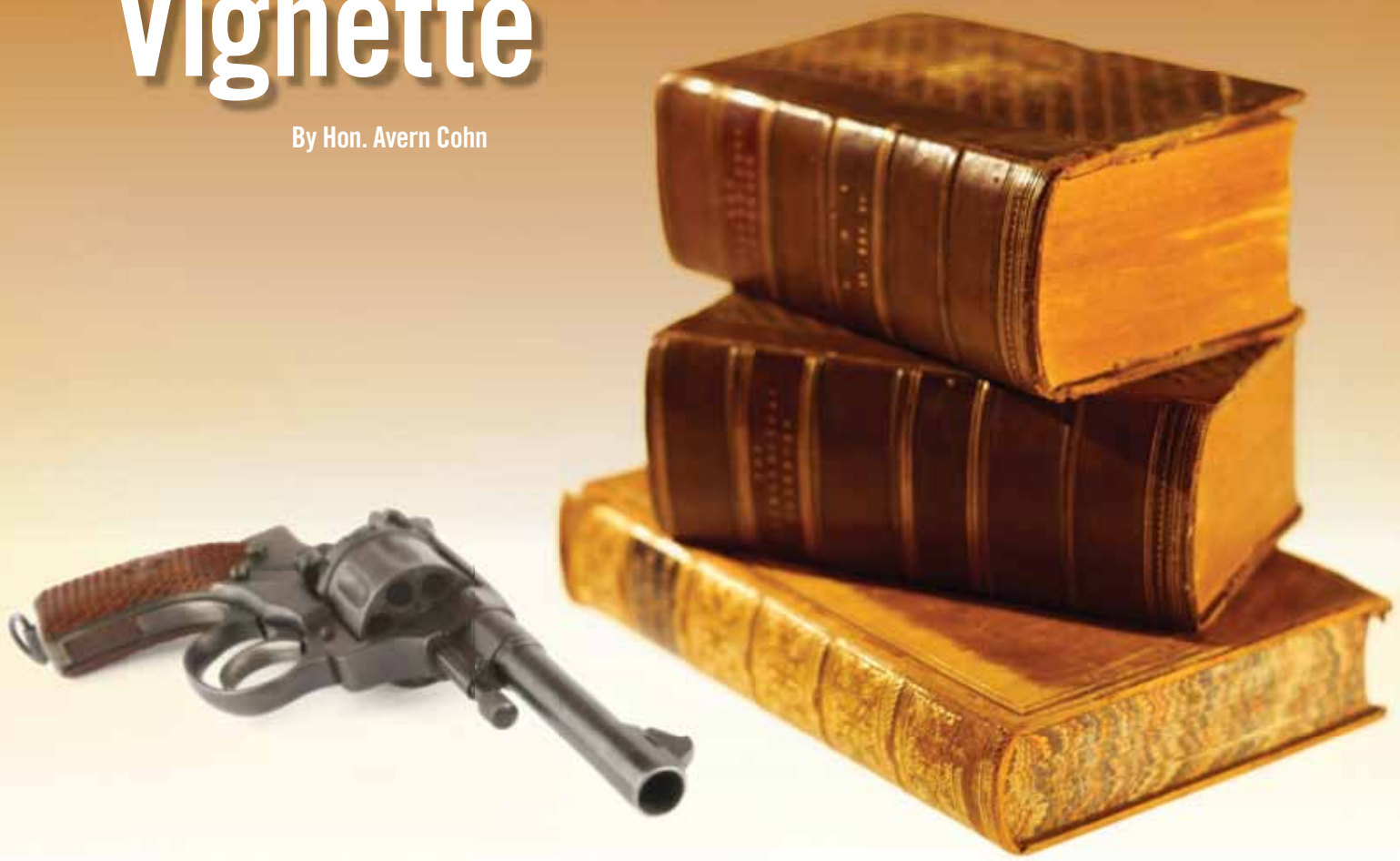
Vignette

By Hon. Avern Cohn



I

What does an 1829 contempt proceeding before the Supreme Court of the Territory of Michigan have to do with Second Amendment jurisprudence? In *District of Columbia v Heller,* Justice Antonin Scalia's holding that the Second Amendment secured an individual's right to keep and bear arms relied in part on what the syllabus prepared for the opinion described as "[i]nterpretation of the Second Amendment by scholars, courts, and legislators, from immediately after its ratification through the late 19th century. . . ."[1] Among the cases Justice Scalia cited was *United States v Sheldon,* a contempt action arising out of a newspaper editor's criticism of the Michigan territorial supreme court, first published in Transactions of the Supreme Court of the Territory of Michigan, edited by Professor William Wirt Blume[2] (hereinafter Blume's Transactions).

Blume's Transactions is not well known today. It consisted of a six-volume record of the decisions of the Supreme Court of the Territory of Michigan from 1805 to 1836. In the 1920s the original records of that court were found in manuscript form, stored in an obscure part of the quarters of the Michigan Supreme Court. Milo M. Quaife, director of the Detroit Public Library, described his search for the records while researching an 1821 murder trial, as well as their subsequent discovery, in a review of Blume's Transactions:

> At the State Library in Lansing [I] was firmly informed by an attendant that the territorial court records no longer existed. Insistent upon confirmation of this surprising statement, [I] was finally escorted to an elderly judge of the state supreme court, who courteously, but no less positively, repeated the information already imparted; when or why the precious records had vanished no one knew; that they had done so seemed abundantly clear, and [I] returned to [my] distant home convinced that insofar as [my] present bit of research was concerned, [I] had come to the end of the trail; yet all the time the records [I] was seeking, covering the activities of the territorial court for three decades, lay hidden away in the vaults of the very court whose officials were denying the fact of their existence.
