

“Dangerous Women”: Feminism, Self-Defense, and Civil Rights

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Introduction

“In today’s world, if a woman is assaulted, she cannot expect or depend on anyone to help or protect her but herself. Victim behavior is learned behavior . . . Women can stop rape. They can do so by learning psychological and physical skills effectively to fight back.” *Dr. Judith Fein, Feminist self-defense author.*¹

One warm summer night, a slim and lovely young mother walked from an Orange County, California mall to her car, parked on the outer perimeter of the parking lot. Her stomach tightened as she sensed that a man following about fifteen yards behind was stalking her. Her mind flashed to a prior experience. She had been kidnapped by three men and held captive in a motel room for more than twelve hours. Hour after hour, the predators tortured and gang raped her, forcing her to submit to sadistic and degrading sex acts. During the entire encounter all she could think about was “will I live to see my little girls again?” She escaped when the rapists fell asleep, exhausted.

Subsequent to the rape, she did weights, aerobics and Martial Arts, but the memory of being dominated by three bigger, stronger males preyed on her mind. She applied for a defensive gun permit, which, under California’s system of discriminatory

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¹ JUDITH FEIN, ARE YOU A TARGET? A GUIDE TO SELF-PROTECTION AND PERSONAL SAFETY 11 (1988).

licensing, was routinely denied. As she realized that once more, a predator was closing in, she thought “not again.” Reaching into her purse, she gripped the small-caliber handgun she now carried despite the state’s legislative disapproval, and turned to face her assailant, who was now closing fast. Before the gun was fully from her purse, he spotted it with a gasp. He momentarily froze and studied her, noting carefully her look of combined revulsion, hate, fear, and rage. He determined in that instant that, if pressed, she might shoot. He spun and exited the scene like a world-class sprinter. As soon as he disappeared from view, she put the gun back in her purse and drove home to her husband and children, shaken but safe. Since she was carrying the firearm without a permit, she never reported the incident to police,² but revealed in confidentiality to her self-defense instructor, not only the healing power she felt to see the predator become the prey and run away, but also her discomfort with having done an ostensibly criminal act by carrying a defensive weapon.³ Is she a dangerous criminal for carrying a “Saturday Night Special”⁴

² Researcher Gary Kleck notes that police are rarely if ever informed of successful defensive gun use because of the fact that in most cases the citizen would be susceptible to criminal penalty for possession. Consequently most citizen gun use that comes to the attention of police is the unsuccessful encounter in which someone is killed or injured. Kleck argues this phenomenon accounts for what he calls the “police chief’s fallacy” the notion that because police rarely are notified that a citizen has successfully used a firearm to scare off an aggressor, that such incidents are rare and that citizen use of firearms is ineffective for self defense. See GARY KLECK, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* 175 (1997).

³ Name withheld, she was a Martial Arts student of co-author Bob Barrow. In hundreds of confidential interviews on self-defense experiences, similar clandestine defensive gun use was much more frequent than most people would realize. In almost no cases encountered by the author, did the defender actually fire the weapons while in all cases, the assailants fled without injury to any party. In no case was the incident reported to police. Thus anecdotal evidence supports the notion that armed victims deter criminal assault.

⁴ The term “Saturday night special” is used here to describe a small frame, small caliber handgun comfortable for a woman. The term originated as a pejorative term used in the south in the 1870’s to ban the small, cheap handguns black people could afford, while allowing the big, expensive military handguns KKK members brought back from the civil war. The term has been an effective propaganda tool ever since. See Nicholas J. Johnson, *Principals and Passions: the Intersection of Abortion and Gun Rights* 50 RUTGERS L. REV. 97, 132-133, fn. 160 (1997), Don B. Kates, *Gun Control: Separating reality From Symbolism* 20 J. CONTEMP. L. 353, 371 (1994).

without a permit? Or, as a citizen resisting violence and thwarting crime, does she contribute to the “security of a free state?”⁵

The position of this paper is that this woman’s decision to carry a defensive weapon is legitimate social policy that Congress intended to protect as a fundamental right through the Fourteenth Amendment and the Civil Rights Act (42 U.S.C. 1983)⁶

I. Self-Defense Empowers Women

“Self-defense training tells women how to avoid the habits of nice girls and be *mean women* instead, *Professor of Women’s Studies Martha McCaughey Ph.D.*⁷

The young mother in the case above, before the kidnap-rape, considered aggression unfeminine, feared guns, and never considered self-defense training. She was in essence the ideal victim. Confronted by aggressive males, she found herself paralyzed and submissive. This submissive role of helpless “damsel in distress” only fueled the rapist’s fantasies. Such self-defense-phobia is common. Self-defense instructors observe physically strong women who at first are so frightened they cower and cry uncontrollably even in a simulated self-defense situation.⁸ Some feminist writers argue this victim mentality is learned helplessness resulting from sex role stereotyping.⁹ Susan

⁵ U.S. CONST. Amend. II, “A well ordered militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.”

⁶ 42 U.S.C. Sec. 1983 allows that, “Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory [or the District of Columbia], subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the constitution or laws of the United States shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress [except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable]” The bracketed sections were by amendments Pub. L. 96-170 (1979) and Pub. L. 104-317 (1996).

⁷ MARTHA MCCAUGHEY, *REAL KNOCKOUTS: THE PHYSICAL FEMINIISM OF SELF-DEFENSE* 1 (1997).

⁸ PAXTON QUIGLEY, *ARMED AND FEMALE* 37 (1989).

⁹ MCCAUGHEY, *supra* note 7 at 19.

Brownmiller observes, “We have been trained to cry, to wheedle, to plead, to look for a male protector, but we have never been trained to fight and win.”¹⁰ Thus many women are culturally conditioned to a submissive role, ceding both the psychological as well as physical advantage to the aggressor.¹¹

A. Feminism and the Self-Defense Mindset

“North American women in unprecedented numbers are learning to knock out, maim and shoot men who assault them.” *Martha McCaughey*¹²

Professor Martha McCaughey argues that our language reveals how the depth of culturally ingrained gender stereotypes may negatively affect the self-defense mindset.¹³ One with courage is “manly” as opposed to an “unmanly” weakling or coward.¹⁴ She argues that the identification of sexual organs with behavioral attitudes is also revealing of cultural stereotyping. One who is assertive “has balls.”¹⁵ One who is timid or weak is “a pussy.” Gender stereotypes foreclose many women from assertive behavior because the assertive woman, the “woman with balls” is acting “unwomanly.”¹⁶

¹⁰ SUSAN BROWNMILLER, *AGAINST OUR WILL* 402 (1975), *cited in* FEIN, *supra* note 1 at 24.

¹¹ Not even women trained as law enforcement officers are totally immune to this conditioning. Police officer Margaret O’Shaughnessy observes, “We need a program to give women the instinct to fight. We’ve been trained all our lives not to hit. We’ve got to find that switch and click it.” See QUIGLEY *supra* note 8 at 37,

¹² MCCAUGHEY, *supra* note 7 at 1

¹³ *Id.* at 19

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 25.

Self-defense however is gender-neutral.¹⁷ Self-defense training can overcome the victim mentality by inculcating a non-gendered self-defense mindset, allowing women to think rationally about whether and how to confront potential threat.¹⁸ It also provides a means to thwart solo attack. For example a convicted sex offender tried to force a High School Sophomore into his car.¹⁹ She was trained, in a basic fighting-arts class, not to struggle aimlessly, but to focus her energy, and explode at an opportune moment. When the sex-offender grabbed her, she took a breath, relaxed and walked two steps toward his car. Feeling no resistance, he instinctively relaxed his grip. Instantly, she kicked him in the testicles as hard as she could. As he doubled over clutching himself, she screamed like a banshee and kicked his head like a soccer ball.²⁰

He had successfully raped several adult women. All had submitted, and all were so horrifically abused they were too traumatized to testify. With around eight weeks of professional instruction and a self-defense mindset, this fifteen-year-old put a stop to his criminal activity, sending him first to the hospital and then to jail. Further, she

¹⁷ Co-Author Bob Barrow has trained nationally recognized female martial-arts fighters. Some are hyper-feminine in their everyday lives; others are not. All have been trained to “flip the switch” and become simply a fighter in the arena of combat. Ailene Garmeros for instance was a student of co-author Bob Barrow at the Chuck Norris Karate School in Torrance California. Over a period of two years, she made a transition from a timid little girl crying she wanted to go home to a poised and feminine female instructor who enjoyed stepping into the fighting arena, instantly changing her demeanor from demure young woman to trained fighter, and pummeling male opponents of equal rank and experience.

¹⁸ A lack of self-defense training and mindset leads to irrational and consequently dangerous conclusions about life and death issues such as telling women that a whistle is better for self-defense than a gun because it can’t be taken and used against her. *See for example* STEFANIE MANN AND M.C. BLAKEMAN, *SAFE HOMES, SAFE NEIGHBORHOODS: STOPPING CRIME WHERE YOU LIVE* 9/12.(1993). Ask most self-defense instructors whether if attacked they would prefer to have a gun or a whistle and few would choose the whistle.

¹⁹ She was student of co-author Bob Barrow at the Chuck Norris Karate Studios in Torrance California.

²⁰ Styles of Martial Arts, which have excellent kicking techniques, such as Korean, or Northern Chinese are especially effective for women. Most women are flexible and can quickly learn to kick with power. A woman’s leg strength is relatively closer to that of a man’s than is her upper body strength. Further, her leg is both longer and stronger than his arm. Therefore her kicking versus his punching means she can win a physical fight. However, this does not mean she will want to fight if there is any possible way to avoid it.

contributed to the general public safety not only by refusing victimization herself, thus thwarting an attempted kidnapping, but also contributing to the general security by protecting other women who would otherwise have been attacked. Further, her courage empowered other young women who learned of the experience and took similar instruction. While training in Fighting Arts can thus build confidence, overcome the Self-defense phobia, and provide effective self-defense in certain situations, unarmed combat has such limitations that the Martial Arts Masters who developed it considered it a last resort for use only when no sort of weapon was available.²¹

B “Arms and the Woman”

“Stance. Aim. Line up the sights. Finger on the trigger. Squeeze. . . How exhilarating to hear the loud explosion of the gun, to smell the gunpowder and to realize I had done this thing that had seemed so forbidden, [and done so] if for no other reason than my own feminist principles.”
*Professor Martha McCaughey on her first shooting lesson*²²

A handgun is not only the most effective, but in some ways the most humane method of self-defense. Margot Feldman, ordered out of her shower by an arrogant knife-wielding rapist, shivered naked in her bedroom nearly paralyzed with fear. Commanded to put on some “sexy underwear” she reached into her drawer where she discovered a long

²¹ Robert L. Barrow, Note *Women with Attitude: Self-Defense, Policy, and the Law* 21 T. JEFFERSON L. REV. 59, 70-71 (1999).

²² MCCAUGHEY, *supra* note 7 at 69.

-forgotten handgun her dying father had made her promise to keep loaded there.²³ When she turned around with her panties in one hand and a gun in the other, the balance of power instantly shifted and the arrogant criminal became a groveling, quivering coward.²⁴ She forced him at gunpoint to call 911 and report himself. She declared, "...I saved my life, or at least my sanity with a gun I never had to shoot. And I saved the lives of who knows how many other women. And you know what else? I would have shot the creep if I had to."²⁵ This is not an isolated case. Research shows that victims armed with a gun are more likely to prevent the completion of the crime and less likely to be injured or killed.²⁶

While a firearm thus provides a definite advantage for a woman over a single assailant, where there are multiple attackers or the criminals themselves are armed, it provides the only credible means to equalize the situation. For example, Evelyn Tankersly, awakened when an armed intruder kicked in her bedroom door, fired the handgun from her bedside table. The intruder ran bleeding down the stairs yelling, "Get out! She's got a gun!" Police learned Tankersley's home had been invaded by several

²³ QUIGLEY, *supra* note 8 at 22-23.

