THE SPORTING PURPOSES TEST

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The sporting purposes test (SPT) in American firearms law aims to distinguish firearms that are "particularly suitable" for sporting purposes from those that are not.

The salient purpose of this discrimination has been to exempt firearms that pass the test from gun bans. ("Gun ban" can refer to the prohibition of the manufacture, importation, transfer, or possession of the targeted firearms.)

The SPT also provides a basis for banning firearms that do not pass the test. Putative examples of the latter are handguns dubbed Saturday Night Specials, military rifles, and "semi-automatic assault weapons" (SAWs). SAWs are semi-automatic pistols, rifles, and shotguns that have or accept high capacity ammunition magazines as defined in the 1994 Public Safety and Recreational Firearms Use Protection Act. This federal Act is also referred to as the Assault Weapons Ban of 1994 (although it allows transfer and possession of "grandfathered" SAWs and magazines lawfully possessed on or before its enactment date). The Act's two monikers reflect the dual vector of the SPT: protecting sporting guns while banning others.

Even ardent gun ban proponents accord sporting guns ultimate immunity: "If I had my way, guns for sport would be registered, and all other guns would be banned" (Deborah Prothrow-Stith, *Deadly Consequences,* 198).

By providing a discriminatory basis for immunity from - or liability to - the most restrictive of gun controls, the SPT begs three questions. (1) What is the rationale for privileging sporting firearms while discriminating against others? (2) What, exactly, is required to pass - or fail - the test? (3) What is the justification of this discriminatory policy?

In America, the rationale is found in the legislative history of the test.

Simkin and Zelman (1992) document what the SPT and its rationale have in common with earlier European models. Sporting purpose first became a salient factor in 20th-Century gun control policy following WWI in Europe when governments prohibited civilian ownership of military firearms in both Weimar and Nazi Germany and other European regimes. Following the Bolshevik Revolution and WWI, one impetus for restricting civilian access to military firearms was to ensure a government monopoly on effective armed force as against emergent and potentially violent dissidents (Munday, 1992). But even in the Soviet Union and Nazi Germany hunting rifles and shotguns were allowed to approved civilians. The ostensible rationale for the privileged exemption of sporting arms even in these draconian regimes was to accomodate certain political constituencies and economic interests, namely hunters and sport shooters and the

economic enterprises dependent on them (Phillips, 1991). More recently, when the European Union (EU) debated bans on civilian firearms and cross-border firearms transport, sporting guns were spared in the economic interest of multi-billion-dollar commerce: arms manufacturers in Europe employ tens of thousands of people; for millions within the EU, shooting is a major recreation; in Britain, shooting (targets or game) is the most popular participatory sport after fishing (Phillips, 1991). Hunting is also popular in America and raises significant monies for government and local economies (for example, the Vermont Fish and Wildlife Department estimated that the fall, 1996, hunting season brought $68 million into the state's economy).

Sporting uses of firearms clearly generate economic benefit, and a large population of sport shooters and hunters is a political constituency to be reckoned with. But other factors also weigh in the justification of public policy. An account of the attempt to derive standards for passing or failing the STP from its legislative intent will help us parse the question of its justification. While "sporting purpose" language is found in state statutes and local ordinances, the federal SPT is the prime analogue in American gun law and will serve to illustrate the generic issues.

The federal Gun Control Act (GCA) of 1968 is the source of the sporting purpose test in America. In the context of the GCA's listed exceptions from its importation and mail-order ban (which, inter alia, targeted military rifles stigmatized by the bolt-action Italian Carcano carbine used to assassinate President John F. Kennedy), United States Code Title 18, Chapter 44, Section 925(d) stipulates: "The Secretary [of the Treasury] shall authorize a firearm or ammunition to be imported or brought into the United States or any possession thereof if the firearm or ammunition . . . (3) is of a type that . . . is *generally recognized as particularly suitable for or readily adaptable to sporting purposes* . . . ." [italics added]

The typical statement of the SPT drops the curious phrase "or readily adaptable to" sporting purposes, curious because imported military surplus rifles in the 1960s were popular precisely because they were inexpensive and "readily adaptable" to hunting by shortening their barrels, sporterizing their stocks, and affixing preferred sights.

