

Notes

Do Battered Women Have a Right to Bear Arms?

Sayoko Blodgett-Ford[†]

.../I found an
announcement/not the woman's
bloated body in the river/floating
not the child bleeding in the
59th street corridor/not the baby
broken on the floor/
"there is some concern
that alleged battered women
might start to murder their
husbands and lovers with no
immediate cause"¹

Today, tragedies such as the shooting of a kindergartner riding the bus home from school² are widely reported by the press and lead many people to believe that gun controls³ are desperately

[†] Many people helped me with this Note, including Professor Vicki Schultz, Professor Akhil Reed Amar, Don B. Kates, Jr., and Robert J. Cottrol.

¹ Ntozake Shange, *With No Immediate Cause*, in FAMILY VIOLENCE: POEMS ON THE PATHOLOGY 66, 67 (Mary McAnally ed., 1982) (quoted in Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991)).

² See Joseph A. O'Brien, Jr. & Suzanne Sataline, *Crossfire Wounds Boy, 6, On School Bus*, HARTFORD COURANT, June 11, 1993, at A1. Unlike many other victims of violence, kindergartner Cesar Sandoval survived and returned home. Blanca M. Quintanilla, *Boy Injured in Shooting Released from Hospital*, HARTFORD COURANT, July 25, 1993, at D1; cf. Craig Wolff, *Washington Heights Boy, 12, Is Killed When a Gun Fires*, N.Y. TIMES, Sept. 24, 1993, at B6 (discussing victim of violence who did not survive).

Approximately 31,600 people were killed by guns in 1985—55% were suicides, 37% were homicides, 5% were accidents, and 1.5% were killed by police officers or for undetermined reasons. GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 42-43 (1991). Guns were used in about 22% of the 142,292 suicides, homicides, and accidents that occurred in 1985. *Id.* at 60 (Table 2.7). There are approximately 200 million guns in circulation around the country. Michael Isikoff, *200 Million Guns Reported in Circulation Nationwide*, WASH. POST, May 24, 1991, at A1.

³ I use the term "gun controls" to refer to laws that restrict the ownership, acquisition, and/or manner of carrying a firearm, not general criminal laws that cover the *use* of a firearm. There are many statutes, ordinances, and legislative proposals for gun controls. Because this Note focuses on battered women, I will discuss only permit/license requirements and waiting periods. See *infra* part III.

needed.⁴ Gun control opponents, on the other hand, are equally fervent in their belief that such measures would infringe the right to bear arms.⁵ Left out of this debate almost entirely, however, is the right of women to bear arms for self-defense. When women are described as arms bearers in the debate over gun control, they are typically (pg.510) characterized as potential rape victims and the rapists are presumed to be strangers.⁶ This picture is not accurate. Unlike men, women are sexually assaulted, severely beaten, and/or killed by someone they know more often than by a stranger.⁷ Domestic batterers in particular are responsible for a significant amount of violence against women.⁸ Given these differences, it is not enough simply to extend the same form of analysis used to evaluate arms-bearing by men to the situation of women. In this Note I hope to broaden the debate over gun control by analyzing the situation of battered women.

In Part I, I will argue that regardless of the original meaning of the Second Amendment, the Privileges or Immunities Clause of the Fourteenth Amendment and provisions in many state constitutions⁹ grant individual citizens a right to bear arms for defensive purposes. In Part II, I will discuss the need of battered women to bear arms for protection. In Part III, I will argue that gun control statutes—such as lengthy waiting periods to purchase (or carry) a firearm and firearm permit/license requirements—that generally may be reasonable for others, may be unconstitutional as applied to battered women. (pg.511) Finally, in Part IV I will argue that battered women may be constitutionally entitled to a jury instruction regarding their right to bear arms for self-defense in two

⁴ In general, according to public opinion polls, "[a]bout 75 % of all Americans favor registering gun purchases and about 70% favor requiring police permits to buy a gun." KLECK, *supra* note 2, at 9.

⁵ See, e.g., Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59 (1989) (author was Deputy General Counsel for the National Rifle Association).

⁶ See, e.g., *Many Women in America Taking Up Guns for Protection*, DALLAS MORNING NEWS, Nov. 1, 1992, at 9A (noting Paxton Quigley's statement that she had interviewed 150 rape victims and found that "[i]n so many cases if they had a loaded gun they could have prevented that rape"); Angel Thompson, *Class Teaches Women Tips for Fighting Back*, TIMES-PICAYUNE, Apr. 8, 1993, at 111; cf. Don B. Kates, Jr., *The Value of civilian Handgun Possession as a Deterrent to Crime or a Defense Against Crime*, 18 AM. J. CRIM. L. 113, 150 (1991).

⁷ See, e.g., Jane Hansen, *Verdict: It was her life or his*, ATLANTA J. & CONST., Oct. 26, 1991, at B1 ("[t]he U.S. Surgeon General announced that American women are now safer on the city's crime-ridden streets than in their own homes. More than a third of women killed die at the hands of their husbands or boyfriends. The personal assaults are the No. 1 cause of injury to women, more than car wrecks, rapes and muggings combined."); Susan Reed, *Boyfriends and Husbands Often Women's Worst Enemy*, CNN television broadcast, Oct. 22, 1993, available in LEXIS, Nexis Library, CNN file (reporting results of a San Francisco study finding that "59 percent of all women killed in San Francisco are victims of family violence" and that "[P]olice believe a woman is battered every 15 seconds"); see also *infra* discussion in part II.A.

Also, violence against women is sexual more often than violence against men. Cf. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 278 (1991) (Table 3.23) (estimating 1.6 rapes per 1,000 men over age 12 compared to 11 rapes per 1,000 women over age 12). For statistics on the increasing incidence of rape in the United States, see Eloise Salholz, *Women Under Assault*, NEWSWEEK, July 16, 1990, at 23; Michael Isikoff, *Record Number of Rapes Reported in U.S. in '90*, WASH. POST, Mar. 22, 1991, at A3. For a discussion of women's ability to use firearms to defend themselves against rape, see Carol Ruth Silver & Don B. Kates, Jr., *Self-Defense, Handgun Ownership, and the Independence of Women in a Violent, Sexist Society*, in RESTRICTING HANDGUNS 139 (Don B. Kates, Jr. ed., 1979).

⁸ See *Justice Says Violent Crimes Against Women Averaged 2.5 Million per Year From 1979 Through 1987*, U.S. NEWSWIRE, Jan. 11, 1991 (Bureau of Justice Statistics Director Steven D. Dillingham stated that "[t]he violence women suffer is more frequently caused by people with whom the victims have had a prior relationship than is the case among men.... Almost one in five of the women who had been attacked by a family member or boyfriend said that the violence they experienced had been part of a series of at least three similar violent crimes that occurred within six months of the interview".).

⁹ For example, Alabama, Arizona, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, and Wyoming. See APPENDIX, *infra*, for the complete text of these constitutional provisions.

circumstances: first, if they are charged with violating a gun control law, such as a waiting period; second, if they shoot their abuser and are charged with violating one of the more general criminal laws, such as laws against murder or assault.

I. CONSTITUTIONAL RIGHTS TO BEAR ARMS

The academic and legal debate over gun control has centered on whether the Second Amendment to the United States Constitution guarantees an individual or a collective right to bear arms. In Section A, I will sketch this debate only briefly, because I conclude that the original meaning of the Second Amendment is largely irrelevant to most gun controls that affect battered women. In Section B, I will argue that the framers of the Fourteenth Amendment intended to guarantee an individual right to bear arms for self-defense as a privilege or immunity of citizens that, at a minimum, no state can abridge. Because my conclusion is contrary to Supreme Court precedent, I will discuss the evidence for my claim, including statements of members of the Thirty-ninth Congress and historical background, in some detail. In Section C, I will analyze some of the provisions in state constitutions that guarantee an individual right to bear arms.

A. *The Second Amendment*

The debate over the meaning of the right to bear arms has focused on the Second Amendment to the U.S. Constitution, which provides that:

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.

