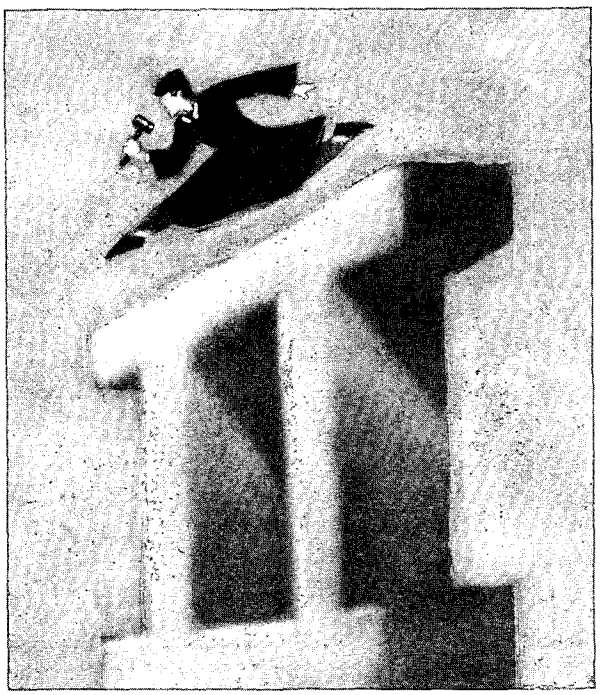
GUN-SHY JUDGES

BY JACOB SULLUM



"At first glance, the machine gun issue may seem absurd," *Washington Post* reporter Michael Isikoff wrote of a recent challenge to a federal ban on the possession of automatic weapons. Try to imagine a similar observation in a news story about a case involving freedom of speech or separation of church and state. And that was in a relatively sympathetic account of *Farmer v. Higgins*.

Gun-control advocates were even less kind. "The NRA wants to legalize machine guns," wrote Richard Cohen, the *Post*'s chronically indignant columnist. "You read that right: machine guns....The zealousness of the NRA may have at last done it in."

The New Republic complained that "the NRA is trying more avidly than ever to spread deadly weapons. In a case now before the Supreme Court, the NRA, dropping the usual blather about 'sporting purposes,' is arguing that the Constitution protects every American's right to own a machine gun."

Two things are striking about the way the press handled *Farmer v. Higgins*, which the Supreme Court declined to hear in January. First, it exaggerated the role of the National Rifle Association, which was not a party to the case and did not file a friend-of-the court brief (although its legal defense fund did cover the plaintiff's expenses). Second, even reporters trying to be fair (such as Isikoff) gave short shrift to Second Amendment arguments, while commentators dismissed them out of hand.

The two points are related. For supporters of gun control, the NRA bogeyman serves to conceal issues of individual rights and constitutional law. To Cohen and the editors of *TNR*, the machine-gun case was about a powerful organization run amuck, not about a Georgia gun collector resisting government encroachment on his freedom. Judging from their glib commentary, you would never guess that a matter of principle was at stake.

This obliviousness has been encouraged by the Supreme Court's apparent indifference to the Second Amendment. The Court has not considered a gun-control case, other than those involving felons, in more than 50 years. Meanwhile, circuit courts have whittled away at the right to keep and bear arms, lending credence to those who say it no longer exists, if it ever did.

Gun owners and their defenders had hoped the Court would take advantage of *Farmer*, which involved the first federal ban on possession of firearms by nonfelons, to break its silence. But as usual, the Court left us guessing as to what meaning, if any, it will eventually ascribe to the Second Amendment: "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."

As hard as it may be for gun-control advocates to fathom, J.D. Farmer, Jr., does indeed believe those words protect his right to own a machine gun. In 1986 the Smyrna, Georgia, gun enthusiast applied to the Bureau of Alcohol, Tobacco, and Firearms for permission to convert a semiautomatic HK-94 into a fully automatic weapon for his collection. Under the National Firearms Act (passed in 1934), he had to submit fingerprints and photographs, undergo a police background check, and pay a $200 tax. But the BATF turned down Farmer's application on the ground that the Firearm Owners Protection Act of 1986 had banned private possession of new machine guns.

Farmer challenged the BATF decision in federal district court, charging that the bureau had misinterpreted the law, which provides an exemption for weapons transferred or possessed "under the authority" of a government agency. He argued that this exemption included machine guns registered with the BATF. Furthermore, Farmer charged that a machine-gun ban would be unconstitutional, both because it would violate the Second Amendment and because the Constitution does not give Congress a blanket power to prohibit possession of things it doesn't like. (Previous federal gun-control legislation had been based on the Interstate Commerce Clause or the congressional taxing power, neither of which seems to apply in this case.)

U.S. District Judge J. Owen Forrester agreed that the BATF's interpretation of the law was unreasonable and therefore an abuse of discretion. He noted that "defendant's proffered interpretation presents the particularly unattractive possibility of constitutional infirmity" on both Second Amendment and Commerce Clause grounds. Forrester ordered the

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BATF to process Farmer's application.