²⁴ *Id.*

²⁵ *Id.* at 23.

²⁶ GARY KLECK, TARGETING GUNS 167-174 (1997). This common sense conclusion is based upon Kleck's analysis of the most extensive, representative, and detailed data base available relevant to victim defensive action. This data base is compiled from the National Crime Victimization Study, between 1979 and 1985 and includes over 180,000 robberies, assaults and burglaries. His analysis is consistent with the findings of other researchers who examined smaller data bases. Phillip Cook found that burglaries where the victims resisted with firearms were less likely to be completed. See Phillip Cook, *The Technology of Personal Violence* in 14 CRIME AND JUSTICE 57 (Michael Tonry ed., 1991). Southwick found that robbery victims using firearms were less likely to lose cash or other valuables. Lawrence Southwick Jr., *Self-defense with guns: the consequences* (1996) (Revised version of a paper presented to the annual meetings of the Western Economic Association, San Diego, 1995 on file with the author). Kleck and DeLorne show that those who resist robberies using a firearm are less likely to lose property or to be injured than are victims who do not resist or who use another means to resist. Gary Kleck and Miriam DeLorne, *Victim Resistance and Offender Weapon Effects in Robbery*, 9 JOURN. QUAN. CRIMIN. 55-82. (1996)

intruders armed with three handguns, one of which the predator had dropped at her bedroom door.²⁷ In another case, two armed robbers cut the phone line preparatory to a home invasion. Ruby McFarland, a seventy-four-year-old grandmother ran them off by firing a warning shot through the door with a hundred-year-old handgun that had belonged to her grandfather.²⁸

Thus a gun, the great equalizer, is especially advantageous to women. The average assailant attacking her is five inches taller and 45 pounds heavier.²⁹ If a woman must engage in an unarmed fight against a criminal assailant, someone definitely *must be* injured.³⁰ Black Belt self-defense expert Dianne Huntemann described how she used makeshift weapons to fend off a would-be rapist on the streets of Paris. “I stabbed him in the throat with a rat-tail comb and shoved him in front of a car.”³¹ Feminist Martial Arts author Judith Fein agrees that in unarmed combat someone has to get hurt, “*you indeed have to hurt him*. You must, in fact, *incapacitate* him so that he can not come after you.”³²

²⁷ Carrie Greer, *Victim Describes Shooting Robbers*, LAS VEGAS REV. JOURN., Mar. 16, 1995, at 1B.

²⁸ Martha Jackson, *Widow Scares Away Intruders*, CHARLESTON DAILY MAIL, Feb. 9, 1994, at 1A.

²⁹ Sayoko Blodgett-Ford, *Do Battered Women Have a Right to Bear Arms?* 11 Yale L. & Pol’y Rev. 509, 534 (1993).

³⁰ Research shows that women armed with a weapon of any kind fare better against rapists than do unarmed women. Kleck and Sayles compared incidents involving armed resistance with unarmed resistance in a national survey. They found that rape victims who resisted using a weapon of any kind, whether it was a gun, knife, or another weapon, were less likely to have the rape attempt completed than victims resisting with any other way. Gary Kleck and Susan Sayles, *Rape and Resistance*, 37 SOC. PROB. 149-162 (1990). Their results confirmed Lizotte’s 1986 analysis of rapes in selected cities in *Determinants of completing rape and assault*, 2 JOURN. OF QUAN. CRIM. 203-217 (1986).

³¹ Ms. Huntemann a Chuck Norris National Female Black Belt “Competitor of the Year” was a student of co-author Barrow.

³² FEIN, *supra* note 1, at 24. (emphasis in original)

In contrast, ninety-seven percent of the time a citizen displays a handgun she or he deters criminal attack without firing or by merely firing a warning shot.³³ No one is injured because the assault was deterred.³⁴

Since some jurisdictions prohibit carrying defensive firearms, such incidents are under-reported because women who have defended themselves by displaying a defensive firearm who subsequently report the incident are often arrested and charged with felony firearm possession.³⁵ Nevertheless, estimates of such defensive gun use range from 700,000 to as high as 2.5 million per year.³⁶ Almost half of these incidents are by women.³⁷ Even on the rare occasions when an armed citizen must shoot a criminal

³³ Kleck *supra*, note 26 at 162.

³⁴ This claim is based upon Kleck and Gertz's path-breaking 1993 research in which they engaged a professional polling firm to survey a national representative sample of adults, age 18 and over and living in households with telephones. *See*, Gary Kleck and Mark Gertz, *Prevalence and Nature of Self-defense with a Gun*, 86 JOURN. CRIM. L. & CRIMIN. 150-87 (1995). Using random digit dialing sampling techniques, forty-eight independent samples of residential telephone numbers were drawn, one from each of the lower forty-eight states. Professional interviewers asked questions about defensive uses of firearms of all respondents in the sample. Almost 5,000 interviews (4,977) were completed, including 222 respondents who reported a defensive gun use (DGU) against another person. To be included, a DGU had to involve a gun at least being used as part of a threat against a person, for example, by pointing it at the other person, "for self-protection or for the protection of property at home, work, or elsewhere." Respondents were asked separately about their DGU. (eg, police work, security guard or military service), as were any defensive uses against animals. Any mention of defensive use of firearms elicited a long series of detailed questions designed to establish precisely how the firearm was used, and whether the DGU was connected with a specific crime or crimes. All reports of DGUs were subject to extensive screening in order to weed out any unreliable reports; any reports found to be problematic were rejected.

³⁵ After giving up her valuables to a street punk, Dorothy Newton and her nephew were shot. She recovered but he was paralyzed. When surrounded by gangsters again she and her niece again submitted, giving up their money and valuables. When they pointed a gun at Newton's face and went for her niece, she pulled a concealed handgun, wounded two and chased off the rest. She was arrested and charged with unlawful possession. Scott Bowles, *A Gun to the Head Forced Her Hand: "Flashback" Spurred Richmond's Reluctant Hero to Fire in Self-Defense*, WASHINGTON TIMES, June 28, 1996 at A1. When Pizza Delivery woman Josie Cash scared off robbers by showing her gun, she reported the incident. She was arrested and charged with a felony for having the gun. JOHN R. LOTT, MORE GUNS LESS CRIME 13 (1998).

³⁶ Kleck and Gertz, *supra* note 34, John R. Lott Jr., *The Real Lessons of School Shootings* WALL ST. J. Mar. 27, 1998 at A 14.

³⁷ Kleck and Gertz *supra* note 34, Table 4, found that 46% of defensive gun users were women, while Philip Cook and Jens Ludwig, GUNS IN AMERICA, (NY Police Foundation, 1996) found 41% of were women.

assailant, 85% of those shot with a handgun will recover.³⁸ Further, citizens are 5.5 times less likely to shoot the wrong person than are police.³⁹

Approximately fourteen million gun owners are women.⁴⁰ Gun ownership surveys reveal that between 37% and 53% of American households contain firearms and while many of those citizens express liberal values, those values do not affect their willingness to use a gun to resist criminal attack.⁴¹ In fact, 80 percent of “good Samaritans” who come to the aid of crime victims are gun owners.⁴²

Nicholas J. Johnson points out that anti-self defense advocates favor a submission theory, that one should not resist a criminal attack. Handgun Control argues, “The best defense against injury is to put up no defense---give them what they want.”⁴³ Betty Freidan rejects the very idea of individual safety. She believes that, “gun-control should override any personal need for safety.”⁴⁴ However a woman defending herself with a handgun is 2.5 times less likely to be injured than one who submits, and four times safer than one who resists by another means.⁴⁵ Therefore, researcher John Lott has concluded a

³⁸ Nelson Lund, *The Past, Present, and Future of the Individuals' Right to Arms* 31 GA. L. REV. 1, n. 169 (1996).

³⁹ David Kopel, *Trust the People: The Case Against Gun Control* CATO INSTITUTE POLICY ANALYSIS NO. 109 at 9. (July 11, 1988). Available at <<http://www.Cato.Org>>.

⁴⁰ McCaughey, *supra* note 7 at 1. Peggy Tartaro, the editor of *WOMEN & GUNS*, estimates that between 11 million and 17 million women in the United States own one or more firearms. Cited in Mary Zeiss Stange and Carol K. Oyster *GUN WOMEN, FIREARMS AND FEMINISM IN CONTEMPORARY AMERICA* (2000) at 233. This agrees with Tom Smith's estimate in *Changes in firearm Ownership Among Women, 1980 – 1994*, 86 J. CRIM. L. & CRIMINOLOGY 133, 143 (1995) that 21% of gun owners are women.

⁴¹ See Gary Kleck *supra* note 26 at 67. See also John T. Whitehead and Robert H. Langworthy, *Gun Ownership and Willingness to Shoot*, 6 JUST. Q. 263, 273 (1989) Cited in Nicholas J. Johnson, *Principles and passions: The Intersection of Abortion and Gun Rights*, 50 Rutgers L. Rev. 97, 84, at fn.8 (1997).

⁴² Ted L. Huston, Gilbert Geis, Richard Wright, *The Angry Samaritans* PSYCHOLOGY TODAY June 1976 at 64.

⁴³ Johnson, *supra* note 41 at 106.

⁴⁴ Ann Japenga, (interviewing Betty Friedan) *HEALTH*, March-April 1994, at 52 cited in Daniel D. Polsby and Don B. Kates, *Of Holocausts and Gun Control*, 75 WASH. U. L.Q. 1237, 1243 (1997).

⁴⁵ LOTT, *supra* note 35 at 4.

woman should resist with a gun if available, but if not, submission is probably safer than resistance.⁴⁶ Scare stories however, that the criminal will take the gun away and use it on the woman are generally unfounded.⁴⁷

C. Self-Defense and Public Safety

In the last fifteen years, 23 states have passed right to carry laws, mandating carry permit applications be honored absent legitimate disqualification.⁴⁸ In the most comprehensive criminological study to date, economist John Lott found that within five years of the time a State introduces a right to carry law, murder rates drop by fifteen percent, robbery by eleven percent and rape by nine percent.⁴⁹ He points out that even with property losses associated with criminal shifts from personal violence to crimes against property, there is a net societal benefit from armed citizen deterrence to crime. From a purely economic standpoint, every single citizen who receives a concealed weapons permit reduces victim losses by \$5000. Some of those losses involve avoiding the medical and social costs of bodies shattered by criminal violence. Therefore, Lott

⁴⁶ *Id.*

⁴⁷ A woman may quickly master weapons retention in a basic defensive shooting class. A good source of information is A.W.A.R.E. (Arming Women Against Rape and Endangerment) online at <<http://www.aware.org.html>> A criminal (no matter how skillful) cannot take a gun from a woman unless he gets close enough to touch the gun. If she keeps him back, he can't grab the gun. Since a potential attacker understands that a woman can move her finger an eighth of an inch more quickly than he can move his body, common sense favors retreat as opposed to trying for the gun. A police officer on the other hand is required to take a suspect into custody. To do so, the officer must pat down and cuff the suspect. Therefore, the officer faces the combination of a cornered suspect with the necessity of going within "take away" range time after time. Therefore, the odds are higher that a police officer may ultimately be disarmed than a citizen. Thus the comparison of gun takeaways between officers and citizens is based on false analogy, a logical fallacy in which one draws a faulty conclusion by comparing two situations that in fact are not completely analogous. Author Barrow has trained police officers in contact self-defense and found their prior official training minimal. Police spokesperson who argue that since "trained officers" have guns taken away, then the "untrained" citizen is even more likely to lose the gun to a criminal are thus mistaking the differences in the two sets of circumstances.