The Supreme Court has held that the Second Amendment applies only to the federal government¹⁰ and that it protects only arms that bear a "reasonable (pg.512) relationship to the preservation or efficiency of a well regulated militia."¹¹ Some authors argue that the decisions of the Court support their view that the Second Amendment guarantees only a collective right to maintain

¹⁰ See *Miller v. Texas*, 153 U.S. 535, 538 (1894) (Second Amendment "operate[s] only upon the Federal power, and ha[s] no reference whatever to proceedings in state courts"); *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886) (Second Amendment "is a limitation only upon the power of Congress and the National Government"); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (Second Amendment "has no other effect than to restrict the powers of the national government"). These cases were all decided many years before the Supreme Court began to incorporate certain provisions of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment. See, e.g., *Near v. Minnesota*, 283 U.S. 697 (1931) (applying First Amendment's protection of freedom of the press to the states).

¹¹ *United States v. Miller*, 307 U.S. 174, 178 (1939); cf. *Adams v. Williams*, 407 U.S. 143, 150-51 (1972) (Douglas, J., dissenting) ("the Second Amendment ... was designed to keep alive the militia"); *United States v. Friel*, No. 92-2418, 1993 U.S. App. LEXIS 20718, at *3-*4 (1st Cir. Aug. 17, 1993) (noting that Second Amendment "applies only to firearms having a 'reasonable relationship to the preservation or efficiency of a well regulated militia'" (citation omitted); *United States v. Hale*, 978 F.2d 1016, 1018-21 (8th Cir. 1992) (holding that Second Amendment does not protect individual possession of military weapons).

state militias.¹² Others disagree and argue that the Second Amendment guarantees the right of each individual to bear arms for defense of self, family, property, and the state.¹³

Although it does not conclusively resolve the debate, the historical background of the Second Amendment indicates that the protection of the state militias was a major concern of many of the framers of the Constitution. When the Constitution was adopted, anti-federalists fiercely opposed the creation of a federal standing army, which they viewed as a dangerous threat to liberty.¹⁴ The framers reached a compromise in Article I, Section 8, which allows the federal government to maintain a standing army but gives state governments a large degree of control over the militia.¹⁵ However, some of the framers were still concerned that Congress could use its power to disarm the state militias.¹⁶ Thus, they sought a guarantee that the state militias could be preserved as a check on the federal government.¹⁷ The Second Amendment, at (pg.513) a minimum,¹⁸ provided such a guarantee.¹⁹

The debate over the original meaning of the Second Amendment is interesting and important.²⁰ However, for the purposes of this Note, it is not necessary to attempt to resolve the

¹² See, e.g., CARL BAKAL, *THE RIGHT TO BEAR ARMS* 299 (1966); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia lately?*, 15 U. DAYTON L. REV. 5 (1989) (Henigan is the Director of the Legal Action Project at the Center to Prevent Handgun Violence in Washington, D.C.). Support for this view can be found in JOHN HART ELY, *DEMOCRACY AND DISTRUST* 94-95 & n.76 (1980); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-2, at 226 n.6 (1978); John Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI.-KENT L. REV. 148 (1971); Roy G. Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961, 1000-01 (1975).

¹³ See, e.g., STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984); David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559 (1986); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983).

¹⁴ See Hardy, *supra* note 13, at 584-99.

¹⁵ Article I, Section 8 provides, in relevant part, that:

[Congress shall have power] [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, end for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress

U.S. CONST. art. I, § 8, cl. 15-16.

¹⁶ See, e.g., *THE BILL OF RIGHTS, A DOCUMENTARY HISTORY* 606 (Bernard Schwartz ed., 1971) (discussing December 1787 letter from Jefferson to Madison complaining that the proposed Constitution omitted "a bill of rights providing clearly and without aid of sophisms for freedom of religion, freedom of the press, *protection against standing armies*, restriction against monopolies") (emphasis added).

¹⁷ As Elbridge Gerry stated during the congressional debate over the Second Amendment: "What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty." David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 572 (1991) (citing 1 ANNALS OF CONG. 749-50 (Joseph Gales ed., 1789)).

¹⁸ Professor Akhil Amar has concluded that "the text of the Second [Amendment] is broad enough to protect rights of discrete individuals or minorities; but the Amendment's core concerns are populism and federalism." Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1162 (1991).

¹⁹ Interestingly, the specific requirements of the federal militia statute of 1792, which purported to establish a uniform militia, were "virtually ignored for more than a century, during which time the militia proved to be a decidedly unreliable fighting force." *Perpich v. Dep't of Defense*, 496 U.S. 334, 341 (1990) (footnotes omitted).

²⁰ For a discussion of the original meaning of the Second Amendment to republican theorists, see Williams, *supra* note 17. For a feminist critique of republican theory, see Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 YALE L.J. 661 (1989).

debate. Most gun controls that affect battered women originate at the state level²¹ and most criminal trials of battered women who shoot their abusers are held at the state level.²² I contend that regardless of the original meaning of the Second Amendment, the framers of the Fourteenth Amendment intended to guarantee an individual right to bear arms as a privilege or immunity of citizenship that could not be infringed by the (pg.514) states.²³ The framers of the Fourteenth Amendment may have *wrongly* believed that the Second Amendment guaranteed such a right. Nevertheless, when their vision became part of the Constitution it took priority over the intent of the framers of the Second Amendment, at least with respect to actions by the states.

B. *The Fourteenth Amendment*

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides that:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which Shall abridge the privileges or immunities of citizens of the United*

²¹ For a discussion of permit/license requirements and waiting periods, see *infra* part III. An exception would be the five-day national waiting period recently passed by the Congress. See Clifford Krauss, *Gun-Control Act Wins Final Battle as G.O.P. Retreats*, N.Y. TIMES, Nov. 25, 1993, at A1; see also Ruth Marcus & Michael Isikoff, *Clinton's Anti-Crime Package: More Police, Curb on Pistol Imports*, WASH. POST, Aug. 12, 1993, at A16. This will be discussed *infra* in part III.A.

²² This is because, unlike state courts, federal courts have only limited jurisdiction. See U.S. CONST. art. III, § 2. Although numerous cases involving battered women have reached the federal courts, these have been primarily through petitions for a writ of habeas corpus. See, e.g., Lumpkin v. Ray, 977 F.2d 508 (10th Cir. 1992) (affirming denial of petition for writ of habeas corpus; expert testimony inadmissible because woman convicted of first degree murder of her husband failed to offer evidence of existence or characteristics of discrete group of women suffering from "battered woman syndrome"); United States v. July, No. 90-10457, 1992 WL 57428 (9th Cir. 1992) (unpublished disposition) (woman convicted of second degree murder in violation of 18 U.S.C. § 1111); Burton v. Johnson, 948 F.2d 1150 (10th Cir. 1991) (affirming grant of habeas corpus and ordering new trial for woman convicted of first degree murder for killing her husband), *on subsequent appeal*, 975 F.2d 690 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 1879 (1993); United States v. Gordon, 638 F. Supp. 1120 (W.D. La. 1986) (denying motion to suppress evidence for woman prosecuted under 18 U.S.C. §§ 1111 & 1117 for murder and conspiracy to commit murder when husband's body was found on federal military base), *aff'd* 812 F.2d 965 (5th Cir. 1987), *cert. denied*, 483 U.S. 1009 (1987); Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984) (affirming denial of petition for writ of habeas corpus for woman convicted of murdering her common law husband), *aff'd*, 474 U.S. 140 (1985); People v. Fleming, 507 N.E.2d 954 (Ill. App. 1987) (woman convicted of murder of her husband), *appeal denied*, 515 N.E.2d 116 (Ill. 1987), *petition for writ of habeas corpus denied sub nom.* Fleming v. Gramby, 735 F. Supp. 302 (C.D. Ill. 1990), *rev'd sub nom.* Fleming v. Huch, 924 F.2d 679 (7th Cir. 1991) (jury instructions violated due process and were not harmless); Ohio v. Tourlakis, No. 52035, slip op. at 5-6 (Ohio App. 1987) (refusing to admit expert testimony regarding battered woman syndrome in case of woman convicted of attempted murder of her boyfriend), *petition for writ of habeas corpus denied*, 738 F. Supp. 1128 (S.D. Ohio 1990); Fennell v. Goolsby, 630 F. Supp. 451 (E.D. Pa. 1985) (denying petition for writ of habeas corpus). In Moran v. Ohio, 469 U.S. 948 (1989), Justice Brennan discussed the importance of expert testimony regarding battered women's syndrome in his dissent from the Court's denial of certiorari.