On appeal, the U.S. Court of Appeals for the 11th Circuit inexplicably declared that "the sole issue is whether section 922(o) [of the Firearm Owners Protection Act] prohibits the private possession of machine guns not lawfully possessed prior to May 19, 1986." Having done away with Farmer's constitutional objections by the simple expedient of ignoring them, the court found that the statute had indeed banned private ownership of automatic weapons. "We have considered Farmer's remaining arguments and find them to be without merit," the court asserted in reversing Forrester's order.

The court's refusal seriously to examine constitutional arguments that Forrester had found plausible is symptomatic of the disdain toward the Second Amendment shown by many judges, legal scholars, and civil libertarians. As Sanford Levinson, a liberal professor at the University of Texas Law School, observed in a 1989 *Yale Law Journal* article: "For too long, most members of the legal academy have treated the Second Amendment as the equivalent of an embarrassing relative, whose mention brings a quick change of subject to other, more respectable, family members."

Partly because of this neglect, many advocates of gun control simply do not perceive a constitutional issue associated with firearm regulation. Hence they take a remarkably cavalier approach to legislation. Calling for passage of the Brady Bill, which would establish a national, week-long waiting period for handgun purchases, *The New Republic* admits that the law's impact would be minor at best. Asked if a federal ban on "assault weapons" would reduce crime, Gwen Fitzgerald of Handgun Control Inc. says, "Let's pass the law and find out."

The lack of Second Amendment scholarship has also hampered defenders of the right to bear arms. Richard E. Gardiner, director of state and local affairs for the NRA, says the shortage of academic interest is the main reason his organization has until recently been reluctant to pursue Second Amendment cases. But during the last decade researchers such as Don B. Kates, Jr., and Farmer's attorney, Stephen P. Halbrook, have marshaled impressive evidence on the meaning of the Second Amendment.

That research has moved at least one gun-control advocate, *New Republic* senior editor Michael Kinsley, to admit that the arguments of the "gun nuts" are stronger than he'd like them to be. After Levinson's article appeared, Kinsley wrote a column in which he reluctantly concluded that the Second Amendment does indeed guarantee "an individual right to own guns." He acknowledged that the traditional counter-arguments—for example, that the National Guard takes care of the "well regulated militia" and therefore of the "right to keep and bear arms" as well—are facile at best.

ACLU Executive Director Ira Glasser admits that, contrary to official ACLU policy, the Second Amendment protects an individual's right to bear arms.

Still, it remains true, as Levinson put it, that most civil libertarians simply do not have a place for the Second Amendment on their "cognitive maps" of the Bill of Rights. Asked why the American Civil Liberties Union does not defend the right to bear arms, ACLU Executive Director Ira Glasser admits that—contrary to official ACLU policy—the Second Amendment protects such a right for individuals. But he says that does not mean the government may not regulate guns. Were Congress to ban private ownership of firearms completely, he says, the ACLU would challenge the action.

This is doubtful, since the organization's policy guide declares that "the right to bear arms is a collective one....The possession of weapons by individuals is not constitutionally protected." But even if Glasser differs with ACLU policy on this point, he still wonders what all the fuss is about. Why worry about gun control when the government is threatening to cut off funding for abortions?

Glasser rejects the idea of private gun ownership as a bulwark against tyranny, since the modern state's firepower would overwhelm anything citizens could pick up in a gun shop. But as Levinson noted, "It is simply silly to respond that small arms are irrelevant against nuclear-armed states....a state facing a totally disarmed population is in a far better position...to suppress popular demonstrations and uprisings than one that must calculate the possibilities of its soldiers and officials being injured or killed."

If civil libertarians such as Glasser have difficulty understanding why law-abiding people would want to arm themselves against the government, it's because they have strayed so far from the philosophy of natural rights that underlies the Constitution. As Halbrook demonstrates in his book *That Every Man Be Armed*, the Second Amendment drew on a long tradition in British common law. The Framers valued the right to bear arms not merely for collective defense against invaders but for individual defense against both criminals and oppressive government. They understood the "well regulated militia" to consist of all citizens capable of bearing arms.

Notwithstanding the claims of gun-control advocates, the Supreme Court has never denied this view of the Second Amendment. In the most frequently cited case, *United States v. Miller* (1939), the Court upheld a provision of the National Firearms Act regulating interstate transportation of sawed-off shotguns. But the decision was based on the plaintiffs' failure to demonstrate that such a firearm "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia" (which the Court recognized to be "all males capable of acting in concert for the common defense").

By implication, the plaintiffs might have prevailed had they shown that a sawed-off shotgun is a weapon suitable

for militia use. Hence the reasoning behind *Miller* runs directly counter to conventional gun-control wisdom, i.e., that it's OK to ban "military-style" weapons. Under the *Miller* test, such firearms, including "assault rifles" and machine guns, are clearly covered by the Second Amendment.