⁴⁸ This brings the number of states that have a right to carry law to a total of 31 states, *See* Lott *supra* note 35 at 43. In addition, two states, Vermont and Idaho, do not require a license to carry a concealed handgun.

argues, “concealed handguns are the most cost-effective method of reducing crime thus far analyzed by economists, providing a higher return than increased law-enforcement or incarceration, other private security devices, or social programs like early educational intervention.”⁵⁰

More important, however, are the lives and psyches saved by deterring criminal attack. This deterrent effect of increasing concealed defensive firearms is especially advantageous to women. Each additional woman carrying a concealed handgun decreases the murder rate for women by three to four times more than an additional man carrying a concealed handgun reduces the murder rate for men.⁵¹ Rape was substantially reduced in Orlando Florida simply by publicity that police were teaching women to shoot.⁵² Since concealed carry permits prevent the criminal from knowing who is armed and who is not, those who are not armed, benefit from the general deterrent effect as criminals chose non-confrontational crime rather than risk being shot. John Lott studied 54,000 observations, across all 3,054 Counties in the US over 18 years.⁵³ He computes that in 1992, had the rest of the United States adopted nondiscriminatory concealed carry laws, about 1,500 murders and 4,000 rapes would have been avoided.⁵⁴

In sum, self-defense thwarts crime and saves lives. A firearm, because it nullifies advantages of size, strength, and numbers, and because its deterrent effect often precludes

⁴⁹ Ira J. Hadnot, *Interview with John Lott*, DALLAS MORNING NEWS, May 31, 1998 at 1J. note

⁵⁰ John R. Lott and David B. Mustard, *quoted in* Jeffrey Snyder, *Fighting Back: Crime Self-Defense and the Right to Carry* CATO POLICY ANALYSIS No. 284 Oct. 22, 1997 at 19. Available online at <<http://www.cato.org/pubs/pas/pa-284.html>>

⁵¹ Hadnot, *supra*, note 49.

⁵² QUIGLEY, *supra* note 8 at 12-14.

⁵³ LOTT, *supra* note 35 at 164.

⁵⁴ *Id.* at 160.

aggressive action, is an especially useful defensive tool. That is why the Framers of the Bill of Rights, more accustomed to arms than many today, having just fought a war against a government that had tried to confiscate their arms, enshrined in the Constitution of the United States the notion that an armed citizenry is “necessary to the security of a free State.”⁵⁵ The framers of the Fourteenth Amendment had the same understanding and observing the attempts of racist southern governments to disarm black people after the Civil War, determined to protect fundamental rights, including the right to possess and carry a defensive firearm, for all citizens.

II. Self-defense As a Civil Right

In my State for many years, and I presume there are similar laws in most of the southern States, there has existed a law of the State based on its police power, which declares that free negros [sic] shall not have the possession of arms or ammunition. This bill [the Civil Rights Act of 1866] proposes to take away from the State that police power. . . *Senator William Saulsbury arguing against the Civil Rights Act of 1866.*⁵⁶

The original firearms possession laws, while designed primarily to disarm blacks in the southern states, manifested sexism as well as racism.⁵⁷ The first concealed weapons laws were based on the consideration that openly carrying big guns was “manly” while discreetly carrying small guns was “unmanly.”⁵⁸ The smallest handgun made by Smith and Wesson was called the “Lady Smith” because it fit well in a woman’s hand.⁵⁹ Women

⁵⁵ U.S. CONST. Amend. II.

⁵⁶ Cong. Globe, 39th Cong. 1st Sess. 478 (Jan 29 1866).

⁵⁷ Robert J. Cottrol and Raymond T. Diamond, “*The Second Amendment: Toward an Afro-Americanist Reconsideration*,” GEORGETOWN LAW JOURNAL 80 (1991).

⁵⁸ State v. Chandler, 5 La. An. 489, 490-491 (1850), cited in Snyder, *supra* note 50 at 4.

⁵⁹ Stephan P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to “Bear Arms.”* 49 LAW & CONTEMP. PROBS. 151, 158,159 (1986)

also carried derringers also called “muff guns.”⁶⁰ Smaller than the palm of one’s hand, they were easily concealable in a garter, bodice, purse, or muff. A pre-Civil War Louisiana judge opined regarding the constitutionality of early concealed weapons laws, “[such restrictions] interfere with no *man’s* right to carry arms...’in full and open view,’ which places *men* upon an equality. This [open carry] is the right guaranteed by the Constitution of the United States, and which is calculated to incite *men* to *manly* and noble defense of themselves, if necessary, and of their country, without any tendency to secret advantages and *unmanly* assassination.”⁶¹

This “manly” approach to self-defense would not extend to blacks. In the infamous Dred Scott decision, Chief Justice Tanney of the United States Supreme Court warned of what he considered the terrible consequences that would follow if blacks were to be granted citizenship. If they became citizens, the Chief Justice opined, blacks would be able to, “. . . speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.”⁶² Under Anglo-American tradition, the latter right had been considered the most fundamental of these stated rights because it related to very survival and the other rights were considered dependant upon it.⁶³

After the Civil War, many whites in the defeated southern states feared the fact that, true to Justice Tanney’s prophecies, the newly acquired rights of citizenship gave

⁶⁰ *Id.* at n. 63.

⁶¹ Snyder, *Supra*, note 50.

⁶² Dred Scott v. Sanford, 60 U.S. (19How.) 393,417 (1854).

⁶³ Enlightenment philosopher John Locke, whose ideas regarding the fundamental nature of the rights to life, liberty, and property were echoed in the Declaration of Independence and both the 5th and 14th Amendments, considered armed self-defense a corollary to the right to life, which Locke considered the most fundamental of rights. Locke argued that a people disarmed “have given up them

black citizens the right to vote, to speak, to assemble, and to possess and carry firearms. The right to bear arms had long been considered a traditional bulwark against government oppression and certainly makes oppression more costly.⁶⁴ The KKK was organized to restore dominance of the southern whites, but first, the blacks would have to be disarmed. In the racist epic film “Birth of a Nation” producer-director D.W. Griffith (the son of a confederate officer) depicted the disarmament of the blacks by the white-robed night-riders as a glorious defense of southern virtue and honor.⁶⁵ President Woodrow Wilson, seeing a private screening of the film, was stricken by the intensity of the racial division and contention that the film depicted. He is reported to have said, “It’s like writing history with lightning. And my only regret is that it is all terribly true.”⁶⁶ This disarmament of black citizens in the post civil-war south was founded on “black codes” such as a Mississippi law that required blacks to obtain a license from the county sheriff to carry a gun:

selves to the absolute power and will of a legislator. . . to make a prey of them when he wishes. John Locke cited in Anthony J. Dennis, *Clearing the Smoke From the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57, 74 (1995).

⁶⁴ An important lesson to be gleaned from this history is that weapons control has historically been more about government power than public safety. Mao Zedong recognized the relationship between gun control and social control in his statement “political power grows out of the barrel of a gun.” Mao Zedong *quoted in* Eastern Asian Study Center, University of Indiana, *Mao on Revolution*, CHINA TEACHING WORKBOOK: GOVERNMENT AND POLITICS (Apr. 23, 1999) available at <http://www.easc.indiana.edu/pages/easc/cu.../china/1996/EACPWorkBook/gov/mao_revo.htm>. Mao Zedong further articulated the relationship between social control and gun control in his observation to the Communist Party in 1938, “Our principle is that the [communist] party commands the gun, and the gun must never be allowed to command the party.” *Id.*

⁶⁵ THE BIRTH OF A NATION (D. W. Griffith 1915). The explicitly racist film originally premiered with the title THE CLANSMAN, but within one month was re-titled with the present title. The film was based on Rev. Thomas Dixon Jr.’s anti-black play, THE CLANSMAN. The film is still used today as a recruitment piece for Klan membership. The NAACP declared the film “the meanest vilification of the Negro race.” While the film sparked riots, it was one of the biggest money-makers in the history of film. To respond to his critics, Griffith did a shortened version removing some of the worst portions, and produced a sequel called INTOLERANCE. Tim Dirks, *The Birth of a Nation Greatest Films* at <http://www.greatestfilms.org>. (Mar. 5, 2001). (reviewing THE BIRTH OF A NATION (D. W. Griffith 1915)).

⁶⁶ *Id.*

No freedman, free Negro or mulatto, not in the military service of the United States Government, *and not licensed so to do by the board of police of his or her county*, shall keep or carry firearms of any kind, or any ammunition. . . and it shall be the duty of every civil and military officer to arrest any freedman, free negro, or mulatto found with such arms or ammunition, and cause him or her to be committed to trial. . .⁶⁷

The governmental agents acting under this law were county sheriffs and State Militia, authorities to whom the new citizens would have to apply for a gun license. The prospect of a black man, many of whom were Union army veterans, being granted a gun license by a Mississippi Sheriff in the 1870's or by the state militia which generally were the defeated confederate soldiers, were as slim as a woman getting a gun permit in Los Angeles today. Any black person foolish enough to apply for a gun license merely informed the authorities of his or her possession so that they could then be disarmed. Once disarmed, they were defenseless against the depredations of the KKK, in some cases committed by the same officers who had first disarmed their victims under color of law.⁶⁸

As a result of this practice of disarming newly freed citizens under state authority Congressman Sumner offered a memorial from a convention of black citizens of South

⁶⁷ 1865 Miss. Laws 165 (Nov. 29, 1865) cited in Stevan p. Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms" Visions of the Framers of the Fourteenth Amendment* 5 SETON HALL CONST. L. J 341 fn. 26 (1995). All researchers on the issue of Fourteenth Amendment application of the right to arms are indebted to Halbrook for the most in-depth and comprehensive exegesis of that topic.

⁶⁸ Hence the Title of Section 1983, "Anti KKK Act." Modernly, the Supreme Court has recognized the depredations of the KKK as cited in the debates as a motivating force behind the Fourteenth Amendment and the Civil Rights Acts, but chose to ignore in those debates the many complaints by the Congress against state laws depriving black citizens of the right to bear arms: "There was it was said, no quarrel with the state laws on the books. It was the lack of enforcement that was the nub of the difficulties." *Monroe v. Pape* 365 U.S. 167,174 (1960)

Carolina representing “four hundred and two thousand citizens of that state, being a very large majority of the population.”⁶⁹ The memorial stated:

“We ask that, inasmuch as the Constitution of the United States explicitly declares that the right to keep and bear arms shall not be infringed—and the Constitution is the Supreme Law of the Land---that the late efforts of the legislature of this state to pass an act to deprive us [of] arms be forbidden, as a plain violation of the Constitution.”⁷⁰

Such Sentiments were the motivating force behind the Civil Rights Act of 1866, which was being debated simultaneously with the proposed Fourteenth Amendment.

Arguing in favor of the act, Rep. Henry J. Raymond stated:

Make the colored man a citizen of the United States and he has every right which you or I have as citizens of the United States under the laws and Constitution. . .He has a defined status; he has a country and a home, a right to defend himself and his wife and children; a right to bear arms. . .⁷¹

Outraged that laws in the southern States intended to restrict the right of new black citizens to carry a firearm for personal defense, Rep. Sydney R. Clark attacked Alabama and Mississippi firearms license laws stating, “Sir, I find in the Constitution of the United States an article which declares that ‘the right of the people to keep and bear arms shall not be infringed.’ For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws. . .”⁷²

Thus a significant purpose of Congress in drafting the Fourteenth Amendment and its enforcement law, was to effect machinery to nullify discriminatory state firearm

⁶⁹ CONG. GLOBE, 39th Cong. 1st sess. 337 (Jan 22, 1866).

⁷⁰ Proceedings of the Black State Conventions 1840-1865, at 284 (p.Foner and G. Walker eds.,1980), Cited in Halbrook, *supra*, note 67 at fn. 96.

⁷¹ Cong. Globe, 39th Cong., 1st Sess., 1226 (Jan. 29 1866).