The typical version of the SPT occurs in two contexts: 925(a)(3) and (4), concerning firearms that may to shipped to members of the Armed Forces, and 921(a)(4), which exempts imported *and* domestic shotguns from the restrictions on "destructive devices" imposed by the National Fireams Act (NFA) of 1934: "The term 'destructive device' means [inter alia]. . . any type of weapon (other than a shotgun or a shotgun shell which the Secretary finds is *generally recognized as particularly suitable for sporting purposes*) . . . which will . . . expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter [12-guage shotgun bores are 0.729 inches] . . . . " [italics added]

Thus, the basic terms of the federal sporting purpose test are three: (1*) generally recognized* as (2) *particularly suitable* for (3) *sporting purposes.* The terms of the test were deliberately left vague in the GCA to allow broad discretion to the Secretary of the

Treasury regarding what foreign-made firearms the Bureau of Alcohol, Tobacco and Firearms (ATF) could ban or allow for import (Black, 1989). Accordingly, the SPT has been applied by the ATF on three occasions (in 1984, 1986, and 1989) to determine the *importability* of certain firearms of forein manufacture.

But, more recently (1994), the ATF applied the test to firearms of *domestic* manufacture, specifically to reclassify revolver-action shotguns (which hold twelve rounds in their cylinders) as NFA-restricted destructive devices.

The SPT is also widely invoked in support of proposed bans on other domestic firearms, where lack of sporting purpose is a key criterion in tandem with other liabilities, as an FBI memorandum states: "These would include high capacity, rapid firing rifles and handguns, as well as submachineguns [already restricted but not banned under the NFA of 1934]. These types of firearms are *the most destructive* and possess *little or no utility for sport or target shooting"* (Collingwood, 1993a, 1, italics added). Thus, while the SPT was devised for restricting firearm *imports* and applicable only to domestic *shotguns*, proponents of a broader federal ban sought to extend it to domestic rifles and pistols on the model of the 1989 Roberti-Roos Assault Weapons Act in California.

A problem arose for the SPT in this context insofar as "sporting purposes" included hunting and target shooting. SAWs and semi-automatic rifles and shotguns functionally equivalent to SAWs are used in hunting (in "sporterized" versions or with magazines compliant with hunting laws limiting their capacity to three or five rounds). And target shooting includes competitions such as "combat skeet" and the venerable National Championship Matches at Camp Perry for which military rifles have been mandated by Congress since the turn of the century (as with the shooting festivals or *Schuetzenfesten* of the Swiss citizen militia that mandate the use of military assault rifles). As regards semi-automatic pistols, there is a wide variety of "practical" or "tactical" competitions organized under the auspices of the International Defensive Pistol Association, the United States Practical Shooting Association, the International Practical Shooting Confederation, and the National Tactical Invitational (which also sponsor three-gun matches for pistol, rifle, and shotgun).

These competitions in what is generically called "combat weaponcraft" (Covey, 1995) are devised to test and improve defensive shooting skills, decisionmaking skills (such as when *not* to shoot), and other tactical threat management skills in which marksmanship is only one element and in which firearms *particularly suitable* for combat are de riguer. While these more dynamic and tactically demanding competitions go beyond "pure" target shooting devoted to static precision marksmanship alone, they are well organized forms of target shooting.

Furthermore, combat-relevant shooting competitions using military and combat-suitable firearms are in fact the historical progenitors of (and therefore enjoy a longer tradition than) "pure" target shooting in both Europe and the United States (Munday, 1988).

SAWs, therefore, appear to satisfy the three basic terms of the sporting purposes

test. Because they are particularly suitable for defensive combat purposes, they are particulary suitable for the sporting purposes described above and they are *generally recognized* as such by virtue of the popularity and governance of these sports under well established national and international organizations.This problem was expressly addressed in the legislative and regulatory history of the sporting purposes test.

For example, the fact that there were lawful sporting uses of military rifles and SAWs was expressly recognized by the ATF's 1989 Working Group on the Importability of Certain Semiautomatic Rifles. Its report then sought to explicate the legislative intent behind the spare and vague statutory language of the SPT in the GCA:

"The mere fact that a military firearm may be *used* in a sporting event does not make it a *sporting* firearm. . . . While the legislative history suggests that the term 'sporting purposes' refers to *the traditional sports of target shooting, trap and skeet shooting, and hunting,* the statute itself provides no criteria beyond the 'generally recognized' language of section 925(d)(3). . . . The broadest interpretation could take in virtually any lawful activity or competition which any person or groups of persons might undertake. Under this interpretation, any rifle could meet the 'sporting purposes' test. A narrower interpretation which focuses on *the traditional sports of hunting and organized marksmanship competition* would result in a more selective importation process. . . . A broad interpretation which permits virtually any firearm to be imported because someone may wish to use it in *some* lawful shooting activity would render the statute meaningless." (Black, 1989, 10, italics added)