²³ See, e.g., Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1266 (1992). An argument that the ratification of the Fourteenth Amendment also changed the meaning of the Second Amendment is beyond the scope of this essay. The argument would run roughly as follows: (1) the Fourteenth Amendment forbids any state from abridging "the privileges or immunities of citizens of the United States," (2) the individual right to bear arms is a privilege or immunity of citizens of the United States, (3) the federal government cannot abridge a privilege or immunity of citizens of the United States, (4) the federal government cannot abridge the individual right to bear arms; cf. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1955) (holding that, although the Equal Protection Clause of the Fourteenth Amendment did not apply to the federal government, racial segregation in Washington, D.C. public schools was unconstitutional and noting that "[i]n view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same constitution would impose a lesser duty on the Federal Government").

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²⁴

In Subsection 1 below, I will note that the framers of the Fourteenth Amendment repeatedly stated that the right to keep and bear arms was one of the privileges or immunities of citizenship, which the states could not infringe.²⁵ In Subsection 2, I will discuss some of the history of the Fourteenth Amendment, specifically the plight of Black freedmen and abolitionists in southern states. I contend that this historical context demonstrates that the framers of the Fourteenth Amendment considered the right to bear arms to be an *individual* right to bear arms, not a collective right to serve in state militias. In Subsection 3, I will argue that the Supreme Court incorrectly neutralized the Privileges or Immunities Clause of the Fourteenth Amendment in the *Slaughter-House Cases*²⁶ and in *Bradwell v. State*.²⁷ In 1931, the Court began (pg.515) to selectively incorporate certain provisions of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment.²⁸ I conclude that, even if it is not prepared to reexamine its treatment of the Privileges or Immunities Clause, the Court should incorporate the Second Amendment as an individual right to bear arms.

1. *Congressional Intent*

The framers intended that the Civil War Amendments²⁹ would repudiate the infamous *Dred Scott*³⁰ decision and allow the federal government to enforce laws such as the Freedman's Bureau bill of 1866.³¹ The bill gave Blacks, among other things, "full and equal benefit of all laws and proceedings for the security of person and estate, *including the constitutional right of bearing arms*."³²

Four prominent legislators explicitly demanded that the states not be allowed to infringe the right of all citizens to bear arms. Senator Pomeroy of Kansas, an abolitionist, believed that one of the essential safeguards of the Constitution was the right to bear arms.³³ Congressman Roswell Hart of New York demanded that the rebellious southern states establish "a government whose citizens shall be entitled to all privileges and immunities of other citizens" and specifically mentioned the

²⁴ U.S. CONST. amend. XIV, § 1 (emphasis added). The Fourteenth Amendment was ratified on July 9, 1868.

²⁵ Although I will discuss only statements related to the right to bear arms, the framers of the Fourteenth Amendment had a very broad understanding of the privileges or immunities of citizenship. *See generally* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986).

²⁶ 83 U.S. (16 Wall.) 36 (1873).

²⁷ 83 U.S. (16 Wall.) 130 (1873).

²⁸ *See* *Near v. Minnesota*, 283 U.S. 697, 707 (1931) ("liberty of the press ... is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action").

²⁹ U.S. CONST. amend. XIII (abolishing slavery) (ratified Dec. 6, 1865); U.S. CONST. amend. XIV (ratified July 9, 1868); U.S. CONST. amend. XV (ratified Feb. 3, 1870); *see* CURTIS, *supra* note 25, at 48.

³⁰ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (holding that the word "citizen" in the Constitution does not embrace one of "the negro African race" and that the Constitution expressly affirms a property right in slaves).

³¹ *See* CURTIS, *supra* note 25, at 72.

³² *Id.* (citing CONG. GLOBE, 39th Cong., 1st Sess. 654, 743, 1292 (1866)) (emphasis added).

³³ CURTIS, *supra* note 25, at 52.

Second Amendment in his demand.³⁴ Congressman Sidney Clarke of Kansas wanted Congress to provide "a more perfect freedom and a grander nationality" and "an enlarged liberty to the citizen."³⁵ He believed that Alabama and other rebellious states had violated the Second Amendment by denying Blacks the right to bear arms.³⁶ Senator Sumner of Massachusetts presented a petition "from the colored citizens of the State of South Carolina" asking for "constitutional protection in keeping arms, in holding public assemblies, and in complete liberty of speech and of the press."³⁷

Two prominent figures in the framing of the Fourteenth Amendment—(pg.516) Representative John A. Bingham, who drafted the Amendment, and Senator Jacob Howard, who presented the Fourteenth Amendment on behalf of the Joint Committee formed to decide whether the southern states should be readmitted—both believed that the Amendment would prevent state governments from infringing the right to keep and bear arms.

Representative Bingham described the Fourteenth Amendment as follows:

The proposition pending before the House is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today.³⁸

Senator Howard described some of the privileges and immunities of citizens as follows:

To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as ... *the right to keep and bear arms....*³⁹

Senator Howard and other Republicans believed the Fourteenth Amendment was needed to enable Congress to enforce the Civil Rights bill without being thwarted by the courts. As Senator Howard stated:

Now ... here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, ... some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights ... do not operate in the slightest degree as a restraint or prohibition upon State legislation.⁴⁰

The statements of Senator Howard, Representative Bingham, and the other legislators mentioned above demonstrate that the framers of the Fourteenth Amendment clearly intended that

³⁴ *Id.* at 53.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 56.

³⁸ *Id.* at 70 (quoting John A. Bingham, Address (Feb. 28, 1866)).

³⁹ CURTIS, *supra* note 25, at 88 (emphasis added).

⁴⁰ *Id.*

the Second Amendment should apply to the states.⁴¹ The question then becomes, what did Republicans see as the fundamental right guaranteed by the Second Amendment? Was it the right of the people to keep and bear arms as part of state militias, or was it the right of every citizen to keep and bear arms in order to defend his⁴² person and property? (pg.517) The historical context of the Fourteenth Amendment makes it clear that the framers preferred the latter interpretation.

2. Historical Context

Before the Civil War, many state laws restricted arms-bearing by freed Blacks and/or slaves.⁴³ A Florida Act of 1825 is a particularly disturbing example. The Act provided that white citizen patrols "shall enter into negro houses and suspected places, and search for arms and other offensive or improper weapons, and may lawfully seize and take away all such arms, weapons, and ammunition"⁴⁴ Violence against Blacks during such searches was common.⁴⁵

Mob violence against Blacks was prevalent in northern cities as well, where racism was fed by economic competition between Blacks and whites, and massive segregation made Black communities easy to target.⁴⁶ In response, Black men formed private militia groups and experienced some success in preventing or halting riots, at least until they were disarmed by state authorities.⁴⁷

After the Civil War, many Confederate states attempted to reenslave Blacks through the use of statutes commonly referred to as the Black Codes. The basis for such laws was illustrated by the notorious prerevolutionary decision *Scott v. Sandford*,⁴⁸ in which Justice Taney explained why freed Blacks could not be citizens of the United States.

[If black people were] entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which [Southern states] considered to be necessary for their own safety. It would give the persons of the negro race, who were recognized as citizens in any one State of the Union ... the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, *and to keep and carry arms wherever they went*. And all of this would be done in the face of the subject race of the same color, both

⁴¹ See also Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993) (arguing that the Fourteenth Amendment applies the first eight amendments to the states).

⁴² I use a masculine pronoun here because I do not believe that women were citizens until the ratification of the Nineteenth Amendment, which gave women the right to vote, in 1920. See U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); *infra* note 94 and accompanying text.