⁷² *Id.* at 1838.

possession laws which contravened the rights, including, that of personal defense, which Congress held were intended to protect all citizens of the United States.

A. A Constitutional Amendment to Make the States Honor the Bill of Rights

"The great object of the first section of this [fourteenth] amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Senator Jacob Howard on Fourteenth Amendment incorporation of the Bill of Rights*⁷³

Dean Richard L. Aynes of the University of Akron School of Law observes that fourteenth amendment author John Bingham consistently maintained that the purpose of that amendment was to enforce the first eight articles of the bill of Rights, (including the private right of defensive arms) against abridgement by the states.⁷⁴ Bingham observed that whereas the Thirteenth Amendment had been narrowly drafted to preserve the rights of black citizens, the proposed Fourteenth Amendment was a "general" power to enforce on behalf of all citizens fundamental rights which were "guarantied [sic] from the beginning, but which guarantee has unhappily been disregarded by more than one State of the Union. . . simply because of a want of power in Congress to enforce that guarantee."⁷⁵

⁷³ John Bingham cited in David B. Kopel and Richard E. Gardner, *The Sullivan Principles: Protecting the Second Amendment From civil Abuse*, 5 SETON HALL CONST. L.J. 341, 415 (1995).

⁷⁴ Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L. J. 57,71 (1993).

⁷⁵ CONG. GLOBE, 39th Cong., 1st Sess. 429 (Jan. 25, 1866).

Bingham said *Barron v. Baltimore*,⁷⁶ which held the Bill of Rights unenforceable against the states, “makes plain the necessity for this amendment.”⁷⁷

Further, in the south, state judges were declaring void the Civil Rights Act of 1866 by which Congress had intended to guarantee black citizens “full and equal benefit of all laws and proceedings for the security of person and property.”⁷⁸ Congress had specifically defined in parallel legislation that this security of “person and estate” included “the right to keep and bear arms.”⁷⁹ George W. Julian said that southern courts were evading the Civil Rights Act of 1866 and abrogating the lawful right of arms for personal defense:

[The Civil Rights Act of 1866] is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment for the offence is whipping and the pillory. South Carolina has the same enactments . . . [thus] cunning legislative devices are being invented in most States to restore slavery in fact.⁸⁰

Representative Julian thus not only denounced the requirement of a license to carry a weapon, but considered such a requirement “a cunning legislative device” equivalent to “slavery in fact.”⁸¹

⁷⁶ 32 U.S. (7 Pet.) 243 (1833).

⁷⁷ CONG. GLOBE, 39th Cong., 1st Sess. 1089 (Feb. 28, 1866).

⁷⁸ Cong. Globe, 29th Cong., 1st Sess. 211 (Jan. 12, 1866).

⁷⁹ Cong. Globe, 39th Cong. Ist. Sess. 651 (Feb. 5, 1866).

⁸⁰ *Id.* at 3219.

⁸¹ *Id.* The idea that the right to personal arms was a mark of freedom while denial of personal arms was a badge of slavery was a concept long accepted in Anglo-American tradition. Don B. Kates observes that both Anglo-Saxon and Norman law forbade disarming a freeman while the ceremony of freeing a slave or serf included symbolically giving him the “arms suitable to a freeman.” Don B. Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENT. 87,94 (Feb. 1992) available at <http://www.azstarnet.com/~sandman/self-protection.html>. (Nov. 27, 1998). One of the significant 19th century commentators on the Constitution, Joseph Story, a justice of the Supreme Court, hailed the right to keep and bear arms as “the palladium of the liberties of a Republic.” JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 746 (Carolina Academic Press 1987) (1883). *cited in* Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.

In the Debates over the Civil Rights Act of 1866, Rep. James Wilson had taken the position that Congress already had the power under the Thirteenth Amendment to enforce the Bill of Rights against the States. Bingham had disagreed, advocating, in addition, the necessity of a constitutional amendment “which would arm Congress with the power to compel obedience to the oath [to uphold the constitution] and punish violations by state officers of the bill of rights.”⁸² Subsequently explaining the Fourteenth Amendment Bingham stated: “The fourteenth amendment. . . was deemed necessary. . . as an express limitation upon the powers of the states. . . [because] [I]t had been judicially determined that the first eight articles of amendment to the Constitution were not limitations on the power of the states.”⁸³

Thus, in drafting the Fourteenth Amendment, Congress intended to enforce against contrary State laws or practices, the protections of the Bill of Rights, including the right of the people to keep and bear arms for their personal defense.

B. A Need for Enforcement: The Civil Rights Act, 42 U.S.C. 1983.

“Before adoption [of the Fourteenth Amendment] any State might have...restricted freedom of speech or the press, or the right to bear arms...what prevents a State now from forbidding him to bear arms? ...The reason is the citizens of the States have new guarantees under the Fourteenth Amendment.”⁸⁴

REV. 1, 35 (1992). Story further observed that “one of the ordinary modes, by which tyrants accomplish their purpose without resistance, is by disarming the people, and making it an offense to keep arms.” *Id.* quoting JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (Harper & Bros. 1883).

⁸² Cong. Globe, 39th Cong. 1st Sess. 1088 (Feb. 5, 1866).

⁸³ Cong. Globe, 39th Cong., 1st Sess. 2541 (May 10, 1866) cited in Richard L. Aynes, *supra* note 74 at 73.

⁸⁴ S.p. app. 242 43rd Cong. 1st Sess. (May 4, 1874).

Even after the adoption of the Fourteenth Amendment courts in the South continued to resist the idea that the Amendment would overrule State Law. There was thus widespread resistance to the application of the law as intended by the Congress. A report on the protection of “Loyal and Peaceful Citizens of the South”⁸⁵ by representative B.F Butler indicated that the disarming of blacks under State authority and their subsequent murder by the KKK was continuing: “...in many counties they have preceded their outrages upon him [the freedman] by disarming him, in violation of his right to ‘keep and bear arms’ which the Constitution expressly says shall never be infringed.”⁸⁶

In the Anti-KKK act of 1871 (now 42:U.S.C. 1983) Congress proposed a Federal cause of action against “any person” acting of “under color of” any state law, custom, or practice who allowed a deprivation of rights guaranteed by the Constitution and law.⁸⁷ Thus a Mississippi Sheriff disarming a black citizen under state law, custom, or practice, could be held liable in Federal Court. Opponents balked at the broad scope of the proposed law. Rep. Washington C. Whittorne exclaimed:

“If a police officer of the City of Richmond or New York should find a drunken Negro or white man upon the streets with a loaded pistol flourishing it & etc., and by virtue of any ordinance, law, or usage, either of city or States, he takes it away, the officer may be sued, because the right to bear arms is secured by the Constitution.”⁸⁸

⁸⁵ House of Rep. Report No. 37 41st Cong. 3rd Sess. (Feb. 20, 1971).

⁸⁶ H.R. Rep. No. 41-37, at 3 (1871). Cited in David B. Kopel, *The Second Amendment in the Nineteenth Century*, 4 B.Y.U. L. REV. 1359, 1447 (1998).

⁸⁷ 42 U.S.C. 1983

⁸⁸ Cong. Globe. 42nd Cong. 1st Sess. 373 (1871).

While Representative Whithorne exaggerated in that no one intended the proposed law to protect drunken misuse of firearms, he correctly observed that through Sec. 1983, the Congress intended a broad right to sue officers violating the right to carry a firearm for a lawful purpose, with self-defense considered precisely such a purpose, a proposition with which none of the Representatives on either side disagreed.⁸⁹ The point of Sec. 1983 was to enforce fundamental rights, specifically including armed self-defense, upon the States. Senator A.G. Thurman said:

Here is another right of a citizen of the United States, expressly declared to be his right--the right to bear arms; and this right, says the Constitution, shall not be infringed. . . These articles all recognize the rights of citizens of the United States, and as I have repeatedly said, their recognition is equal to any definition.”⁹⁰

Rep. John Bingham, drafter of the Fourteenth Amendment, specifically identified the second amendment among protected rights: [reading each amendment] “. . . Article II 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. . . These eight articles I have shown never were limitations upon the power of the States, until made so by the Fourteenth Amendment.”⁹¹

⁸⁹ Although admitting the language of Sec. 1983 grants no immunities and the Congress specifically chose the language “any person” as a defendant, the Courts subsequently exempted judges in *Stump v. Sparkman*, 435 U.S. 349 (1978), legislators in *Tenney v. Brandhove* 341 U.S. 367 (1951), prosecutors in *Imbler v. Pachtman* 424 U.S. 409 (1976), the State (under the 11th Amendment) and gave qualified immunity to administrative officials in *Pierson v. Ray*, 386 U.S. 547 (1967). Subsequent qualified immunity case adapted to various situations the formulation providing immunity from personal liability based on “good faith belief” and “probable cause” defeated if the official “knew or reasonably should have known that the action he took within the sphere of official responsibility would violate the constitutional rights of the plaintiff, or if he took the actions with the malicious intention to cause a deprivation of constitutional rights or other injury.” They only un-immunized target the courts have left is the city. *Monell v. New York State Dept. of Social Services* 436 U.S. 658 (1978).

⁹⁰ Appendix to Cong. Globe, 42nd Cong. 2nd Sess. 25-26 (Feb. 6, 1872).

⁹¹ Cong. Globe, 42nd Cong., 1st Sess. 84 (1871).

In sum, it is clear from the legislative history that Congress intended the Fourteenth Amendment to protect the guarantees of the Bill of Rights specifically including the right to bear arms for one's personal defense and intended as well, that Sec. 1983 be a means to enforce Civil liability against city, county, or state government or officers who violated those rights.

C. Section 1983 and Legislative Intent

“Judges are not left at large to decide cases in light of their personal and private notions..”⁹² *Justice Goldberg, Griswald V. Connecticut*

While Congress thus intended Section 1983 to remedy deprivations of the right of defensive arms, lower courts have not been overly responsive to hearing those facts. The U.S. 7th circuit has gone so far as to declare the intent of the framers of the Fourteenth Amendment regarding incorporation of the right to bear arms to be irrelevant, a notion that flies in the face of traditional statutory analysis.⁹³ Similarly, much like the cardinal who refused to look through Galileo's telescope because he did not want evidence contrary to his beliefs, the 9th Circuit has refused even to consider evidence of congressional intent in relation to the incorporation of the right to bear arms under the fourteenth amendment.⁹⁴ One scholar, unable to rationalize 14th amendment author John Bingham's clear statements of congressional intent to enforce the bill of rights (including the right of armed self-defense) could only conclude that Bingham must have been “confused” about his own intent.⁹⁵

⁹² *Griswald v. Connecticut*, 381 U.S. 479, 493 (1965).

⁹³ *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 n.8 (7th Cir. 1982).

⁹⁴ *Fresno Rifle & Pistol Club v. Van de Kamp*, 965 F.2d 723,730 (9th Cir. 1992).

⁹⁵ Aynes, *supra* note 74 at 66.

The lack of modern Supreme Court jurisprudence on this issue invites a thorough and thoughtful analysis of the historical foundation of the right to armed self-defense. If the Supreme Court were consistent in its own analytical approach, it would rely on the legislative history recorded in the debates in order to establish the intent of the framers in regard to the Fourteenth Amendment and its enforcement statute, 42 U.S.C. 1983. In *Monroe v. Pape*⁹⁶ for example, the Supreme Court pointed out the importance of the debates surrounding Section 1983 in determining the purposes of that act:

“The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise. . . the claims of citizens to the enjoyment of the rights privileges and immunities guaranteed by the 14th amendment might be denied by state agencies.”⁹⁷

The supreme Court thus opines that the debates are the source of instruction as to the purpose of the law in enforcing civil rights against the states.