In particular, the ATF Working Group cited the 1968 Firearms Evaluation Panel's assessment of the recreation of "plinking," which it defined as "shooting at randomly selected targets such as bottles and cans" and to which it expressly denied the protective mantle of "sporting purpose": "It was the Panel's view that 'while many persons participated in this type of activity and much ammunition was expended in such endeavors, it was primarily a *pastime* and could not be considered a *sport* for the purposes of importation ....'" (Black, 1989, 10, italics added]. The ATF Working Group also cited the *Congressional Record* to refine the qualifiers *particularly* suitable for *sporting* purposes according to legislative intent:

"Although a firearm might be recognized as 'suitable' for use in traditional sports, it would not meet the statutory criteria unless it were recognized as *particularly* [sic] suitable for such use. Indeed, Senator Dodd [the principal drafter of the GCA] made clear that the intent of the legislation was to '[regulate] the importation of firearms by excluding surplus military handguns; and rifles and shotguns that are not *truly suitable* for sporting purposes.'

"Mr. HANSEN: If I understand the Senator correctly, he said that despite the fact that a military weapon may be *used* in a sporting event, it did not, by that action become a *sporting* rifle. Is that correct?

"Mr. DODD: That would seem right to me . . . As I said previously the language says [sic] no firearms will be admitted into this country unless they are *genuine sporting weapons* . . . I think the Senator and I know what *a genuine sporting gun* is." (114 Cong. Rec. 27461-62 [1968], italics added)

The ATF thus extracted from the legislative history of the GCA additional qualifications of sporting purposes and sporting firearms, namely: *the traditional* (as distinct from merely lawful, popular, and organized) shooting sports of *target shooting, trap and skeet shooting, and hunting* and *genuine* sporting guns, which were those *truly suitable* for just these sports.

The final factor in the ATF's appraisal of *particular* suitability for the traditional sports of hunting and marksmanship competition was whether a gun was *generally recognized* as such. The ATF took the standard for meeting this criterion to be expert opinion derived from its rigorous and comprehensive survey of firearms sports and industry experts:

"To the extent that the technical evaluations [from these experts] made recommendations with respect to the use of the [SAWs] suspended from importation, the majority recommended them for [inter alia] . . . *combat* target shooting. . . . [One] editor stated that semiautomatic rifles had certain advantages over conventional [bolt- and lever-action] sporting rifles especially for the physically disabled and left-handed shooters. While this may be true, there appears to be no advantage to using a semiautomatic *assault* rifle as opposed to a semiautomatic *sporting* rifle." (Black, 1989, 13-14, italics added)

However, the case law (*Gun South, Inc. v. Brady,* 877 Fed. Rept. 2d 866) on the 1989 import ban that was finally imposed by the ATF allows that the ATF's assessment of *general recognition* is extensible and corrigible. The Congressional Research Service report *"Assault Weapons": Military-Style Semiautomatic Firearms Facts and Issues* (notice the judicious use of quotation marks in the report's title) avers:

"The assertion by ATF that 'some evidence' of lawful use should not control the decision to import is arguable. According to the only court ruling that directly addressed the import ban, the statute's use of the phrase ‘generally recognized' 'suggests a community standard which may change over time even though the firearm remains the same.' While this ruling, and the ATF findings on the particular unsuitability of these firearms for lawful purposes, appears to control at present, the development of a different "community standard" could arguably provide grounds for general acceptance of these firearms in the future." (Bea, 1992, 14)

For example, general recognition by both experts and the shooting public of the particular suitability of *handguns* for various sporting purposes grew markedly in the mid 1970s, before which no magazines were devoted to handguns and since which several have prospered, as diverse handgunning sports have gained in popularity and organization. These include *the traditional sports of hunting and organized*

marksmanship competition, but also the aforementioned competitions in combat weaponcraft under the auspices of national and international organizations.

As the community standard of general recognition of semi-automatic pistols' suitability for combat shooting competitions has long since changed, so has it been changing for semi-automatic rifles and shotguns. Since combat-relevant competitions for military and military-style rifles have a longer tradition than pure marksmanship shooting in both Europe and the United States (Munday, 1988), the qualifier "traditional" does little to raise the bar of the SPT.