⁴³ See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, in 3 GUN CONTROL AND THE CONSTITUTION 265 [ed: originally published: 309], 336-38 (Robert J. Cottrol ed., 1993) (discussing laws in Texas, Mississippi, Kansas, Florida, Georgia, Louisiana, and North Carolina). See HALBROOK, *supra* note 13, at 107-53, for a discussion of the Black experience with the right to bear arms.

⁴⁴ Cottrol & Diamond, *supra* note 43, at 337 (citing 1825 Acts of Fla. 52, 55).

⁴⁵ See *Lone Survivor of Atrocity Recounts Events of Lynching*, N.Y. AMSTERDAM NEWS, June 1, 1927, reprinted in RALPH GINZBURG, 100 YEARS OF LYNCHINGS 175-78 (1988). This article details how a sheriff and three deputies attempted a warrantless search of a Black household and hit a Black woman. Her relatives used a hatchet and firearms to defend themselves and killed the sheriff. They were taken into custody and, after the first one was acquitted of murder, all three were lynched.

⁴⁶ See Cottrol & Diamond, *supra* note 43, at 339-42.

⁴⁷ *Id.* at 341-42.

⁴⁸ 60 U.S. (19 How.) 393 (1856).

free and slaves, inevitably producing discontent and (pg.518) insubordination among them, and endangering the peace and safety of the State.⁴⁹

Justice Taney's parade of "horribles" is an example of the widely held view that free Blacks were dangerous and local authorities were benevolent protectors.⁵⁰ According to this view, Blacks could not be allowed to bear arms. Thus, the subjugation of Blacks continued after the Civil War through state laws that denied Blacks basic rights, such as the freedom to move, to contract, to own property, to assemble, and to bear arms.⁵¹ For example, a Louisiana Statute of 1865 provided that:

No Negro who is not in the military service shall be allowed to carry fire-arms, or any kind of weapons, within the parish, without the special permission of his employers, approved and indorsed by the nearest and most convenient chief of patrol. Any one violating the provisions of this section shall forfeit his weapons and pay a fine of five dollars, or in default of the payment of said fine, shall be forced to work five days on the public road, or suffer corporal punishment as hereinafter provided.⁵²

The violence used to perpetuate the subjugation of Blacks caused many people to believe that Blacks and abolitionists needed to arm themselves in order to defend against local authorities and mobs of "upstanding" citizens. For example, at an 1866 constitutional convention in New Orleans convened for the purpose of giving Blacks the right to vote in state elections:

[t]he police and white Louisianans, in a paroxysm of hatred and fear, mobbed the delegates. Ignoring white handkerchiefs that [delegates] ran up the flagpole and waved from the windows of the [Mechanics] Institute, the mob fired into the building, shot loyalists as they emerged, and pursued them through the streets, clubbing, beating, and shooting all they caught. Forty of the delegates and their supporters were killed, another one hundred and thirty-six wounded.⁵³

Unlike the framers of the Second Amendment, the framers of the Fourteenth Amendment were not concerned with protecting state militias, which were often the greatest culprits in the violence against Blacks and abolitionists. As Senator Lyman Trumbull stated in debates over the Freedmen's Bureau bill, "[n]early all the dissatisfaction that now exists among the freedmen is caused by the abusive conduct of [the Mississippi] militia[,] which would often "hang some freedman or search negro houses for arms."⁵⁴ Representative Henry J. Raymond explained, during debate over the Civil Rights Bill, that a citizen "has a defined *status*; he has a country and a home; a right to defend himself (pg.519) and his wife and children; a right to bear arms."⁵⁵

⁴⁹ *Id.* (emphasis added).

⁵⁰ See HERBERT APTHEKER, AMERICAN NEGRO SLAVE REVOLTS 293-324 (5th ed. 1983) (discussing Nat Turner slave revolt in Virginia in 1831, during which at least 57 white people were killed).

⁵¹ CURTIS, *supra* note 25, at 35 (footnote omitted).

⁵² See Cottrol & Diamond, *supra* note 43, at 344 n.176 (citation omitted).

⁵³ CURTIS, *supra* note 25, at 136.

⁵⁴ CONG. GLOBE, 39th Cong., 1st Sess. 941 (1866), *quoted in* HALBROOK, *supra* note 13, at 110.

⁵⁵ CONG. GLOBE, 39th Cong., 1st Sess. 1266 (1866).

Thus, the framers of the Fourteenth Amendment clearly intended to prevent the states from abridging the privileges or immunities of citizens, including the individual right to bear arms for defense of person and property. For a brief period, they were successful.

3. *The Fourteenth Amendment in the Courts*

In one of the first decisions to interpret the Fourteenth Amendment, a federal court held that no state could abridge the rights contained in the first eight amendments, which were the privileges or immunities of citizens.⁵⁶ Two years later, however, in two of its decisions, the Supreme Court construed the Privileges or Immunities Clause so narrowly as to remove it from the Constitution for most practical purposes.⁵⁷ These decisions were followed by the congressional abandonment of civil rights.

Over sixty years after the ratification of the Fourteenth Amendment, the Supreme Court finally began to apply some of the provisions of the Bill of Rights to the states through the Due Process Clause of the Amendment.⁵⁸ Thus far, the Second Amendment is one of the few provisions of the Bill of Rights that has not been incorporated.⁵⁹ I contend that the Second Amendment should be applied to the states to guarantee that every citizen has the right to keep and bear arms, just as the framers of the Fourteenth Amendment intended.

In *United States v. Hall*,⁶⁰ one of the first federal cases involving the Fourteenth Amendment, the defendants were convicted, under a federal statute, of conspiring to deny other citizens their rights of freedom of speech and assembly. The defendants had argued that such rights were not privileges or immunities of citizens of the United States and that the federal government therefore lacked the power to punish them. The court rejected this argument and held that the statute was constitutional because the Fourteenth Amendment gave citizens of the United States all the privileges and immunities secured by the first eight amendments.^(pg.520)

By the original constitution citizenship in the United States was a consequence of citizenship in a state. By [the privileges and Immunities] clause this order of things is reversed. Citizenship in the United States is defined; it is made independent of citizenship in a state What are the privileges and immunities of citizens of the United States here referred to? They are undoubtedly those which may be denominated fundamental; which belong of right to the citizens of all free states Among these we are safe in including those which in the constitution are expressly secured to the people, either as against the action of federal or state governments.... We think, therefore, that the right of freedom of speech, *and the other rights enumerated in the first eight articles of amendment to the constitution of the United States*, are the privileges and immunities of citizens of the United States.⁶¹

⁵⁶ United States v. Hall, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282).

⁵⁷ Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

⁵⁸ See, e.g., Near v. Minnesota, 283 U.S. 697 (1931) (applying First Amendment protection of freedom of press to the states).

⁵⁹ See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 332-34 & n.4 (4th ed. 1991).

⁶⁰ 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282). Judge William B. Woods, author of the opinion in *Hall*, later was appointed to the Supreme Court, where he dissented in the *Slaughter-House Cases*. See CURTIS, *supra* note 25, at 171-72.

⁶¹ 26 F. Cas. at 81-82 (emphasis added).

The evidence presented in Sections 1 and 2 above demonstrates that this is an accurate description of the intent of the framers of the Fourteenth Amendment. The Supreme Court, however, did not read the Privileges or Immunities Clause so broadly.

The Court first considered the meaning of the Privileges or Immunities Clause in the *Slaughter-House Cases*,⁶² which involved a Louisiana law requiring all butchering in the New Orleans area to be performed in a single slaughterhouse run by a private corporation. The plaintiffs were independent butchers who claimed that the law would put them out of work. The Court held that the statute was constitutional. Justice Miller, writing for the majority, explained that the "most cursory glance" at the Civil War Amendments disclosed "a unity of purpose, when taken in connection with the history of the times," to prevent discrimination against Blacks, but not to protect fundamental rights of a citizen of a state against the legislative power of his own state.⁶³ As for the privileges or immunities guaranteed citizens of the United States by the Fourteenth Amendment, the Court stated that these included the right to go to and from the seat of government, free access to the seaports, protection on the high seas or when under the jurisdiction of foreign governments, and the right to use navigable waters.⁶⁴ This explanation was completely inconsistent with the many statements of the framers of the Fourteenth Amendment that the privileges or immunities of citizens included the rights listed in the first eight amendments to the Constitution.

