, or both can show that they were in compliance with the Act, however, those parties will be insulated from any claim regarding the harm from the accidental discharge itself.

Section 2: Where the firearm has been manufactured and sold in compliance with the Act, if an accidental discharge of the firearm has been facilitated by the removal or disabling of the safety device by the owner of the firearm or some other person of sufficient age to purchase a firearm, the individual who removed or disabled the device shall be held strictly liable for all harm caused by the accidental discharge.

Comment: This section establishes a zone of strict liability for the owner of a firearm. If an owner chooses to store the weapon without the safety device, he or she will bear the costs of any harm resulting from this decision. For instance, a mother who leaves her loaded pistol in a dresser drawer will be strictly liable for the harm that occurs when her young son finds the weapon and accidentally shoots another child.

Section 3: This Act shall take full effect one year from the date of its enactment.

Section 4: This Act shall not replace or preclude any other Act or judicial practice regarding the imposition of liability on other grounds, including negligence in the sale of the firearm, manufacturing or design defects in the firearm, or any other relevant liability claim.

RECEPTION

8:30 p.m., Student Lounge

The INSTITUTE OF BILL OF RIGHTS LAW was established at the College of William and Mary in 1982 by a private bequest to support scholarly research on issues involving constitutional liberties. It is an academic foundation with a mission of quality research and public education.

The STUDENT DIVISION OF THE INSTITUTE OF BILL OF RIGHTS LAW was established to foster dialogue and promote research among law students. An integral part of the Institute, the Student Division enhances the educational opportunities of students and promotes the ideal of the lawyer as a thoughtful citizen contributing to the resolution of social and political problems.

Conference support and organization are provided by Symposium chairman, Rob Ulmer, and committee members, Nicholas Sylvain, Suzanne McGrath, Hank Lerner, Belinda Hatzenbuehler, Fred Jacob, Stephanie Cangin, and Laura Kerrigan.

Institute staff are: Rodney Smolla, Director; Kay Kindred, Deputy Director; Steve Wermiel, Lee Visiting Professor; and Millie Arthur, Administrative Assistant.

BIOGRAPHICAL INFORMATION

SYMPOSIUM MODERATOR

Paul Marcus is the Visiting Haynes Professor of Law at the College of William and Mary, Marshall-Wythe School of Law, and Professor and former Dean of the University of Arizona College of Law. Professor Marcus received his A.B. and J.D. from UCLA. Prior to joining the faculty of the University of Arizona College of Law in 1983, he taught at the University of Illinois College of Law, and practiced law in Los Angeles. Professor Marcus is the author of *Criminal Procedure: Cases and Materials* (with Cook), *Copyright and Other Aspects of Law Pertaining to Literary, Musical and Artistic Works* (with Meyers and Nimmer), *The Prosecution and Defense of Conspiracy Cases*, and *The Law of Entrapment*. Professor Marcus is also the Reporter for the Federal Judicial Conference Committee on Jury Instructions in Criminal Cases.

MOOT COURT EXERCISE JUDGES

The Honorable Abner J. Mikva was appointed to the U.S. Court of Appeals for the District of Columbia Circuit in September 1979. He graduated from the University of Chicago Law School in 1951 and following graduation, he clerked for U.S. Supreme Court Justice Sherman Minton. Chief Judge Mikva practiced law in Illinois until 1968 and served as a member of the Illinois Legislature from 1957 to 1967. He was elected to the U.S. Congress in 1969. While in Congress, he served on the Judiciary Committee and the Ways and Means Committee. Chief Judge Mikva currently teaches "The Legislative Process" at the University of Chicago, and has taught at Northwestern University, University of Pennsylvania, Georgetown University, and Duke University.

Neal Devins is professor of law and lecturer in government at the College of William and Mary. He received his A.B. from Georgetown University and his J.D. from Vanderbilt Law School. Professor Devins has previously served as Assistant General Counsel for the United States Commission on Civil Rights, and Project Director for the Institute for Public Policy Studies at Vanderbilt University. He is the author of over thirty articles on constitutional law, civil rights, and education, and is a frequent contributor to national newspapers and magazines. Professor Devins is the editor of *Public Values, Private School* (Stanford Series on Education and Policy) and the forthcoming book, *Readings in Institutional Dynamics* (with Louis Fisher).

Michael Gerhardt is professor of law at the College of William and Mary, Marshall-Wythe School of Law. Professor Gerhardt received his B.A. from Yale, his M.Sc. from the London School of Economics, and his J.D. from the University of Chicago. Prior to joining the William and Mary faculty in 1990, Professor Gerhardt clerked for Judge Gilbert Merritt of the United States Court of Appeals for the Sixth Circuit, and for Judge Robert McRae, Jr., of the United States District Court for the Western District of Tennessee, worked in private practice in Washington, D.C., and taught at the Wake Forest University School of Law. Professor Gerhardt is the author of numerous law review articles and the co-author of the forthcoming book, *Constitutional Theory: Arguments and Perspectives*.