With such evolutions in "community standards," the ATF's conscientious attempt to refine the vague statutory terms of the SPT brings us full circle to the problem it began with: SAWs have their own sporting purposes for which they are particularly suitable and generally recognized as such. Even if these sports include neither hunting nor pure marksmanship competitions and, so, are not within the ambit of the GCA's legislative intent, they are both lawful and traditional in their own right.

The problem cannot be solved by devising more specific language. It is not a semantic problem, but a normative one. Accordingly, the ATF and other advocates of bans on SAWs resorted to the term "*legitimate* sporting purposes." Recognizing that this rhetorical term has no basis in federal statute, an ATF memorandum on its reclassification of revolver-action shotguns as destructive devices favorably anticipated the 1994 Assault Weapons Ban:

"This [reclassification] ruling represents a small step in imposing rational controls over the non-sporting assault-type weapons addressed in the Feinstein bill [a precursor of the 1994 Assault Weapons Ban]. *With the exception of these large bore shotguns, there is currently no sporting purpose test in existing federal law* governing the types of firearms that can be manufactured and sold commercially. Feinstein's bill would ban . . . these shotguns as well as a host of other rifles and handguns that also provide tremendous firepower, while serving no *legitimate* sporting purpose." (Quoted in Joseph P. Tartaro's column, "Hindsight: Background on the Shotgun Reclassification," *Gun Week,* March 18, 1994, italics added.)

A crucial difficulty for this latter-day notion of *legitimate* sporting purposes is that the GCA of 1968 provides no grounds for privileging the sports favored by its drafters over the combat-relevant competitions that have long since become both popular and highly organized.

Both the new rhetoric of *legitimate* sporting purposes and the GCA's legislative intent beg the question of justification: What justifies privileging firearms particularly suitable for certain sports while discriminating against others? This question is double-edged, requiring justification not only for discriminating against guns that lack the preferred sporting purposes, but also for holding "genuine sporting weapons" harmless: Why not ban SPT-certified guns as well?

The schools of argument on this question cannot be rehearsed in this venue, but the question can be parsed into more specific issues. For expedition, certain stipulations are helpful. SAWs are *combat* weapons, not *sporting* guns in Senator Dodd's sense. They are specifically designed and particularly suitable for *combat*, not for hunting or target shooting, even though they can be *used* in hunting and target shooting is essential for proficiency training. Neither are they exclusively designed or solely useful for *assault*, military or criminal, although they can be so used (as can a screwdriver, the second most popular edged weapon in criminal assaults).

Com-bat is inherently defensive as well as offensive. By the same token, the martial arts are not called *assault* arts. Notably unlike hunting guns, combat weapons are neither exclusively designed nor solely useful for killing: in defensive civilian deployment, guns are used 99 percent of the time to stop a criminal threat without killing or wounding (Kleck, 1997, 164). One reason: guns in the hands of defenders, like guns in the hands of robbers, tend to compel compliance.

Civilian competitions in combat weaponcraft are exclusively designed to exercise and test *defensive* skills, which include safe and proficient gun handling, legally and tactically judicious decisionmaking (such as when *not* to shoot), as well as marksmanship, under a variety of realistic scenarios (for example: low light, in the dark with a flashlight, while moving, with moving and pop-up targets, with both "shoot" and "no-shoot" targets, "man-on-man" with marker ammunition, in "shooting houses" simulating home defense situations). Such scenarios simulate various exigent and adverse circumstances which civilian defenders might encounter. These *competitions* in turn promote rigorous *training* in the safe, effective, and lawful use of firearms in defense of innocent life. SAWs (semi-automatic pistols, rifles, and shotguns advisedly equipped with high capacity magazines) are particularly suitable for defensive combat and, hence, for training and competition in combat weaponcraft.

The question of justification begged can now be parsed into more specific challenges to the sporting purpose test as currently construed in American firearms law.

Why privilege the sports of hunting or pure target shooting over combat weaponcraft?

Training or competition in combat weaponcraft (by oneself or with others) is a *sport* in any common sense of the term in which any other martial art - or fishing, hunting, and target shooting (pursued by oneself or with others) - are sports. It is a *legitimate* sport, as legitimate as hunting or pure target shooting, insofar as it is well institutionalized and pursued safely, lawfully, and to lawful purpose. Purposes served by hunting include the pleasures it affords, its bounty, and sometimes basic sustenance. Purposes served by pure target shooting include the pleasures it affords and enhancement of marksmanship skills, sometimes for their own sake, sometimes for the further purpose of hunting. The purposes served by combat weaponcraft training and competition include the pleasures they afford and the enhancement of a panoply of skills requisite to the safe, effective, and lawful defense of innocent life.