In *Monell V. New York City Department of Social Services*,⁹⁸ the Supreme Court cited Bingham for the proposition that sec. 1 of the Civil Rights Act (Section 1983) “would logically be the vehicle by which Congress provided redress. . . since that section provided the only civil remedy for violations of the fourteenth amendment . . .”⁹⁹ The Court concluded that local governments “ . . .by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental custom even though such a custom has not received formal approval through the body’s official decision

⁹⁶ *Monroe v. Pape* 365 U.S. 167 (1961).

⁹⁷ *Id.* at 180.

⁹⁸ *Monell v. New York Dept. of Social Services*, 436 U.S. 658 (1978).

making channels.”¹⁰⁰ What this tells us is that a practice, whether approved or not which engenders a constitutional deprivation is actionable against local governments under Section 1983.

Constitutional scholars Peter W. Low and John C. Jeffries, authors of a text on civil rights litigation, comment approvingly on the Supreme Court’s reliance on legislative history,¹⁰¹ “Indeed the Court might have opened itself to criticism if it had taken any other approach. Conventional wisdom would say that the Court’s job in interpreting acts of Congress. . . is to give effect to the legislative will, not to consult its own perceptions of sound social policy . . .”¹⁰² The authors concluded that the trend of the Supreme Court in interpreting Section 1983 is to rely on legislative history, based on the congressional debates: “Whatever the merits of this debate, this much is clear: From *Monroe* on, the Supreme Court has tended to anchor its interpretations of 1983 in the traditional mode. Many decisions are explained chiefly, if not exclusively, in terms of statutory language, legislative history, and original intent”.¹⁰³

Therefore, while lower courts may ignore or devalue the legislative history of the fourteenth amendment and the Civil Rights Act, the United States Supreme Court has repeatedly stressed the importance of the legislative history to establish the intent of the Statute. If the Supreme Court were consistent with that approach, applying Section 1983 to the right of armed Self-defense as congress intended, then any municipality with a

⁹⁹ *Id.* at 687.

¹⁰⁰ *Id.* at 690-691.

¹⁰¹ PETER W. LOW AND JOHN C. JEFFRIES JR, CIVIL RIGHTS ACTIONS 128 (1994).

¹⁰² *Id.*

¹⁰³ *Id.* at 130

custom or practice of denying that right to any law abiding citizen without just cause would be liable to suit under Section 1983.

III Establishing a Violation of the Fourteenth Amendment Under Section 1983.

“Well as I understand it, the right to bear arms is a Federal right, not a State right and has never been incorporated to the States via the Fourteenth Amendment.” *Raymond Pacello Jr., San Diego Attorney.*¹⁰⁴

The Supreme Court has held, in accord with the legislative history and intent of Section 1983 that all that is required for a claim under that section is that there be a deprivation of a right protected by the Fourteenth Amendment.¹⁰⁵ First, in order to have standing, no matter how many individuals may be injured by the wrongful governmental action, the plaintiff must have been injured in a concrete and personal way.¹⁰⁶ Therefore, opponents of the right have argued that the right at issue is communal, the right of a state to have a national guard rather than an individual right of self-defense. Were that the case, individuals would have no standing to bring an action. Therefore the first issue is whether or not the right to bear arms is in fact an individual right.

Once the deprivation of an individual right is established, the Court must determine whether or not the right at issue is fundamental, in which case any conflicting governmental policy will receive the strict (and usually fatal) scrutiny of the Court, or whether the right or interest at issue is non-fundamental in which case the policy will be

¹⁰⁴ Raymond Pacello Jr., *Colloquium: Gun Laws, Gun Control, and Gun Rights* THE JURIST at <<http://www.jurist.lawpitt.edu/gunlaw.htm>> (July 2000).

¹⁰⁵ *Monroe v. Pape* 365 U.S. 167, 171 (1961).

¹⁰⁶ Justice Kennedy has written, “While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 581 (1992). What this is saying is that while many may benefit from vindicating the right at issue, the violation must be of an individual right thus causing an individual harm to the plaintiff.

upheld if the government has any “rational basis” for the policy.¹⁰⁷ While the right to armed self-defense is a topic of intense controversy, historical analysis supports the notion that the right at issue is both individual and fundamental.

A. The Right to Bear Arms as an Individual Right of Self-Defense.

“The right of the whole people, old and young, men, women, and boys, and not the militia only, to keep and bears arms of every description, and not merely such as are used by the militia, shall not be infringed, curtailed, or broken in on in the slightest degree... “ *Nunn v. Georgia* ¹⁰⁸

In our day, the conventional wisdom assumes that the right protected by the Second Amendment, if any, was not a right of individuals to possess firearms for personal defense, but rather a guarantee that the state, through the National Guard, could possess arms.¹⁰⁹ Note however, that consistently throughout the debates on the Fourteenth amendment and the Civil Rights acts, both proponents and opponents of the legislation considered the right to bear arms to be an individual right of citizens of the United States. No one proposed that the right to bear arms was meant to protect the State’s right to have a Militia.

Such a proposition would have been met with derision for two reasons. First it would be in conflict with a nearly unanimous understanding of the right to bear arms for

¹⁰⁷ *Reno v. Flores*, 507 U.S. 292, 301-307 (1993).

¹⁰⁸ *Nunn v. State*, 1 Ga. 243, 251 (1846).

¹⁰⁹ Most law school and university courses in Constitutional Law ignore the historical connection between the Second and Fourteenth Amendments, their graduates believing as an article of faith that there is no relation between those amendments and even if there were, the right protected by the Second Amendment, if any, is not an individual right to personal armed self-defense, but rather a collective right of the National Guard to be armed. Richard J. Hardy, for example, author of a high school text on government, spends twenty-four pages on the First Amendment, and one sentence on the Second, that sentence asserting the conventional theory that the Second Amendment guarantees the right of the National Guard to Arms. *See* RICHARD J. HARDY, *GOVERNMENT IN AMERICA* 128, 166-190 (Houghton-Mifflin 1994). This stance ignores voluminous scholarly research to the contrary. David B. Kopel and Richard B. Gardner observe that, “there are few subjects on which legal scholarship is as unanimous as the original intent of the second

personal defense which had been in effect from earliest times and had been codified in the English Bill of Rights of 1689. There, in the third draft, the framers altered the phrase which stated the purpose of the right to bear arms by striking the word “common” from the phrase “for their common defense” to read instead “for their defense.” The framers of the English Bill of Rights thus consciously abrogated the notion of limiting the right to bear arms to a communal rather than an individual right of self-defense.¹¹⁰

Similarly, in drafting the Second Amendment, the framers of the Bill of Rights also specifically rejected the phrase “for their common defense” likewise deliberately avoiding language which could be interpreted as limiting the right to communal service.¹¹¹ This view of the right to keep and bear arms as an individual right was consistent with an almost universal agreement among every authority up to and including the framers of the Fourteenth Amendment. In an exhaustive survey, David B. Kopel cites every Nineteenth Century reference to the right to keep and bear arms.¹¹² He concludes “Every known scholarly commentator who said anything about the Second Amendment, all six Supreme Court Cases, and every judge except for one in Arkansas treated the Second Amendment as an individual right.”¹¹³ Professor Joyce Lee Malcolm observes, “The argument that today’s National Guardsmen, members of a select militia constitute the only persons entitled to keep and bear arms has no historical foundation. Indeed it would be redundant

amendment. . .The nearly unanimous conclusion is that the second amendment was intended to guarantee a right to arms of individual people. Kopel and Gardner, *supra*, note 79 at 741.

¹¹⁰ Lund *supra*, note 38 at 10.

¹¹¹ JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 129 (Thomas Greenleaf ed. 1789) Cited in Scott Bursor, *Toward a Functional Framework for Interpreting the Second Amendment* 74 TEX. L. REV. 1125.1137 (1996).

¹¹² Kopel *supra* note 86 at 1359.

¹¹³ *Id.* at 1544

to specify that members of a militia had the right to be armed. A militia could hardly function otherwise.”¹¹⁴

The second reason a state’s rights theory of the right to bear arms would have been absurd, is the context in which the framers of Section 1983 intended to protect that right. Far from seeing a need to defend State’s rights, Congress saw the power of the State, personified in the southern militias permeated by confederate veterans and members of the KKK, as the very force against which the individual right had to be protected, thereby plugging the theoretical loophole under which the 2nd amendment had been considered unenforceable against the states. Significantly, proponents and opponents of the legislation, Democrats and Republicans alike, agreed on one point--- the right at issue was an individual right of a citizen of the United States and not a State’s right. Therefore Congress targeted its legislative effort against the State and its officers and in favor of the individual. Further, the purpose was not to protect blacks only, which many argued could be done through the Thirteenth Amendment, but rather a general power to protect the rights of *all* citizens from encroachment by the state.¹¹⁵

This notion that the right to bear arms includes the personal right of self-defense is entirely consistent with views that influenced the framing of the Bill of Rights. John Adams advocated “arms in the hands of citizens, to be used at individual discretion, in private self-defense.”¹¹⁶ Patrick Henry said, “The object is . . . that *every one* who is able

¹¹⁴ JOYCE LEE MALCOM, *TO KEEP AND BEAR ARMS: THE ORIGIN OF AN ANGLO-AMERICAN RIGHT*, 163 (Harvard University Press 1996).

¹¹⁵ Rep. John Bingham, Cong. Globe, 39th Cong. Ist. Sess. 651 (Feb. 5, 1866).

¹¹⁶ John Adams *cited in* Anthony J. Dennis, *Clearing the Smoke From the Right to Bear Arms and The Second Amendment*. 29 AKRON L. REV. 57,71 (1995).

may have a gun.”¹¹⁷ Alexander Hamilton described an “original right of self-defense which is paramount to all positive forms of government.”¹¹⁸ Thomas Paine put the right to arms on a par with Law itself: “Arms like laws discourage and keep the invader and plunderer in awe and preserve order in the world . . .horrid mischief would occur were [victims] to be deprived the use of them . . .the weak will become a prey to the strong.”¹¹⁹

The notion of an individual right to arms rather than a state’s right is also consistent with modern opinions of the United States Supreme Court. In *United States v. Verdugo-Urquidez*, the United States Supreme Court has declared that the use of the term “the people” as used in the Second Amendment is consistent with its use in the First Amendment.¹²⁰ “[T]he people’ protected by . . . the first and second amendments. . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”¹²¹ What the Court is telling us is that the rights protected by both the First and Second Amendments are rights “of the of the people” and not of the state, in sum, individual rights.

B. The Right to Bear Arms as a Fundamental Right.

“The Sacred Rights of Mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole record of human nature, by the Hand of the Divinity itself, and can never be erased or obscured by mortal power.” *Alexander Hamilton*¹²²

¹¹⁷ *Id.*

¹¹⁸ Alexander Hamilton, THE FEDERALIST NO. 28 at 127 (George Macy Co., 1945), *cited in* Johnson, *supra* note 81 at 35.

¹¹⁹ Pilsby and Kates, *supra*, note 44, at 1269.

¹²⁰ *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

¹²¹ *Id.* at 265.

¹²² Johnson, *supra* note 81 at 68.

The Supreme Court has not applied its Fourteenth Amendment Fundamental Rights Doctrine to the right to keep and bear arms for personal defense.¹²³ However, the Court has outlined several approaches for determining what rights are fundamental. In *Planned Parenthood v. Casey*, arguing a woman’s right to terminate a pregnancy, the Court stated that personal decisions, “that involve the most intimate and personal choices a person must make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the fourteenth amendment.”¹²⁴ Such fundamental interests, the court said, are based on a rule of “personal autonomy and bodily integrity.”¹²⁵ Certainly criminal assault violates an individual’s personal autonomy and bodily integrity.¹²⁶ Feminist self-defense writer Dr. Judith Fein points out that rape is an egregious assault on a woman’s personal liberty. “The rapist takes away your control and can do anything he wants---beat you, rape you repeatedly, perform sadistic acts.”¹²⁷ Therefore, feminist commentator Jane Cohen emphasizes that physical security is the foundation of liberty of thought, speech, and movement.¹²⁸ The choice whether to resist or submit is surely one of “the most intimate and personal choices a person must make in a lifetime,” [therefore a choice] “central to personal dignity and bodily integrity.”¹²⁹ In further discussion of fundamental rights in *Casey*, the Supreme Court noted the due process clause of the 14th amendment is not limited to, but includes, “the specific

¹²³ For a fuller discussion see Barrow, *supra* note 19 at 73-99.