The *Slaughter-House* decision was further cemented in *Bradwell v. State*.⁶⁵ In *Bradwell*, the Supreme Court rejected Myra Bradwell's claim that (pg.521) the Illinois bar's refusal to admit women violated the Fourteenth Amendment. The Court held that the right to practice law in state courts was not a privilege or immunity of citizens of the United States but instead related to state citizenship. Thus, the Court concluded that the states had unfettered power to regulate the practice of law.

The holdings in the *Slaughter-House Cases* and *Bradwell* could possibly be justified by the fact that those cases involved butchers and a female lawyer rather than former slaves.⁶⁶ However, even in an area in which the framers had expressly stated that the Fourteenth Amendment would apply—protection of the rights of Black freedmen—the Supreme Court refused to recognize or give effect to their intent.

One of the purposes of the Fourteenth Amendment was to give Congress the power to stop violence against Blacks, and, for a very short period of time, it was successful. The Ku Klux Klan was extremely powerful in the 1870s and frequently was responsible for the assassination of Black

⁶² 83 U.S. (16 Wall.) 36 (1873).

⁶³ *Id.* at 74.

⁶⁴ *Id.* at 79.

⁶⁵ 83 U.S. (16 Wall.) 130 (1873). The *Slaughter-House Cases* were decided on April 14, 1873. *Bradwell* was decided on April 15, 1873. Myra Bradwell's lawyer on appeal, Senator Matthew Hale Carpenter, argued in favor of the state legislation in the *Slaughter-House Cases*. Compare 83 U.S. (16 Wall.) at 57 with 83 U.S. (16 Wall.) at 133-34. For a discussion of the *Bradwell* case, see Frances Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895*, 84 MICH. L. REV. 1518, 1520-34 (1986).

⁶⁶ One contemporary who believed that U.S. citizens had absolute constitutional rights also believed that gender-based distinctions, which he grouped with distinctions based on age and mental capacity, could be recognized. See CONG. GLOBE, 39th Cong., 1st Sess. 1835 (1866) (statement of William Lawrence of Ohio).

leaders and Republicans.⁶⁷ In response, Congress passed the anti-Klan statutes⁶⁸ and President Grant suspended the writ of habeas corpus in nine South Carolina counties.⁶⁹ More than 5000 Klansmen were arrested under the new statutes and fifty-five were found guilty of violating civil rights.⁷⁰

In *United States v. Cruikshank*,⁷¹ however, the Supreme Court held one of the anti-Klan statutes unconstitutional. The defendants were white men who had killed more than sixty Blacks. They were charged with conspiring to prevent Blacks from exercising their right to assemble and their right to bear arms, among other rights.⁷² The Court dismissed the charges, holding that the Bill of Rights restricted the power of Congress but not of private individuals: "For their protection in its enjoyment, the people must look to the States."⁷³ The sad consequences of this turn of events is reflected by the (pg.522) lynchings of at least 3446 Blacks between 1882 and 1960.⁷⁴

It seems safe to conclude that the framers would have enthusiastically approved of the analysis in *Hall* and disapproved of the Court's narrow construction of the Privileges or Immunities Clause in the *Slaughter-House Cases*, *Bradwell* and perhaps *Cruikshank*.⁷⁵ Yet, despite the fervor Republicans initially brought to the cause of equality, the promise of the Civil War Amendments was abandoned only a few years after *Hall* was decided. Michael Kent Curtis describes the political forces at work.

In 1876 the Democratic presidential candidate won a majority of the popular vote. The electoral vote was close and hung on the outcome in disputed southern states. By the compromise of 1877 the election was given to the Republicans. In return, federal troops were to be withdrawn from the South, leaving blacks and southern Republicans to their own devices.

For a brief shining moment during and after the Civil War, protection of blacks had been associated with the cause of the Union. By the mid-1870s protection of blacks seemed to disrupt national unity, and the commitment to protection of their rights faded away as quickly as it had come.⁷⁶

⁶⁷ CURTIS, *supra* note 25, at 178.

⁶⁸ *See, e.g.*, Act of May 31, 1870, § 6, 16 Stat. 141, 142 (codified as amended at 18 U.S.C. §§ 241-42 (1988)), providing, in relevant part:

That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution [sic] or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony

⁶⁹ CURTIS, *supra* note 25, at 178.

⁷⁰ *Id.*

⁷¹ 92 U.S. 542 (1875).

⁷² *Id.* at 544-45.

⁷³ *Id.* at 552.

⁷⁴ *See* Cottrol & Diamond, *supra* note 43, at 351-52. Both women and men were victims of this violence. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 119 (1988).

⁷⁵ Because it involved *private* action rather than state action, the holding in *Cruikshank* may have been consistent with the intent of the framers.

⁷⁶ CURTIS, *supra* note 25, at 180 (footnote omitted).

Curtis concludes that "[m]ore and 'more Republicans began to emphasize the issue of states' rights."⁷⁷ Consistent with these political forces and the evisceration of the Privileges or Immunities Clause in the *Slaughter-House Cases* and *Bradwell*, in *Presser v. Illinois*,⁷⁸ and *Miller v. Texas*,⁷⁹ the Court continued to hold that the Second Amendment did not apply to the states through the Fourteenth Amendment.⁸⁰ (pg.523)

The Fourteenth Amendment eventually was given new life in a series of Supreme Court decisions holding that certain provisions of the Bill of Rights deemed "fundamental to the American system of justice" applied to the states through the Due Process Clause.⁸¹ Nevertheless, the Second Amendment right to bear arms, the Third Amendment's protection against quartering of soldiers in private homes, the Fifth Amendment's grand jury guarantee, and the Seventh Amendment's guarantee of a jury trial in civil cases have not been applied to the states.⁸²

The framers of the Fourteenth Amendment intended to prevent the states from infringing the privileges or immunities of citizens, including the right to bear arms. Thus, according to Professor Akhil Amar, the Second Amendment should be incorporated, but not mechanically:⁸³

[T]he very same words "the right ... to keep and bear arms" take on a different coloration and nuance when they are relabeled "privileges or immunities of citizens" rather than "the right of the people," and when they are severed from their association with a well-regulated

⁷⁷ *Id.* at 178 (citation omitted).

The Ninth Circuit recently rejected the argument that the Fourteenth Amendment guarantees an individual right to bear arms. In *Fresno Rifle and Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 730 (9th Cir. 1992), the court upheld California's Assault Weapons Control Act of 1989, stating:

Nor are we influenced to change this view by remarks of various legislators during passage of the Freedmen's Bureau Act of 1866, the Civil Rights Act of 1866, and the Civil Rights Act of 1871. The plaintiffs argue that these remarks show that the framers of the Fourteenth Amendment intended that the Second Amendment guarantee an individual right of persons to acquire and keep rifles, pistols, and shotguns. While they provide an interesting insight that the plaintiffs assert is newly discovered, the point is the same: *Cruikshank*, which was decided only five years after the adoption of the 1871 Act, and *Presser* both make clear that the Second Amendment binds only the national government.

The court apparently did not appreciate the dramatic political changes that had occurred during the five years between the adoption of the 1871 Act and the *Cruikshank* decision, making the opinion of the Supreme Court justices very different from that of the framers of the Fourteenth Amendment, and, in my view entitling the latter to greater deference.

⁷⁸ 116 U.S. 252, 264-66 (1886).

⁷⁹ 153 U.S. 535, 538 (1894).

⁸⁰ In *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269-71 (7th Cir. 1982), *cert. denied* 464 U.S. 863 (1983), the Seventh Circuit recently reaffirmed the principle that the Second Amendment does not apply to the states, although the court acknowledged the strong historical evidence to the contrary. The court upheld a ban on handguns by the Village of Morton Grove as a reasonable exercise of the Village's police power. *Id.* at 269-71.