The Supreme Court has also undermined the old gun-control canard that the Second Amendment does not apply to individuals. In the 1990 case *United States v. Verdugo-Urquidez*, a unanimous Court made it clear that the phrase *the people* means the same thing in the Second Amendment as it does in the First, Fourth, and Ninth amendments: "a class of persons who are part of a national community." (Not, as the ACLU would have it, "the collective population of each state for the purpose of maintaining an effective state militia.")

The *Verdugo-Urquidez* decision was one reason that Second Amendment defenders hoped for a favorable ruling in *Farmer*. The gratutitousness of the machine-gun ban also seemed to work in Farmer's favor. BATF Director Stephen E. Higgins had admitted in congressional testimony that registered machine guns are not a law enforcement problem. "There's not a documented case since 1934 of the misuse of a registered machine gun by a private citizen," Halbrook says.

But given that the Supreme Court grants only about 1 in 100 requests for review, Halbrook was not surprised that it declined to hear *Farmer*. He says the Court may be waiting for more discussion of the Second Amendment at the circuit level before considering another gun-control case. On the other hand, "if there was something comparable to this involving the First Amendment"—say, a ban on certain kinds of magazines because they are particularly prone to libel—"they would take it," Halbrook says. "This case would have been a golden opportunity for them to address the black sheep of the Bill of Rights—the one amendment that they don't want to talk about."

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HOUSE OF HOPE

BY BRYAN MILLER

You could call her a miracle worker, but she'd probably laugh out loud.

Sister Connie Driscoll single-handedly reduced the number of homeless in the city of Chicago by two-thirds, and she did it without adding a single bed. No miracles were required; the Roman Catholic nun accomplished this feat by the simple expedient of creating a more efficient reporting system.

Sister Connie Driscoll (right) provides Chicago's homeless with a place to stay and the principles of individual responsibility.

What Driscoll actually reduced was the city's numbers of reported "turnaways," those who aren't admitted to shelters because no beds are available. Under the old system, if a woman tried to get lodging at two shelters and was turned away, but was admitted at a third, she was still counted twice as a turnaway.

"In September of 1988, we showed 6,000 women and children turned away from shelters," Driscoll recalls. "And when that figure got that high, I said, 'C'mon. Enough is enough. Let's find out how many of those are duplications.' " So she developed reporting sheets that give the date, the initials of the women, their dates of birth, and the number of children they have; every shelter fills the sheets out and turns them in regularly. They also send in lists that show who's currently in each shelter. By September 1989, the turnaways were down to 2,120.

There are solutions to the problems of the homeless, solutions that don't require the intervention of government, private solutions that work. Sister Connie Driscoll and Sister Therese O'Sullivan of the St. Martin de Porres House of Hope in Chicago's Woodlawn neighborhood have been proving it every day for almost eight years. They base their work on the principle of individual responsibility.

Driscoll and O'Sullivan founded their shelter for homeless women and children in 1983 on tough-love principles. If you want to stay here, you have to keep your area clean. You have to sign up for and perform chores. You have to take care of your children. You have to take classes, both GED classes and classes in "life skills." Many women, says Driscoll, don't know how to do laundry or go shopping. You have to save 70 percent of your public aid checks, so you have a stake when you leave.

It works. In the last seven years, over 6,000 women have passed through the doors of St. Martin de Porres. Driscoll claims that only 6.5 percent of her charges have returned to the shelter system; for the Chicago system as a whole, 38.9 percent will return to a shelter. The 140-bed shelter runs on a $240,000-a-year budget. To remain independent, Driscoll takes no money from any branch of government or even from the church. The nuns run a separate facility for pregnant and parenting teens on the same principles.

The money for all this comes from individuals (the nuns take no salary), from private foundations, and from Driscoll's speaking engagements. The staff of 10 (five of them ex-residents) is loyal, despite low wages. "If you want to make a lot of money, obviously you're not going to come to work for me," observes Driscoll.

Driscoll, a Missionary Sister of the Poor, doesn't match most people's mental image of a typical nun. She is outspoken. The black patch over her left eye and the long brown cigarettes she smokes give her a faintly piratical air. The remaining bright blue eye gleams with intelligence, humor, and, when she gets going, fire. A one-time lawyer, she decided she didn't care for the law a long time ago. She became a nun in 1982; several years ago, she and O'Sullivan adopted a baby girl. She's also a statistics freak—she's been tracking the women who stay at St. Martin via computer since opening the shelter and now keeps the figures for the entire city of Chicago. The numbers are all on the tip of her tongue.

One number she declines to give is the number of homeless in Chicago: "There are so many variables." For instance, in Cook County, prisoners can't be required to sleep on cots in jail—but they can sleep on cots in homeless shelters; court-ordered releases swell the numbers of male homeless on a regular but artificial basis. Runaways, prostitutes, drug and alcohol abusers, battered women, and those who are just between apartments for a few days are all included in the official count of the homeless population.

The average length of a stay at her shelter is 76 days, but, notes Driscoll, that

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