¹²⁴ *Planned Parenthood of S.E. Pa. V. Casey*, 505 U.S. 833, 851 (1992).

¹²⁵ *Id.* at 857.

¹²⁶ For an in-depth analysis of the analogy between abortion and gun rights see Johnson, *supra* note 41 at 97.

¹²⁷ FEIN, *supra* note 1 at 22.

guarantees elsewhere provided in the Constitution . . . [such as] the freedom of speech, press, and religion, [and] *the right to bear arms* . . .”¹³⁰

The feminist argument that physical security is the foundation of all other rights is consistent Anglo-American legal history. William Blackstone the great authority on English Law, observed that, “the principle aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature.”¹³¹ Primary among those absolute rights was “personal Security.”¹³² Blackstone viewed the right to bear arms as a corollary right pre-existing government itself. He therefore declared self-defense to be “*the primary law of nature, so it is not, neither can it be in fact taken away by the law of society.*”¹³³ Blackstone, the seminal Anglo-American legal scholar is telling us that self-defense over-rides conflicting societal law.

Similarly, John Adams described the right of armed self-defense as a natural right predating and therefore trumping both written law and the social contract upon which the law rests. “Resistance to sudden violence, for the preservation not only of my person, my limbs and life, but of my property, is an indisputable right of nature which I have never surrendered to the public by the compact of society, and which, perhaps, I could not surrender if I would.”¹³⁴ Even Thomas Hobbes an early advocate of big government, argued the individual right of self-defense overrides man-made law. “A covenant not to

¹²⁸ Johnson, *supra* note 81, at 139, *citing* Jane Maslow Cohen, *Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?* 57 U.PITT. L. REV. 757 (Arguing that murders committed by abused women who are the victims of repeated physical abuse are morally justified.)

¹²⁹ 505 U.S. 833,851.

¹³⁰ *Casey*, 505 U.S. at 848. For a fully detailed discussion of the Supreme Court’s modern fundamental rights doctrine as applied to the Second Amendment, *see* Barrow *supra*, note 19 at 73-100

¹³¹ William Blackstone *cited in* Johnson, *supra* note 41 at 197, fn 255.

¹³² *Id.*

defend myself from force, by force, is always void.”¹³⁵ The unmistakable meaning of each of these seminal legal theorists is that survival trumps law. Therefore the decision of the young mother in the introduction to this article to arm herself for self-defense in contravention of California law is entirely reasonable in the context of fundamental rights analysis. These legal philosophers upon whom our laws rest, however, would go even a step further. They would declare void a man-made law that would deny her that choice.

Modernly courts have had to wrestle with the substantial weight of an individual’s interest in self-preservation weighed against the state’s interest in order and control, concluding that even the rights of convicted felons, may under some circumstances, outweigh contrary firearms possession law. The 5th Circuit has held self-defense to be a fundamental right.¹³⁶ That court, confronted with the clash between self-defense and a state statute denying firearms possession to convicted felons, concluded that self-defense, however temporarily, must outweigh the statute: “We do not believe that Congress intended to make ex-felons helpless targets for assassins. The right to defend oneself from a deadly attack is fundamental. Congress did not contemplate that the [possession law] would divest convicted felons of that right.”¹³⁷ If the right to defend oneself against deadly attack is so fundamental as to outweigh conflicting law on behalf of a convicted felon, there is a logical inconsistency with restrictions that in effect deny that same fundamental right of self-defense to the general law-abiding population.

¹³³ Johnson, *supra* note 81 at 35

¹³⁴ JOHN ADAMS, THE BOSTON GAZETTE, (1763) *cited in* Dennis, *supra* note 98 at 73.

¹³⁵ *Id.* at 36.

¹³⁶ U.S. v. Panter 688 F.2d 268 (5th cir. 1982).

¹³⁷ *Id.* at 271.

Under the Supreme Court's fourteenth amendment doctrine a right, to be deemed fundamental must meet one of three tests: 1) it is implicit or explicit in the language of constitution,¹³⁸ 2) "rooted in the nation's history and tradition."¹³⁹ or 3) "implicit in the concept of ordered liberty"¹⁴⁰ The right to bear arms meets all three tests. It is not only explicit in the Constitution of the United states, but was considered so "rooted in the nation's history and tradition," and so "implicit in the concept of ordered liberty" that the revolutionary war was fought partly as a result of the Crown's ransacking private homes and seizing private arms. In fact the statement of the framers that an armed citizenry is "necessary to the security of a free state"¹⁴¹ is merely another way of saying it is "implicit in the concept of ordered liberty."¹⁴² Therefore the right to bear arms is both an individual and a fundamental right.

IV. Vindicating the Right of Self-Defense

"The peaceable part of mankind will continually be overrun by the vile and abandoned while they neglect the means of self-defense." –*Thomas Paine*¹⁴³

One purpose of Section 1983 was to override discriminatory or otherwise unconstitutional state laws.¹⁴⁴ Therefore a citizen may bring suit under Section 1983 for

¹³⁸ *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973).

¹³⁹ *Bowers*, 478 U.S. at 194.

¹⁴⁰ *Id.* at 191-192.

¹⁴¹ U.S. CONST. Amend. II.

¹⁴² *Bowers*, 478 U.S. at 191-192

¹⁴³ Thomas Paine, *cited in Johnson, supra*, note 81 at 76 fn 238.

¹⁴⁴ *Monroe v. Pape*, 365 U.S. 167, 173 (1961).. While admitting overriding certain state laws was a purpose of Section 1983, the Supreme Court in this case cited Mr. Sloss of Alabama, an opponent of the Civil Rights legislation for the proposition that no state had " passed any laws endangering the rights and privileges of colored people" *Id.* This statement ignores numerous assertions in the congressional debates to the effect that laws and decisions in the southern states were in fact endangering the rights of black people, specifically including their right to armed self-defense.

state official's violation of his rights or for arbitrary, wrongful government action.¹⁴⁵

While administrative officials may have either absolute or limited immunity from damages under modern decisions, local governments such as cities and counties, have no such immunity. In *Monell v. New York Department of Social services*, the Supreme Court held that, "the 'plain language' of Section 1 [Section 1983] is that local government bodies were to be included within the ambit of the persons who could be sued under Section 1 of the Civil Rights Act."¹⁴⁶ Therefore, municipalities are subject to suit where the deprivation is subject to a governmental "custom" or practice even where such a custom has not received formal approval.¹⁴⁷ The statute offers a full range of remedies. A plaintiff may obtain equitable relief by means of a court order for the governmental entity to affirmatively do some act or to desist from some current practice.¹⁴⁸ A full range of damages are available including nominal or presumed damages to vindicate the right at issue absent substantial injury,¹⁴⁹ compensatory damages for cases with consequential injury,¹⁵⁰ and punitive damages against local governmental officials whose acts constitute "reckless indifference" to the rights of others.¹⁵¹ To encourage lawyers to take cases with the intent of vindicating Civil Rights, attorney's fees are usual.¹⁵²

¹⁴⁵ *Zinermon v. Burch* 494 U.S. 113 (1990).

¹⁴⁶ *Monell v. New York City Department of Social Services* 430 U.S. 658 (1978).

¹⁴⁷ *Id.* at 690-691.

¹⁴⁸ The language of Section 1983 provides for both an "action at law" for which damages are available or "suit in equity" in which injunctive relief or court order would be available. 42 U.S.C. 1983.

¹⁴⁹ *Memphis Community School District v. Stachura* 477 U.S. 299, 313 (1986). in which Justice Marshall argues that a constitutional violation, may in itself constitute a compensable injury.

¹⁵⁰ *Id.* at 305-310.

¹⁵¹ *Smith v. Wade* 461 U.S. 30, 38 (1983).

¹⁵² 42 U.S.C. Sec. 1988 provides that "In any action or proceeding to enforce a provision Sections 1981, 1983, 1982, 1983, 1985, or 1986 of this title. . .the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The legislative history indicates that notwithstanding the discretionary nature of the language, 1988 requires attorney's fees be

To determine the degree of scrutiny the court will give to a governmental restriction of a protected interest, the Court must determine whether the personal interest violated by the government is considered fundamental. Where the governmental restriction abridges a fundamental right, that action will receive the strict scrutiny of the Court, which usually means the government will lose unless it can show that the restriction is “narrowly drawn” to serve a “compelling” governmental interest.”¹⁵³ Carry permit laws that give broad discretion to the authorities to deny permits without good cause, are neither “narrowly drawn” nor conducive to a “compelling governmental interest.”¹⁵⁴

A. Restrictions Allowing Authorities Unbridled Discretion to Deny Carry Permits are not “Narrowly Drawn.”¹⁵⁵

“For *most*, this is their first arrest of any kind. I don’t mean this is their first conviction, but I mean this is their very first arrest of any kind, and many of them are old people. Many of them are shopkeepers, persons who have been previous victims of violent crimes. . . I believe *most of the defendants* who come to court believe that they need a gun to protect themselves in the community...”

*Judge David Shields describing defendants arrested for firearm possession in Chicago.*¹⁵⁶

Present restrictions on defensive firearm possession in some jurisdictions are not “narrowly drawn”¹⁵⁷ because they give unbridled discretion to local officers to deny permits to carry defensive weapons without specific guidelines as to the proper bases for denial. Such discretionary licensing laws were an outgrowth of the racist restrictions

granted unless special circumstances exist that would make the award unjust. LOW and JEFFRIES, *supra* note 101 at 104.

¹⁵³ Reno v. Flores, 507, U.S. 292, 301-306 (1993).

¹⁵⁴ *Id.*

¹⁵⁵ 507 U.S. 292, 301-306.

¹⁵⁶ Clayton E. Cramer and David B. Kopel, “*Shall Issue: the New Wave of Handgun Permit Laws*” 62 TENN. L. REV. 679, 732 (1995). A typo omits part of the sentence in the print version. A correct citation is available online at <<http://www.ggnra.org/cramer>>.

initiated in the post civil-war south, in which every state had laws specifically targeted to prevent southern blacks from being armed.¹⁵⁸ As discriminatory gun laws evolved in the northeast and western states, from those early restriction targeted exclusively a blacks, they were written more broadly, giving local authorities complete discretion to decide whether to deny a carry permit based on their perception of the “good moral character” of the applicant.¹⁵⁹ Thus local authorities could exclude a wider array of disfavored groups such as Italians, Irish, Eastern Europeans, anarchists, Jews, Chinese, Mexicans etc.¹⁶⁰ Thus in California to this day, one may not carry a firearm, openly or concealed, without a license from local authorities who *may* (or may not) issue a carry permit upon proof satisfactory to the officer of the applicant’s “good moral character,” “good cause,” and certification of training.¹⁶¹

Ultimately, the disfavored group became all gun owners with some agencies using such broad discretion to deny permits to all but the politically connected.¹⁶² Therefore, where such laws allow carry permits in theory, permits are generally unobtainable in practice.¹⁶³ For example, with a population of several million, the only Civilian carry

¹⁵⁷ 507 U.S. 292, 301-306.

¹⁵⁸ JOSEPH R. CONLIN, *THE AMERICAN PAST: PART I A SURVEY OF AMERICAN HISTORY TO 1877* 430 (2d ed. 1987).

¹⁵⁹ See for example Cal. Pen. Code 1250(a)(1)(A)(West 2000).