⁸¹ See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Sixth Amendment right to trial by jury); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel in criminal trials); *Mapp v. Ohio*, 367 U.S. 643 (1961) (unreasonable searches and seizures); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (religion clauses); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (religion clauses); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (free speech and peaceable assembly); *Powell v. Alabama*, 287 U.S. 45 (1932) (right to appointment and effective assistance of counsel); *Near v. Minnesota*, 283 U.S. 697 (1931) (free press); *Stromberg v. California*, 283 U.S. 359 (1931) (free speech). *But see* *Adamson v. California*, 332 U.S. 46 (1947) (Fifth Amendment privilege against self-incrimination did not apply to the states); *Palko v. Connecticut*, 302 U.S. 319 (1937) (double jeopardy clause did not apply to the states), *overruled by* *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

⁸² See generally NOWAK & ROTUNDA, *supra* note 59, at 332-34 (Nowak and Rotunda also mention the Eighth Amendment's prohibition on excessive fines but conclude that the Amendment "may already have been impliedly made applicable to the states").

⁸³ See Amar, *supra* note 23, at 1197 (argument for "refined incorporation").

militia.... [T]he core applications and central meanings of the right to keep and bear arms and other key rights were very different in 1866 than in 1789. Mechanical incorporation obscured all this, and, indeed, made it easy to forget that when we "apply" the Bill of Rights against the states today, we must first and foremost reflect on the meaning and the spirit of the Amendment of 1866, not the Bill of 1789.⁸⁴

Until the Supreme Court gives effect to the intent of the framers and applies the Second Amendment to the states,⁸⁵ battered women must look to state constitutions for protection of their right to bear arms.^(pg.524)

C. State Constitutions

While the federal right to bear arms has, as yet, remained illusory, thirty-one states have constitutional provisions that can be read to guarantee an individual right to bear arms.⁸⁶ For example, Article I, Section 15 of the Connecticut Constitution provides that: "Every citizen has a right to bear arms in defense of himself and the state."⁸⁷ Delaware's right-to-bear-arms provision is phrased in gender-neutral language: "A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use."⁸⁸

These constitutional provisions are not absolute. Generally, the right to bear arms is subject to reasonable restrictions by the state under its police power, i.e., the power to protect the public health, safety, and welfare.⁸⁹ *State v. Reid*⁹⁰ provides an early example of these limits. In *Reid*, the Supreme Court of Alabama upheld the conviction of a sheriff for carrying a concealed weapon. The court noted, however, that the state legislature did not have unbridled discretion to regulate arms-bearing: "A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional."⁹¹

This case indicates that some state courts may be willing to take seriously an individual right to bear arms.⁹² However, the reasonableness of restrictions on that right has thus far been judged

⁸⁴ *Id.* at 1266.

⁸⁵ This may happen soon. In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court held that the Fourth Amendment did not apply to a search by DEA agents of the Mexican residence of a Mexican citizen. The Court cited the Preamble, the First Amendment, the Second Amendment, the Ninth Amendment, and the Tenth Amendment to support its conclusion that the phrase "the people" is a term of art that refers to a "class of persons who are part of a national community." *Id.* at 265.

⁸⁶ Alabama, Arizona, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Vermont, Washington, West Virginia and Wyoming. See Appendix, *infra*. For an examination of the scope of Connecticut's right to bear arms, see Sayoko Blodgett-Ford & J. Drake Turrentine, *Gun Controls and the Connecticut Constitution*, 66 CONN. BAR. J. 425 (1992).

⁸⁷ CONN. CONST. art I, § 15.

⁸⁸ DEL. CONST. art. I, § 20.

⁸⁹ See, e.g., *People v. McFadden*, 188 N.W.2d 141, 144 (Mich. Ct. App. 1971) ("Because of the state's legitimate interest in limiting access to weapons peculiarly suited for criminal purposes, the right to bear arms, like all other rights, is subject to the reasonable exercise of the police power."); cf. *State v. Brown*, 571 A.2d 816, 817 (Me. 1990) ("no absolute right" to bear arms).

⁹⁰ 1 Ala. 612 (1840).

⁹¹ *Id.* at 616-17.

⁹² See also *Schubert v. DeBard*, 398 N.E.2d 1339 (Ind. App. 1980).

according to a male standard, i.e., where the attacker is a stranger and the attack comes as a surprise.⁹³ The needs of battered women have been ignored.^(pg.525)

II. BATTERED WOMEN AND FIREARMS

The Fourteenth Amendment was, in part, an attempt to address the needs of an oppressed group—Black freedmen—by making it clear that, as citizens of the United States, they had a right to bear arms. Since the Nineteenth Amendment gave women the right to vote in 1920, women also are citizens of the United States.⁹⁴ As citizens, women should have a federal (and often a state) constitutional right to bear arms.⁹⁵ Yet, even in 1993, the right to bear arms often is described in the same masculine terms used in 1866.⁹⁶ Specifically, the need of many women to bear arms to defend themselves against attacks by people they know has not yet been addressed. Below I will argue that battered women are particularly vulnerable to attack when they attempt to separate from an abuser. Because such women expect violence from a person they know well, a firearm can be especially useful for self-defense. Thus, I contend that statutes preventing a battered woman from obtaining a firearm under such circumstances may violate her constitutional right to keep and bear arms.

A. *Home Is a Danger Zone*

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.... The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.⁹⁷ ^(pg.526)

Contrary to this rosy picture of domestic harmony, man often is the very thing woman needs protection *from*. In fact, home is a very dangerous place for many women.

⁹³ See *infra* part II; see also *supra* note 6 and accompanying text.

⁹⁴ See *supra* note 42 and accompanying text. The Nineteenth Amendment was ratified August 18, 1920 and provides that: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend. XIX.

⁹⁵ The rights of citizens include the right to vote and to serve in public office, on juries, and in the military forces. See Jennifer K. Brown, Note, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175, 2177-82 (1993) (denial to women of right to vote); Mary Becker, *The Politics of Women's Wrongs and the Bill of "Rights,"* 59 U. CHI. L. REV. 453, 455, 494 (1992) (denial to women of right to serve in public office and military forces). The right to bear arms also is included. As Professor Akhil Amar noted:

Alien men and single white women circa 1800 typically could enter into contracts, hold property in their own name, sue and be sued, and exercise sundry other civil rights, but typically could not vote, hold public office, or serve on juries. These last three were political rights, reserved for Citizens. So too, the right to bear arms had long been viewed as a political right, a right of Citizens.

Amar, *supra* note 18, at 1164 (discussing distinction between political rights and civil rights and noting link between arms-bearing and suffrage).

⁹⁶ The *Peairs* case provides an example. On May 23, 1993, a Louisiana jury found Rodney Peairs, who shot and killed a 16-year-old Japanese exchange student, not guilty of manslaughter after the defense attorney argued that the student "kept grinning and coming toward Peairs, 'with absolutely no regard for his home, his gun, his fear, his woman.'" William Booth, *Man Acquitted of Killing Japanese Exchange Student*, WASH. POST, May 24, 1993, at A6. Compare to CONG. GLOBE, 39th Cong., 1st Sess. 1266 (1866) (statement of Rep. Raymond) (a citizen "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").