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> Eventually they were rediscovered and disinterred and a decade ago were entrusted to Professor Blume of the University of Michigan Law School for editing. The resultant achievement can only be characterized as monumental, to be viewed by most historical editors with feelings of sinful envy. Provided with every scholarly facility that could be desired and laboring eight years at the task, Professor Blume now places the fruit of his toil before the

reader in six massive volumes totaling over 3,600 pages, beautifully printed by the University of Michigan Press.[3]

Decided in 1829, *Sheldon* involved a contempt action filed by the territorial Attorney General against John P. Sheldon, editor of *The Detroit Gazette*. Sheldon had published an article criticizing the territorial supreme court's decision that the Wayne Circuit Court had erred in the selection of a jury in a case in which John Reed was convicted of stealing a watch from a Detroit silversmith's shop. Sheldon raised the constitutional guarantee of freedom of the press in his defense. The court rejected the defense on the ground that punishment for publishing what is "false and malicious, or of an unlawful tendency" trumps the First Amendment.[4]

While the territorial supreme court consisted of three judges, only two heard the case: Henry Chipman and William Woodbridge. (The report of the case makes no mention of the third judge, Solomon Sibley.) Both wrote lengthy and erudite opinions. It was the Chipman opinion that Justice Scalia cited in *Heller*.

Chipman was appointed to the territorial supreme court in 1827 by President John Quincy Adams. He served through 1832. A biographical sketch of him can be found on the website of the Michigan Supreme Court Historical Society.[5]

In the course of discussing the limits of freedom of speech and of the press, Chipman said:

> The constitution of the United States also grants to the citizen the right to keep and bear arms. But the grant of this privilege cannot be construed into the right in him who keeps a gun to destroy his neighbor. No rights are intended to be granted by the constitution for an unlawful or unjustifiable purpose. And although that instrument prohibits the passing of any law abridging the liberty of the press, it does not follow, that if the act of which this defendant is charged is a contempt of the authority of the court, that it is any less a contempt because it is committed through the medium of the press.[6]

Justice Scalia cited *Sheldon* twice in his opinion in *Heller*. First, in a discussion of pre-Civil War caselaw; he stated:

> An 1829 decision by the Supreme Court of Michigan said: "The constitution of the United States also grants to the citizen the right to keep and bear arms. But the grant of this privilege cannot be construed into the right in him who keeps a gun to destroy his neighbor. No rights are intended to be granted by the constitution for an unlawful or unjustifiable purpose." *United States v Sheldon,* in 5 Transactions of the Supreme Court of the Territory of Michigan, 337, 346 (W. Blume ed. 1940) (hereinafter Blume). It is not possible to read this as discussing anything other than an individual right unconnected to militia service. If it did have to do with militia service, the limitation upon it would not be any "unlawful or unjustifiable purpose," but any nonmilitary purpose whatsoever.[7]

The second reference to *Sheldon* was at the opening of a discussion on the limitations of the Second Amendment:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. See, e.g., *Sheldon,* in 5 Blume 346; [W. Rawle, A View of the Constitution of the United States of America (1825), p 123; Pomeroy, An Introduction to the Constitutional Law of the United States (1868), pp 152–153; Abbot, Judge and Jury: A Popular Explanation of the Leading Topics in the Law of the Land (1880), p 333].[8]

Seventy years after publication, Blume's Transactions was cited in an opinion of the United States Supreme Court.

II

There are two points of interest in Justice Scalia's citing of *Sheldon*. First, how did he come upon the case? Blume's Transactions is not a widely known set of reports. While *Sheldon* is reported in Westlaw,[9] cases reported in Blume's Transactions had been rarely cited before *Heller,* and *Sheldon* was not one of them. More than that, the Second Amendment discussion in *Sheldon* was dictum.

The answer lies in the amicus curiae briefs filed in *Heller*. *Sheldon* was discussed in an amicus curiae brief authored by C. Kevin Marshall under the following heading:

> Early American Authorities Likewise Adopted the English Focus on Directly Punishing Belligerent Uses of Arms, Rather Than Interfering With the Freedom of Individuals to Keep Them for Defense of Home and Family.

The brief stated:

> As in England, the right did not authorize breaching the peace. The Massachusetts Supreme Court in a libel case likened the freedom of the press to the "right to keep fire arms," which did not protect "him who uses them for annoyance or destruction." *Commonwealth v. Blanding,* 20 Mass. 304, 314 (1825). The Michigan Territory's Supreme Court, also in a libel case, explained that the Constitution "grants to the citizen the right to keep and bear arms. But the grant of this privilege cannot be construed into a right in him who keeps a gun to destroy his neighbor." *United States v. Sheldon,* 5 Blume Sup. Ct. Trans. 337, 1829 WL 3021 at *12.[10]

An August 24, 2004, memorandum opinion for the United States Attorney General also cited *Sheldon*:

> In an 1829 libel case, the Supreme Court of Michigan (then a territory) drew a parallel between the freedoms of speech and press and the right of the people to bear arms to explain that individual rights are not unlimited: "The constitution of the United States also grants to the citizen the right to keep and bear arms.

> But the grant of this privilege cannot be construed into the right in him who keeps a gun to destroy his neighbor."[11]

C. Kevin Marshall coauthored this memo. Marshall explained his familiarity with *Sheldon* as follows:

> I used *Sheldon* in my amicus brief because I was aware of it from the [Attorney General] opinion. As to *Sheldon*'s appearance in the [Attorney General] opinion, the news is unexciting: I believe that I came across it as part of a seemingly endless series of searches through old cases on Westlaw for any scraps of reference to the right to keep and bear arms. I do not recall having seen it in the literature. *Sheldon* was instructive both because of its proximity to the Founding—predating the spike in cases on the right beginning in 1840—and because of its linking of the arms right with the freedoms of speech and of the press. The latter aspect both indicates that the arms right is an individual one (the question presented in the [Attorney General] opinion) and suggests an approach to discerning its limits (the context of the citation in the amicus brief). In all of this, *Sheldon* is complemented by *Commonwealth v. Blanding* (Mass. 1825), citing alongside *Sheldon* in both the [Attorney General] opinion and the amicus brief.[12]