¹⁶⁰ see Polsby and Kates, *supra* note 44 at 1265

¹⁶¹ Cal. Pen. Code 12050 (a)(1)(A) (West 2000).

¹⁶² Don B. Kates points out that the few gun licenses issued in New York in the 1970s included opponents of gun ownership like Nelson Rockefeller, former Mayor John Lindsay, the wealthy husband of Dr. Joyce Brothers (who argues that gun ownership is symptomatic of male sexual dysfunction). Among those now deceased on the list were Eleanor Roosevelt, Lyman Bloomingdale, Henry Cabot Lodge, Arthur Godfrey, Sammy Davis Jr., Robert Goulet, Sid Ceasar and a plethora of Rockefellers. The more recent list includes Anti gun publisher of the New York Times Arthur Ochs Sulzberger, Donald Trump, Lawrence Rockefeller, Leland Dupont, Joan Rivers, Howard Stern, Michael Korda, William F. Buckley, and Bill Cosby. Cited in Johnson, *supra* note 41 at fn 155.

¹⁶³ Don B. Kates Jr., *Guns, Murders, and the Constitution*, PACIFIC RESEARCH INSTITUTE FOR PUBLIC POLICY (1990) cited in Peter J. Kasler (JD) *Police Protection Isn't Enough*, THREAT MANAGEMENT INSTITUTE (1993) available at <<http://www.tmi@crl.com>>.

permit Los Angeles police approved in eight years was when Chief Willie Williams failed the police officer's standards test and could not qualify to carry as an officer.¹⁶⁴ Forced by a lawsuit to offer more permits, the city issued a total of five permits, three to government employees and two to lawyers.¹⁶⁵ Meanwhile LAPD denied a jeweler who carried large amounts of valuables, had passed a defensive firearms class, and had police-documented death threats for helping an officer make an arrest¹⁶⁶ The United States Supreme Court has held that one of the significant purposes of Section 1983 is provide a federal remedy in such cases where "the state remedy, though adequate in theory, was not available in practice."¹⁶⁷

California's legislative research body studied the discriminatory nature of permit denial in 1986 and found that of the small but elite group of applicants actually granted a permit, "the overwhelming majority. . . were white males."¹⁶⁸ In Los Angeles a female private detective was disqualified from a permit because of her gender.¹⁶⁹ Similarly, the young California mother in the introduction to this article, having been a victim of kidnap, torture, and gang rape did not have sufficient "good cause" in the opinion of the Orange County California Sheriff's Department, to carry a defensive weapon.¹⁷⁰ A federal Judge in California upheld giving permits almost exclusively to retired police and celebrities apparently on the theory that the latter's right of self-defense is more important than the

¹⁶⁴ Cramer and Kopel, *supra* note 154 at 681-682. A typo omits part of the sentence in the print version. A correct citation is available online at <<http://www.ggnra.org/cramer>>.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at

¹⁶⁷ *Monroe v. Pape* 365 U.S. 167 (1961).

¹⁶⁸ Cramer and Kopel, *supra* note 154.

general population.¹⁷¹ Thus laws allowing broad discretion to authorities to deny permits to law abiding citizens are not “narrowly drawn”¹⁷² in that the practical effect of such unbridled discretion is to deny a fundamental right of self-defense to citizens without good cause and to criminalize behavior intended to be protected by the framers of the Second and Fourteenth Amendments and the Civil Rights Acts. Where a restriction abridging a fundamental right is not “narrowly drawn”¹⁷³ that is sufficient in itself to overturn the restriction, but in the case of self-defense, disarming the law-abiding members of society also fails to advance a “compelling” governmental interest.¹⁷⁴

B. Restrictions with the effect of Disarming Law Abiding Citizens do not serve a “Compelling” Governmental Interest.¹⁷⁵

"A principal source of errors and injustice are false ideas of utility...The laws of this nature are those which forbid to wear arms, disarming only those who are not disposed to commit the crime. . .It certainly makes the situation of the assaulted worse and the assailants better. . ." *Beccaria, hand copied in the Italian into Thomas Jefferson's notebook*¹⁷⁶

In Denver, William Phillips, the Police detective in charge of the permit program has stated, “just because you fear for your life is not a compelling reason to have a permit.”¹⁷⁷ Denver thus believes one needs a “compelling reason”¹⁷⁸ to exercise a constitutionally protected right of self-preservation. They have it backwards. Under the

¹⁶⁹ *Id.* at fn. 18 *citing* Paul H. Blackman, CARRYING HANDGUNS FOR PERSONAL PROTECTION: ISSUES OF RESEARCH AND PUBLIC POLICY 9 (Paper presented at the annual meeting of the American Society for Criminology, San Diego Nov. 13-16, 1985).

¹⁷⁰ *see* intro., this article.

¹⁷¹ Cramer and Kopel, *supra* note 154 at fn *citing* Hickman v. County of L.A. No. CV 91-5594- RM (BX) (C.D. Cal. April 21, 1994).

¹⁷² 507 U.S. 292, 301-306.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Quoted in* Halbrook, *supra* note 59 at 151.

¹⁷⁷ Cramer and Kopel *supra* note 154.

Supreme Court's fourteenth amendment fundamental rights analysis, the state should have a "compelling reason" to *deny* a permit. As result of this reverse-priority mindset, death threats against outspoken Jewish talk-show host Alan Berg did not constitute, in the minds of local police, a "compelling" enough reason for Berg to get a carry permit in Denver. Shortly after the Department denied his permit Berg was murdered by the Aryan Nation.¹⁷⁹

While public safety should certainly be considered a "compelling" governmental interest, there is scant evidence that disarming law-abiding citizens serves the interest of public safety. In fact, evidence to the contrary is beginning to accumulate supporting the founders deeply held conviction that the general security of all is enhanced when an increasing number of citizens are possessed with both the ability and the means to defend themselves and others.¹⁸⁰

As a case in point Cramer and Kopel contrast two incidents in American Cities with differing laws on citizen self-defense.¹⁸¹ Dr. Suzanna Gratia and her parents were patrons at Luby's Cafeteria in Killeen Texas when a psychopathic killer, undeterred by Texas prohibitions on firearms in public places, calmly walked around with two handguns execution-killing the patrons as they huddled helplessly on the floor.¹⁸²

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Naomi Aoki, *Weapons Law Hasn't Triggered Violence*, VIRGINIA PILOT-STAR, Oct. 7, 1997 at A1. With the mounting experience of the majority of states that now have "right to carry" provisions demonstrating a reduction in crime without a corresponding increase in anti social behavior by permit holders, the focus of the academic debate has shifted from whether armed citizens are a threat to public safety to the extent to which they positively enhance public safety. Certainly the thousands each year who avoid becoming victims or protect others by displaying a firearm make a valuable contribution to public safety.

¹⁸¹ Cramer and Kopel, *supra* note 154 at 718-719.

¹⁸² *Id.*

Dr. Gratia, who obediently did not carry her handgun into the restaurant, could only watch helplessly as the killer murdered both her parents.¹⁸³ Right to carry reform legislation had almost passed the Texas legislature, but was held up in committee by the anti-self-defense lobby.¹⁸⁴ Testifying before the Missouri legislature, which was considering right to carry reform, Dr. Gratia said:

I know what a lot of people think, they think, “my God, then you would have had a gun fight and then more people would have been killed.” Uh-uh, no. I was down on the floor; this guy is standing up; everybody else is down on the floor. I had a perfect shot at him. It would have been clear...at least I would have had a chance [to save the victims].¹⁸⁵

In Contrast, two months later, when two criminals with stolen handguns began to herd the twenty patrons and staff of Shoney’s Restaurant in Anniston Alabama into the freezer, (often a prelude to execution) Thomas Glenn Terry, legally carrying a concealed pistol, killed the first with five shots in the chest, and was slightly wounded before shooting the second as well.¹⁸⁶ The score for the two incidents: infringement of the right to carry by Texas netted twenty-three citizens killed, while support of the right to carry by Alabama, netted twenty citizens saved, a difference of forty three innocent lives in just two incidents. Section 1983, if applied as its framers intended, would

¹⁸³ *Id.* at 719.

¹⁸⁴ In 1994 when the citizens of Texas approved a non-binding resolution asking the Texas legislature to approve right to carry, Governor Ann Richards who had vetoed such a bill in the past vowed to do so again. Her challenger George W. Bush said if elected, he would sign an appropriate bill, which he did in 1995 with Texas becoming the 21st state to approve right to carry legislation. Contrary to opponents predictions of blood in the streets, as 200,000 Texans passed the stringent requirements for permits, they proved to be substantially more law-abiding than the general population, 5.7 times less likely to commit violent crime, and 14 times less likely to commit non-violent crime. Meanwhile Texas crime rate, which had been 38 percent above the national average, dropped 50 percent faster than the national average. H Sterling Burnett, *Concealed-Handgun Laws Help Fight Crime*, HUMAN EVENTS June 30, 2000 at 15.

¹⁸⁵ *Id.*

¹⁸⁶ Cramer and Kopel, *supra* note 154 at 719.

provide a remedy to prevent such cases as involving Alan Berg and Suzanna Grazia by protecting the right to defensive firearm possession itself, prior to any need to exercise it.

C. Restriction on Citizen Self-Defense Shifts the Balance of Power in Favor of Criminals.

“Men by their nature are naturally divided into two parties: Those who fear and distrust the people . . . and those who identify themselves with the people, have confidence in them, cherish and consider them as the most honest and safe depository of the public interest.” *Thomas Jefferson*¹⁸⁷

Countries with strict gun control experience a higher number of confrontational burglaries (in which the residents are home) than we do in the United States.¹⁸⁸ This is because Americans are allowed to have guns at home and burglars prefer not to be shot.¹⁸⁹ Rather, American burglars prefer to enter unoccupied residences where, not only can they avoid a confrontation with an armed citizen, but they can also steal the citizen’s gun which is available unattended because restrictions on the citizen prevent her from maintaining it in her possession and control when outside the home, where it would be useful for self-defense. Instead, carry restrictions require her to leave it at home to endanger children or be stolen by criminals. Thus, between .57 and 1.82 million guns are stolen each year.¹⁹⁰

James Wright and Peter Rossi, who investigated the gun use of convicted felons, found that up to 70 percent of the most recent guns possessed by criminals were stolen,

¹⁸⁷ Thomas Jefferson, *quoted in* Kopel, *supra* note 39 at 109.

¹⁸⁸ Snyder, *supra* note 50 at 17 *citing* “*Estimated Percent Distribution of Personal and Household Incidents*, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS at 264 table 3.10.

¹⁸⁹ JAMES D. WRIGHT AND PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS 15 (1986). Three fifths of the criminals in the survey agreed with the statement, “most criminals are more worried about meeting an armed victim than they are about running into the police.”

¹⁹⁰ KLECK, *supra* note 26 at 92 (1997).

with thefts from homes and apartments by far the most numerous.¹⁹¹ The average was 39 stolen guns per man.¹⁹² Kleck has observed that such thefts are the primary way guns are transferred from the less criminal to the more criminal segment of the population.¹⁹³ Therefore many handguns are presently on the street in the wrong hands as a direct result of the government's violation of the gun owner's right to "bear" (carry) her handgun on her person where it is in her possession and control.

While thus shifting possession of firearms from the law-abiding to the criminal populations, such Policies also shift the balance of power on the street. The effect, ironically, is to force the gun owner to go on the street unarmed, a target of criminals, very well armed with firearms which, absent the restriction, would more likely be in the possession of many of the potential victims. Therefore, as a direct consequence of regulations in major American cities denying permission to carry a firearm in public areas, almost ninety percent of violent crime in the U.S. occurs outside the home in areas where the majority of the population is thus disarmed by law.¹⁹⁴

It is fairly indisputable that criminals, while a relatively small minority of the population are, by definition, responsible for 100% of the crimes committed. The degree of harm that they can do depends on the degree of opportunity that they are given. The framers of the Constitution, accepting defense of self and others as a civic duty, understood that law abiding citizens, armed and vastly outnumbering the criminal

¹⁹¹ Wright and Rossi, *supra* note 189 at 231

¹⁹² *Id.* at 198.