Why should the pleasures of a blood sport, or hunting's bounty, or recreational shooting be held to be more legitimate pursuits than training for the lawful exercise of the right to protect human life? Why should the development of skills and responsibilities requisite to defending human life not be *more* important to encourage than hunting, or marksmanship alone? Why privilege *sporting* purpose over *protective* purpose in reckoning the value of firearms? These questions require a larger view of the social costs and benefits of firearms and their uses beyond their recreational value.

Why privilege sporting purpose or recreational value of any *sort with special consideration in weighing the social costs and benefits of firearm use?*

When the contest is drawn between *sporting* guns (in Senator Dodd's sense) and SAWs which happen to have their own legitimate sporting purposes, weighing the social value of their respective sports in favor of combat weaponcraft is not enough to preserve SAWs from bans. Bans on SAWs are not predicated solely or primarily on their lack of politically privileged sporting purpose. Their collateral liability consists in the costs speculated to result from their abuse, given that SAWs are potentially more destructive than SPT-certified guns by virtue of their "firepower" (Collingwood, 1993a, 1993b).

Two features, combined, enhance SAWs' "firepower" and destructive potential (and, by parity, their suitability for defense): being semi-automatic (rapid firing) and having high capacity magazines (enabling a high volume of continuous fire). The speculation amounts to this: because of these capabilities, criminal abuse of SAWs results in *a higher overall rate of injury and death* than if criminals used revolvers, or pistols limited to ten rounds, or semi-automatic hunting rifles limited to ten rounds, or shotguns limited to five rounds. The question is: Is this true? The evidence from the National Institute of Justice report *Impacts of the1994 Assault Weapons Ban:1994-1996* (Roth and Koper, 1999) does not support this hypothesis.

The reasons for this are many and interesting, but off topic. Consider, instead, a thought experiment. Suppose that the banned SAWs and magazines holding more than ten rounds vanished and criminals substituted magnum revolvers, ten-shot pistols, sawed-off semi-automatic sporting shotguns, and semi-automatic hunting rifles firing cartridges designed to dispatch mammals far more robust than humans. By virtue of the cartridges they fire, these guns are as lethal as the banned SAWs, or more lethal.

A successful ban on SAWs would necessarily result in criminal substitution of SPT-certified guns. Once they became criminals' weapons of choice, would their sporting purposes still afford them special immunity from bans? Should they? If *not*, what justifies their current special immunity? If *so*, would the costs of their criminal abuse not outweigh the benefits of their sporting use?

If the answer is that the costs of their criminal abuse would be outweighed by the social utility of their use in defense against criminal violence, then the same consideration must be accorded the same social benefits of SAWs, which are *particularly* suitable for

defending against criminal violence. When the costs of the criminal abuse of firearms are balanced against the benefits of their lawful uses, why should *any* sporting purpose, let alone purely *recreational* purposes, be given special consideration? An explanation might lie in the political reckoning of economic benefits and political constituencies. But this is no justification, all things considered.

These are some of the salient challenges to the justification of the sporting purposes test as a measure for meeting out privileged immunity from gun bans or privileged status of any kind.

In the end, justification requires not only weighing the costs of firearms abuse against the benefits of their lawful uses, where an *overall social utility test* would seem more to the point than the SPT. It also requires reckoning the moral and constitional right to keep and bear arms, which is claimed to tip or trump the utilitarian calculus (Snyder, 2001). Would such a right specially privilege firearms particularly suitable for "target shooting, trap and skeet shooting, and hunting"? Is, perhaps, sporting purpose simply beside the point? That is the bottomline challenge to the SPT.

-Preston K. Covey

See also

Assault Weapons; Assault Weapons Ban of 1994; Crime and Gun Use; Defensive Gun Use; European Union - Gun Control; Federal Gun Control Act of 1968; Hunting; International Defensive Pistol Association (IDPA); Lethality Effect of Guns; Reasons for Gun Ownership; Recreational Uses of Guns; Saturday Night Specials; Substitution Effects; Target Shooting; United States Practical Shooting Association (USPSA).

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