⁹⁷ *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

1. *The Prevalence and Nature of Domestic Violence*

Estimates of the number of families that will experience some form of domestic violence range from eleven to fifty-two percent.⁹⁸ Women in general are four times as likely as men to be victims of a crime of violence committed by a relative. In contrast, men are at least three times as likely to be victims of a crime of violence committed by a stranger.⁹⁹ According to one estimate, "between 1.5 and two million women seek medical treatment each year because of an assault by a male partner."¹⁰⁰ In a 1978 study of 900 cases of family violence, women were victims in ninety-four percent of the cases and offenders in three percent of the cases.¹⁰¹ Yet, in 1984, 1310 women were killed by their husbands and 806 husbands were killed by their wives.¹⁰² The vast majority of women who killed their husbands had been battered by those men.¹⁰³

There is disagreement about the exact definition of battering and battered (pg.527) women.¹⁰⁴ For the purposes of this Note, I define battered women as women who are intimately involved with someone who repeatedly uses physical or sexual violence to achieve and maintain dominance and control in the relationship, and who threatens to kill or seriously injure the woman, her relatives, or her children if she attempts to leave the relationship.¹⁰⁵

⁹⁸ See generally LEWIS OKUN, WOMAN ABUSE: FACTS REPLACING MYTHS 37-39 (1986); MILDRED DALY PAGEDOWN, FAMILY VIOLENCE 42-46 (1984); ROBERT T. SIGLER, DOMESTIC VIOLENCE IN CONTEXT: AN ASSESSMENT OF COMMUNITY ATTITUDES 12 (1989) (survey of available studies). Accurate statistics on the number of battered women in America are very hard to obtain. This is partly because many women are too ashamed or afraid to report an attack and partly because police and prosecutors often take no action even when an attack is reported. ANGELA BROWNE, WHEN BATTERED WOMEN KILL 9 (1987) (stating that, in one study, "43 percent of the women who had been abused told no one and only 4 percent of the reported assaults resulted in court action").

⁹⁹ According to the BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 266 (1990), where the victim and offender were related, there were 3.6 crimes of violence per 1000 female victims versus 0.9 crimes of violence per 1000 male victims. Where the victim and offender were strangers, there were 23.9 crimes of violence per 1000 male victims versus 8.8 per 1000 female victims. Crimes of violence include rapes, robberies, assaults, and aggravated assaults. In Table 3.24 of the same source, women are reported to be victims of violent crimes committed by an intimate 24.5 % of the time while men are victims of violent crimes committed by an intimate only 3.9% of the time. *Id.* at 269 ("intimate" includes: spouse, ex-spouse, parent, child, brother/sister, other relative, boy/girlfriend, unspecified).

¹⁰⁰ BROWNE, *supra* note 98, at 9.

¹⁰¹ *Id.* at 8 (citing study of R. Emerson Dobash and Russell Dobash); cf. Tamar Lewin, *Battered Men Sounding Equal-Rights Battle Cry*, N.Y. TIMES, Apr. 20, 1992, at A12. The theory that as many men as women are battered was discredited once the *outcomes* of family violence were examined. See Lisa D. Brush, *Violent Acts and Injurious Outcomes in Married Couples: Methodological Issues In the National Survey of Families and Households*, in VIOLENCE AGAINST WOMEN 240 (Pauline B. Bart & Eileen Geil Moran eds., 1993).

¹⁰² BROWNE, *supra* note 98, at 10.

¹⁰³ See generally, MARTIN DALY & MARGO WILSON, HOMICIDE 278 (1988); Daniel G. Saunders, *When Battered Women Use Violence: Husband-Abuse or Self-Defense?*, 1 VIOLENCE AND VICTIMS 47, 49 (1986); Murray A. Strauss, *Domestic Violence and Homicide Antecedents*, 62 BULL. N.Y. ACAD. MED. 446, 448 (1986).

¹⁰⁴ Given the great variety of relationships, it is not reasonable to expect that one catch-all definition will adequately describe every situation.

¹⁰⁵ This definition is loosely based on Angela Browne's discussion of battered women. See BROWNE, *supra* note 98, at 74.

While I recognize that men may be the victims of battering at the hands of their female spouses, and that battering also occurs within homosexual relationships, the focus of this Note is on women who are battered by their male spouses. For a cogent examination of battering within homosexual relationships, see Barbara Hart, *Lesbian Battering: An Examination*, in NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING 173 (Kerry Lobel ed., 1986); Denise Bricker, Note, *Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners*, 58 BROOK. L. REV. 1379 (1993). For a discussion on men who are battered by women, see Lewin, *supra* note 101.

In addition to general assaults, rape and other abusive sexual acts often are part of battering.¹⁰⁶ For example, Dr. Angela Browne compared forty-two battered women who had killed their abusers with 205 battered women who had not.¹⁰⁷ Dr. Browne found that "76 percent of the homicide group and 59 percent of the control group reported [forced sexual intercourse]."¹⁰⁸ In addition, "[w]ell over half (62 percent) of the women in the homicide group, and 37 percent of the comparison group, reported that their husbands had forced or urged them to perform other sexual acts that the women considered abusive or unnatural," including "the insertion of objects into the woman's vagina, forced oral and anal sex, bondage, forced sex with others, and sex with animals."¹⁰⁹ In one disturbing case, a battered woman was sexually assaulted by her husband, a police officer, who used such objects as a wine bottle, a broom handle, and his gun.¹¹⁰

Until very recently, most states did not prohibit marital rape.¹¹¹ Consistent (pg.528) with this legal regime, many battered women do not characterize forceful sexual acts by their husband as rape. For example, many battered women in a 1980 study who reported they had *not* been raped "still said that they had submitted to sexual demands in order to prevent beatings, or out of fear of their partner. Some of these women even reported physical assaults during sexual activity so severe that they were injured or lost consciousness, yet did not define these as *sexual* assaults."¹¹²

2. A Profile of Battering

Dr. Angela Browne recognized a pattern in the experiences of battered women who killed their batterers.¹¹³ Although not all battering relationships fit this pattern, particularly because most

¹⁰⁶ For the purposes of this Note, rape is when "a woman chooses not to have intercourse with a specific man and the man chooses to proceed against her will." See SUSAN BROWNMILLER, *AGAINST OUR WILL* 8 (1975). This definition is appropriate because batterers frequently desire intercourse after they have inflicted a beating, in which case they may not have to use any additional force. See BROWNE, *supra* note 98, at 9 ("half of all rapes to women over 30 are part of the battering syndrome") (citing estimate by researchers on a National Institute of Mental Health project).

¹⁰⁷ See CYNTHIA K. GILLESPIE, *JUSTIFIABLE HOMICIDE* 125-26 (1989) (discussing results of Angela Browne's 1983 study).

¹⁰⁸ *Id.* at 126.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ In 1987, Angela Browne reported that "[m]arital rape is exempt from prosecution in most states: By 1980, only three states had eliminated the marital rape exemption from their laws, and five states had modified it. However, by 1982, 13 other states had *extended* their exemptions to include cohabiting couples as well as the legally married." BROWNE, *supra* note 98, at 102 (footnotes omitted). However, the *Washington Post* recently reported that "North Carolina became the nation's last state to make marital rape a crime, as the state Senate voted 44 to 3 to repeal the exemption for husbands." WASH. POST, July 2, 1993, at A9.

This legal regime was consistent with the views of the influential philosopher Jean-Jacques Rousseau, who argued that even a woman's express refusal to consent to sexual relations should not be taken seriously.

To win this silent consent is to make use of all the violence permitted in love. To read it in the eyes, to see it in the ways in spite of the mouth's denial ... If he then completes his happiness, he is not brutal, he is decent. He does not insult chasteness; he respects it; he serves it. He leaves it the honor of still defending what it would have perhaps abandoned.

JEAN-JACQUES ROUSSEAU, *POLITICS AND THE ARTS: LETTER TO M. D'ALEMBERT ON THE THEATRE* 85 (Allen Bloom trans., 1960). See generally BROWNMILLER, *supra* note 106, at 6-22 for a discussion of early legal and religious views of rape.

¹¹² BROWNE, *supra* note 98, at 101 (footnote omitted).

¹¹³ See generally BROWNE, *supra* note 98. The profile of battering discussed in this section is loosely based on the experiences of battered women which Browne discusses.

battered women do *not* kill their abusers, it is a useful tool for analyzing the situation many battered women face.