The second point of interest in Justice Scalia's citation of *Sheldon* is his reliance on what was dictum from a contempt action in a libel case dealing with the First Amendment to support his conclusion about the scope of the Second Amendment. Despite the fact that both the amicus curiae brief and the Attorney General memorandum clearly stated that *Sheldon* was a libel case, Justice Scalia did not note this. Yet elsewhere in his opinion, Justice Scalia stated the subject matter of cases that discussed the Second Amendment only in dicta. For example, he referred to *Commonwealth v Blanding*[13] as "an 1825 libel case"[14] and described *Aldridge v Commonwealth*[15] as "[a] Virginia case in 1824 holding that the Constitution did not extend to free blacks…."[16] The omission is even more curious because, as Marshall notes, the analogy between the Second Amendment and the First Amendment rights of freedom of speech and freedom of the press supports the view that the right to keep and bear arms is an individual right.

More significant is the fact that Justice Scalia suggested that Judge Chipman, had he been thinking of something other than individual rights, would have said something different. In so doing, Justice Scalia ignored the likelihood that Judge Chipman's observation was no more than a throwaway observation amidst a detailed discussion of libel and the First Amendment. While Judge Chipman's observation might provide insight into early nineteenth-century views of the Second Amendment, it was not intended to advance Second Amendment jurisprudence as Justice Scalia suggests.

III

What is good about Justice Scalia's discussion of *Sheldon* is not its contribution to Second Amendment jurisprudence, but the fact that 70 years after publication, Blume's Transactions was cited in an opinion of the United States Supreme Court. During his tenure at the University of Michigan Law School, Professor Blume was an esteemed member of the faculty. His contributions to the early history of Michigan jurisprudence were highly regarded during his lifetime. That his Transactions continued to have relevance in 2008 is a mark of his academic achievements. ■

Avern Cohn was appointed judge of the United States District Court, Eastern District of Michigan, in 1979 by President Jimmy Carter. Before his appointment, Judge Cohn engaged in private practice in the Law Office of Irwin I. Cohn and at Honigman Miller Schwartz and Cohn. Judge Cohn is a member of several bar associations, including the Federal Bar Association and the Bar of the Supreme Court of the United States. He received his JD from the University of Michigan Law School in 1949.

FOOTNOTES

1. *District of Columbia v Heller*, 554 US 570, 571; 128 S Ct 2783; 171 L Ed 2d 637 (2008) (syllabus prepared by the Reporter of Decisions for the *United States Reports*).
2. *United States v Sheldon*, Case No. 315 (1829), in 5 Blume, ed, Transactions of the Supreme Court of the Territory of Michigan (University of Michigan Press, Ann Arbor: 1935–1940).
3. Quaife, *Book Review*, 47 Am Hist R 144, 145 (1942).
4. *Sheldon*, n 2 *supra* in 5 Blume's Transactions, p 346.
5. Michigan Supreme Court Historical Society, *Biographies: Henry Chipman* <http://www.micourthistory.org/bios.php>. All websites cited in this article were accessed October 10, 2011.
6. *Sheldon*, n 2 *supra* in 5 Blume's Transactions, pp 346–347.
7. *Heller*, 554 US at 612.
8. *Id.* at 626.
9. *United States v John P Sheldon*, Case No. 337 (1829), in 5 Blume, ed, Transactions of the Supreme Court of the Territory of Michigan (University of Michigan Press, Ann Arbor: 1935–1940).
10. Brief of the CATO Institute and History Professor Joyce Lee Malcolm as Amici Curiae Supporting Respondent, *District of Columbia v Heller*, 554 US 570, 571; 128 S Ct 2783; 171 L Ed 2d 637 (2008), available at 2008 WL 383526, p 30.
11. Bradbury, Neilson Jr. & Marshall, United States Department of Justice, Office of Legal Counsel, *Whether the Second Amendment Secures an Individual Right* 86 (2004), available at <http://www.justice.gov/olc/secondamendment2.pdf>.
12. Letter from C. Kevin Marshall to Hon. Avern Cohn (March 4, 2009) (on file with author).
13. *Commonwealth v Blanding*, 20 Mass (3 Pick) 304 (1825).
14. *Heller*, 554 US at 602.
15. *Aldridge v Commonwealth*, 4 Va (2 Va Cas) 447 (1824).
16. *Heller*, 554 US at 611.