KEYNOTE SPEAKER

Sarah Kemp Brady chairs both the Center to Prevent Handgun Violence, and its lobbying affiliate, Handgun Control, Inc. She received her B.A. from the College of William and Mary in 1964. From 1964 to 1968, Mrs. Brady was a public school teacher in Virginia. For the next ten years, she worked actively in various capacities within the Republican Party. She served as Assistant to the Campaign Director at the National Republican Congressional Committee from 1968 to 1970. Mrs. Brady joined the staff of U.S. Representative Mike McKeivitt (R-CO) as an Administrative Aide in 1970. She held the same position in Congressman Joseph J. Maraziti's office (R-NJ) from 1972 to 1974. Mrs. Brady then served for four years as Director of Administration and Coordinator of Field Services for the Republican National Committee.

TOWN MEETING PANELISTS

Richard E. Gardiner is the Legislative Counsel for the National Rifle Association of America Institute for Legislative Action. He graduated in 1973 from Union College in Schenectady, New York with a Bachelor of Science degree in Electrical Engineering. After serving as an officer in the U.S. Navy, Mr. Gardiner attended the George Mason University School of Law in Arlington, Virginia, from which he graduated in 1978. Mr. Gardiner was an Assistant General Counsel for the National Rifle Association from 1979 until 1989, when he was appointed Director of the State and Local Affairs Division of the NRA's Institute for Legislative Action. Mr. Gardiner is also a member of the Fairfax Bar Association and the ACLU.

Dennis A. Henigan is Director of the Legal Action Project at the Center to Prevent Handgun Violence in Washington, D.C. The Legal Action Project is a national public interest law program which defends reasonable gun laws against legal attack and represents gun violence victims in lawsuits against the gun industry. He also serves as General Counsel of Handgun Control, Inc., a non-profit citizens' organization working for stronger laws to reduce handgun violence. Mr. Henigan received his law degree in 1977 from the University of Virginia School of Law and his undergraduate degree from Oberlin College in Ohio. He has spoken and written extensively on constitutional and liability issues relating to firearms.

Sonny Stallings is a former Virginia State Senator (8th District), and currently practices law in Virginia Beach. He received his J.D. from University of Richmond and his B.S. in Political Science from Old Dominion University. During his Virginia Senate term, Mr. Stallings served on the Courts of Justice, Commerce and Labor, General Laws, and Local Government Committees. From 1977 to 1979, Mr. Stallings was an Assistant Commonwealth Attorney in Virginia Beach. He served as a Virginia Beach Police Officer in 1975. In addition to his current membership on the Criminal Justice Services Board, Mr. Stallings was Commissioner of the Virginia Commission of Game and Inland Fisheries, and served in the U.S. Marine Corps in Vietnam.

Paul LeBel is the Cutler Professor of Law at the College of William and Mary, Marshall-Wythe School of Law. Professor LeBel received his A.B. from George Washington and his J.D. from Florida. Prior to joining the faculty in 1982, he was a graduate teaching fellow at the University of Illinois College of Law and taught at the University of Alabama School of Law from 1978 to 1982. Professor LeBel is the author of a book entitled *John Barleycorn Must Pay: Compensating the Victims of Drinking Drivers*, and many articles and reviews on tort law, the law of defamation, and jurisprudence. He has also written a number of satirical pieces that appear in the *Journal of Legal Education*.

FICTIONAL TOWN MEETING CHARACTERS

Michelle Anderson (portrayed by Robin Vogel) is a mother whose 14-year-old daughter was accidentally shot in the chest and killed when the 5-year-old girl whom she was babysitting at a neighbor's house found her father's loaded gun in his nightstand. The parents of the child were fined \$5,000 under a negligent entrustment statute in the state, but the firing of the weapon by a child unaware of the results of its action was found to be an intervening cause of the harm and blocked other criminal charges against the parents. Similarly, a civil suit ended with the parents not being held liable because of the issue of proximate cause, and because the state explicitly refused to recognize handguns as inherently dangerous and worthy of strict liability.

Chris Sanford (portrayed by Susan Sieger) is a gun dealer whose shop is her family's only source of income. She has two boys, aged 4 and 8, who sometimes go to work with her on the weekends, and have often watched her handle guns. She lives in a high-crime neighborhood and keeps a loaded, unlocked gun under her bed for safety. This year Chris showed her older boy where it is kept and explained to him how and when to use it. He got a BB gun for his eighth birthday, and Chris has gone shooting with him several times.

George Edelman (portrayed by David Pernini) is a policeman, with fifteen years of experience, who walks a beat in an inner-city neighborhood where a lot of shootings take place. His most recent cases have been the suicide of an 18-year-old who shot herself after failing to overdose on sleeping pills a few months earlier, and a weekend flurry of drive-by shootings in which no gang members were harmed but three young children were killed by stray bullets. George and his family live in a small suburb twenty miles from the city, assuming the suburb to be safer, but their home was burglarized during their last vacation.