¹⁹³ KLECK, *supra* note 26 at 91.

¹⁹⁴ U.S. Dep't Justice, Bureau of Justice Statistics, *Criminal Victimization in the United States*, 1991, 1992, at 75 cited in Lund, *supra* note 38, at fn. 173.

population, and even potential invaders, constituted such a valuable adjunct to both law enforcement and military functions as to be deemed “necessary to the security of a free state.”¹⁹⁵

In our day, by largely eliminating this counterforce, the advantage has gone more and more to the criminal population. Notwithstanding massive increases in police presence, street officers are outnumbered approximately 160 to 1¹⁹⁶ by the criminal population. Those jurisdictions that have attempted to answer the problem by greater restrictions on citizen self-defense, and greater police presence have the highest crime rates while those jurisdictions that have eased restrictions on citizen self-defense have experienced significantly greater decreases in violent crime.¹⁹⁷ Restrictions on the right to carry a defensive weapon are therefore not only a violation of a fundamental right but, when they allow unbridled discretion to authorities to deny permits without good cause, are neither “narrowly drawn” nor justified by furthering a “compelling” governmental interest.

V Responsibility vrs. Liability: The State Has No Duty to Protect its Citizens

“There is no constitutional right to be protected by the state against being murdered by criminals or madmen. The constitution . . . does not require

¹⁹⁵ U.S. CONST. Amend II.

¹⁹⁶ Constitutional author Don B. Kates has pointed out that while police are outnumbered somewhere on the order of twenty to one by criminals, half of the police force must be assigned to investigative, administrative, and clerical duties. He further observes that three shifts plus sick days, days off, and vacations further divide the other half. Therefore basic math tells us that on-duty street officers are outnumbered a hundred sixty to one by criminals. Don B. Kates Jr., *Guns, Murders, and the Constitution*, PACIFIC RESEARCH INSTITUTE FOR PUBLIC POLICY (1990) cited in Peter J. Kasler (JD) *Police Protection Isn't Enough*, THREAT MANAGEMENT INSTITUTE (1993) available at <<http://www.tmi@crl.com>>. Even if we had many more police, (and ignoring the risk of thereby creating a “police state”) the police cannot be everywhere at once. The criminal has the luxury of deciding when, where, and whom to attack as well as knowing in advance when he will need to be armed and when he will not. Therefore, with thirty thousand criminal assaults occurring daily, the role of the police is generally reactive and investigative. Blodgett-Ford, *supra* note 29, at 560 n. 129.

¹⁹⁷

the federal government or the state to provide . . . even so elementary a service as maintaining law and order” *Bowers v. DeVito* ¹⁹⁸

There is substantial legal precedent for the right of armed self-defense. In every jurisdiction in America a citizen has an equal right with a police officer to make an arrest for a felony committed in her presence. She also has in every jurisdiction the right to use deadly force in defense of herself or others against threat of serious injury or death. ¹⁹⁹ A California law still on the book says “any person” (not just police) can carry a loaded firearm while attempting to stop a felony from being committed [as against herself or others] or attempting to make a lawful arrest. ²⁰⁰ Therefore even with California’s present restrictions on carry permits, bounty hunters may still carry guns without a permit in California. ²⁰¹ Another California law says a gun carried openly in a holster ²⁰² or on the seat of a car ²⁰³ is exempt from the concealed weapons category. Conflicting as they are with common practices denying by law the right of citizens to possess these tools of self-defense, such laws are vestiges of the constitutional right under which citizen defense of self and others was the first line of defense against criminal violence.

In contrast, many believe that in “modern criminal law, there are assumptions that the responsibility for keeping the peace has passed from the individual to the state and

¹⁹⁸ *Bowers v. DeVito*, 686 F.2d 616, 618 (7th cir. 1982).

¹⁹⁹ For example California law provides that “any person” is justified in using deadly force defending against a felony or “when necessarily committed in attempting by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping or preserving the peace.” Cal. Pen. Code S. 197 (4) (West 2000) Where a defendant reasonably believed decedant had shot at and mortally wounded a police officer it was *his duty* to pursue and use all necessary means to affect arrest in this case justifiable homicide. *People v. Brooks* 131 Cal. 311 (1901).

²⁰⁰ See Cal. Pen. Code S 12021(k) (West 2000).

²⁰¹ 81 O.P. Atty. Gen. 257 (July 29 2000).

²⁰² 38 O.P. Atty. Gen. (1961).

²⁰³ Cal. Pen. Code 12025 (f).

that the use of force to keep the peace is effectively a state monopoly.”²⁰⁴ Thus, those opposing an individual right of armed personal-defense encourage women and others to rely on the protection of the state, arguing that in our modern, civilized society the need of an armed citizenry is anachronistic.²⁰⁵ It would follow from this line of reasoning that if the state has a monopoly on protective force it must have a duty to protect, and consequential liability for failure to protect its citizens. However, even ignoring the fact that criminals normally choose to make their attacks when police are absent, it is an established principle of American Law that police have no duty to protect individual citizens, who, historically were expected to be competent to protect themselves.

The logical contradiction between government-mandated defenselessness and governmental non-obligation to protect citizens, may be illustrated in cases like *Riss v. City of New York*.²⁰⁶ There, Linda Riss’ ex-boyfriend made an escalating series of violent threats. The police rejected not only her repeated pleas for police protection, but also her application for a permit to carry a defensive weapon for her own protection. The rejected boyfriend made good his threat to fix her so no one would want her by throwing acid in her face, blinding and disfiguring her for life. The court upheld the long standing rule that, it is, “a fundamental principal of American Law that the government and its agents are under no general duty to provide . . . police protection, to any particular individual citizen.”²⁰⁷ The lone dissenter pointed out the logical contradiction in such law: “What

²⁰⁴ David W. Dowd, *The Relevance of the Second Amendment to Gun Control Legislation*, 58 MONT. L. REV. 79, 99 (1997).

²⁰⁵ John Dwight Ingram and Alison Ann Ray, *The Right (?) to Keep and Bear Arms*, 27 N.M. L. REV. 491, 499 (1997).

²⁰⁶ *Riss v. City of New York*, 22 N.Y.2d 579 (1958).

²⁰⁷ *Id.* at 3.

makes the City's position particularly difficult . . . is that, in conformity with the dictates of the law, [she] did not carry any weapon for self-defense. Thus by a rather bitter irony she was required to rely for protection on the City of New York which now denies all responsibility to her."²⁰⁸

A. Denial of Self-Help as a basis of Governmental Liability

"If a state cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction."
*Dissenting Opinion Deshaney v. Winnebago County.*²⁰⁹

In *Deshaney v. Winnebago County*,²¹⁰ the leading Supreme Court case on the issue of non-liability for failure to protect, brought under Sec. 1983, the Court articulated the standard position that "nothing in the language of the due process clause itself requires the state to protect the life, liberty, or property of its citizens from private actors."²¹¹ The majority opinion, however, also addressed a line of cases finding state liability for prisoners on the basis that the state had limited their freedom to act on their own behalf.

The Court explained the rationale for holding the State liable to protect prisoners:

"When the state by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide. . .reasonable safety---it transgresses the substantive limits on state action set by...the due process clause."²¹²

Here the Court is saying that substantive due process imposes a duty on the State where it has taken affirmative steps that render a person defenseless. This language would appear appropriate to Riss who was refused both state protection and a gun

²⁰⁸ *Id.* at 584.

²⁰⁹ *DeShaney v. Winnebago County Dept. of Social Services* 489 U.S. 189, 207 (1989).

²¹⁰ *Id.*

²¹¹ *Id.* at 195.

permit and to Dr. Gratia, disarmed by state law and thus disabled to act to save her parents and others. The Court Continues: “The affirmative duty to protect arises not from the state’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the *limitation which it has imposed on his freedom to act in his own behalf.*”²¹³

Restrictions on the right of law abiding citizens to carry a defensive weapon limit the individual’s freedom to act in her own defense against threats to life, liberty, and property. Therefore a denial of the right of self-defense should logically make the city liable not only for abridging a fundamental right of self-defense by denying a citizen effective means of protection, but also for any consequential harm to the citizen as a result of the denial. Illogically under the status quo, the municipality has it both ways. It can deny the citizen her right of self-defense and simultaneously deny its own obligation to provide protection.

B. The Self-Defense Mindset and the Politics of Submission

The state of California spends fifty-one million dollars a year for armed guards for its government officers, many of whom are generally unknown and unrecognizable by the general public.²¹⁴ It is easy to understand why such officials, lacking self-defense training or mindset, and relying on taxpayer funded protection, do not recognize or understand the individual need for self-defense. California Governor Gray Davis for example, while advocating strict measures to disarm citizens, has increased the number of

²¹² *Id.* at 200.

²¹³ *Id.*

²¹⁴ Fox News, Channel 41, Sacramento CA Aug 8, 2000.

his own armed guards from the seventeen who had protected former Governor Pete Wilson, to thirty-five currently.²¹⁵ The reason given by the media is that Davis often visits Los Angeles,²¹⁶ an activity he apparently feels is dangerous enough to warrant an armed retinue. It is ironic that under the status quo the governor will not visit the city without armed guards while its millions of law abiding citizens must endure a state of government-mandated defenselessness which in effect aids and abets the criminal population. Meanwhile Cities such as Los Angeles attack misdirect responsibility for gun violence by those criminals onto manufacturers of firearms rather than onto the city's own policy of both disarming and then failing to protect its citizens.²¹⁷ Given the well-documented expressions of the framers of the Second and Fourteenth Amendments and the Civil Rights Acts, such dereliction of civic responsibility by municipalities would, in a logical world, be within the ambit of governmental misconduct considered by the framers of Section 1983 as being appropriate for redress through that statute.

Conclusion

Modernly, the United States Senate has supported the proposition that the Fourteenth amendment protects an individual right of private arms, enforceable through Sec. 1983. After a comprehensive review of primary source documents, the sub-committee on the Constitution of the Senate Judiciary Committee has declared: "The Second Amendment right to keep and bear arms... is a right of the individual citizen to

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Colt Arms for example presently spends \$300,000 per month defending lawsuits. See Matt Bai, *Unmaking a Gunmaker* NEWSWEEK Apr. 17, 2000 at 50. The effect is to push the price of defensive firearms out of the reach of the Law-abiding poor who live in areas where personal security is most at risk, while making them more valuable and hence a more highly prized acquisition of the criminal population.

privately possess and carry in a peaceful manner firearms and similar arms.”²¹⁸ The committee also asserted that it was the clear intent of Congress that an individual right to carry be protected by the Fourteenth Amendment and enforced through Sec. 1983. “It is clear that the right to keep and bear arms was meant to be and should be protected under the Civil Rights Statutes and the Fourteenth Amendment against infringement by officials acting under color of state law.”²¹⁹

Therefore, the young California mother in the introduction to this article is not an aberrant menace. Her decision to arm herself as insurance against the unlikely but all too frequent possibility of violent attack should not only be respected as a moral choice, but protected as a clearly expressed Constitutional right as intended by the framers of the Second and Fourteenth Amendments to the United States Constitution and the Civil Rights Act, 42 U.S.C. 1983.

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²¹⁸ THE RIGHT TO KEEP AND BEAR ARMS, REPORT OF THE SUB COMMITTEE ON THE CONSTITUTION, UNITED STATES SENATE COMMITTEE ON THE JUDICIARY, 97th Cong. 14 (1982) *internal print pagination unavailable online* at <<http://www.detnet.com/fuselier/2NDAMEND.HTML>>

²¹⁹ *Id.*