Women who killed their batterers were involved with these men for an average of 8.7 years.¹¹⁴ The men were extremely attentive and kind during the courtship. They took care to hide their past from the woman by isolating her from the man's friends and relatives and by asking many questions about the woman's background in order to divert her attention away from their own. In fact, most batterers had a history of using violence against others and, as children, had witnessed the use of violence by one family member against another. The men apparently needed an unrealistic amount of attention and devotion, but also needed to keep a distance from their partners and to anticipate betrayal. The women could not serve both of these conflicting needs, yet whenever battering occurred, the women were told that it was their fault. Alternatively, stress, job problems, alcohol, or drugs would be blamed. The batterers would express regret, and the women would initially accept these explanations, which were especially plausible because they knew nothing of the batterer's past.

It is very important to note, however, that battered women do not accept such explanations because they are mentally impaired in some way, as the (pg.529) common description of "battered women's syndrome" suggests.¹¹⁵ Eventually, the batterer's explanations become grossly insufficient to justify the violence inflicted, and many battered women seek help from others and/or separate from their abuser. For example, one study, which involved over 6000 intake and exit interviews of women in fifty Texas battered women's shelters, found that more than seventy percent of the women had previously left home before becoming shelter residents and fifty-three percent had called the police at least once.¹¹⁶ Unfortunately, battered women frequently face the greatest danger when they attempt to separate from an abuser.

B. *Leaving Can Be Deadly*

Professor Martha Mahoney argues that the legal understanding of the situation of battered women should be reformulated in terms of "separation assault," which she defines as

the attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in a relationship. It is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship. It often takes place over time.¹¹⁷

¹¹⁴ *Id.* at 21.

¹¹⁵ The typical description of the "battered woman syndrome" is that the woman comes to believe that she has little or no control in her life because there appears to be no correlation between her behavior and the behavior of her abuser. This is called "learned helplessness." *See, e.g.,* Lenore E. Averbach, *What Counselors Should Know about the Battered Woman*, in *THE MALE BATTERER: A TREATMENT APPROACH* 158-60 (Daniel Jay Sonkin et al. eds., 1985). This description is not as accurate as the "survivor" theory, which finds "learned helplessness in the help sources." *See* EDWARD W. GONDOLF & ELLEN R. FISHER, *BATTERED WOMEN AS SURVIVORS: AN ALTERNATIVE TO TREATING LEARNED HELPLESSNESS* 104 (1988); Elizabeth Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 *WOMEN'S RTS. L. REP.* 195 (1986), (contains an excellent discussion on the use and abuse of expert testimony regarding battered women's syndrome and "learned helplessness").

¹¹⁶ GONDOLF & FISHER, *supra* note 115, at 30-31.

¹¹⁷ Mahoney, *supra* note 1, at 65-66.

Professor Mahoney finds that battered women often face a dramatically increased risk of being killed or seriously injured by their abusers after they attempt to separate.¹¹⁸ Further confirmation of this trend can be found in a 1977 study conducted by the Women's Correctional Center in Chicago. In this (pg.530) study, "all the women who had killed abusive mates reported that they called for police help at least five times before taking the life of the man; many said the violence they endured became more, rather than less, severe after their attempts at gaining assistance."¹¹⁹

One woman's story illustrates the danger of separation assault:

We had been separated nine months. I came home late one night with a date. I was sitting in the living room playing backgammon with this man, when I saw the car drive up. I thought of sending [my date] home, but I didn't, maybe because I knew I needed help. Maybe I was just defiant.

He knocked. I kept the chain lock on the door, and I told him to go home. He wouldn't leave. He rang the bell for fifteen minutes without stopping. I woke up my roommate, and she disconnected the doorbell.

He started pounding on the door. He broke it in and started a fight with this man. I'm sitting there in horror, watching it—the door broken down, them crashing around the living room The kids woke up. I sat them on the couch with me.

Then—he was *very* drunk—the fighting stopped. It was pretty short. But it took two hours to try to get him to leave. He ran around with a butcher knife ... he left the house with it. Finally, I could call the police. Then I don't know if he came back in with the knife—I think he came back after the police were called. The kids were on the couch screaming and crying, I was trying to take care of them.

The police saw the door leaning in the middle of the room, the room trashed and crashed.... They told me to get a TRO the next day.¹²⁰

Separation assault occurs because battering is a method of dominating a woman and separation threatens the control the batterer seeks.¹²¹ Thus, even the slightest effort to leave can

¹¹⁸ *Id.* at 65. Mahoney notes:

At least half of women who leave their abusers are followed and harassed or further attacked by them. In one study of interspousal homicide, more than half of the men who killed their spouses did so when the partners were separated; in contrast, less than ten percent of the women who killed were separated at the time.

Id. at 64-65 (footnotes omitted); *see, e.g.*, Dave Altimari, *Cops charge man in wife's slaying*, NEW HAVEN REG., Oct. 20, 1993, at 1, 11 (reporting that Katherine Marchitto was strangled by her husband of five years after she left him and moved in with her sister). *See generally* Desmond Ellis, *Post-Separation Woman Abuse: The Contribution of Lawyers as "Barracudas," "Advocates," and "Counselors,"* 10 INT'L J.L. & PSYCHIATRY 403, 408 (1987).

¹¹⁹ *See* BROWNE, *supra* note 98, at 10-11 (footnote omitted). *See generally* JULIE BLACKMAN, *INTIMATE VIOLENCE: A STUDY OF INJUSTICE* (1989).

¹²⁰ Mahoney, *supra* note 1, at 66-67 (alterations in original). In the situation described, the police refused to arrest the woman's husband because "his name [was] still on the lease." *Id.* at 67. *See also* Godfrey v. Georgia, 446 U.S. 420, 424-25 (1980) (violent husband killed his wife and mother-in-law after wife refused to return home).

¹²¹ Mahoney, *supra* note 1, at 53, 65-66.

trigger an attack.¹²² In a Florida study of spousal homicides, for example, researchers found that killings of wives by husbands most often were triggered by "a walkout, a demand, a threat of separation [which is] taken by the men to represent intolerable desertion, rejection and abandonment. Thus ... the threat of separation is usually the trigger for violence in these cases."¹²³

Professor Mahoney notes, however, that each relationship is different, and, in some cases, "a threat to leave the batterer may be very effective at ending the violence."¹²⁴ Because this depends on the particular context of the situation, the battered woman is in the best position to evaluate the likelihood that the violence will escalate when she attempts to separate. As Professor Mahoney (pg.531) notes:

[T]he instrumental nature of [the batterer's] violence makes [the battered woman], the target, the closest observer. She has more resources to measure his violent potential than any outside observer and ... is best placed to assess the man's potential dangerousness, because she is most aware of the times and manner in which violence may occur.¹²⁵

Although a battered woman should not have to leave her home to find safety for herself or her children,¹²⁶ that is often her only choice. Unfortunately, if she leaves, she cannot depend on others to protect her from violence from her abuser.

C. Lack of Protection by Police, Friends, or Neighbors

Despite the increased danger a battered woman often faces when she attempts to separate from her abuser, she cannot rely on neighbors, friends, family, or the police for protection.¹²⁷ For example, one battered woman's ex-husband who was supposed to be visiting the children, instead was in a bar fight near her house. He showed up at the house at 9 p.m., bleeding. He began pounding

¹²² *Id.* at 65.

¹²³ GILLESPIE, *supra* note 107, at 151-52 (most of the men killed their wives after the women left).

¹²⁴ Mahoney, *supra* note 1, at 58 (footnote omitted).

¹²⁵ *Id.* at 58 n.273 (citations omitted).

¹²⁶ *See generally* GILLESPIE, *supra* note 107, at 82-87 (discussing duty to retreat and battered women).

Unfortunately, in addition to the danger of separation assault, battered women often are afraid that if they leave, their batterer will gain custody of the children, who also may have been physically or sexually abused by the batterer. *See generally* LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 136-68 (1989). This fear is well-grounded because batterers often seek custody to keep women from leaving; to force women to give up financial claims; or to hurt the women. These are all attempts by the batterer to control the situation. As Professor Mahoney reports:

Even violent men are frequently successful in custody suits. In one study, fifty-nine percent of the judicially successful fathers had physically abused their wives; thirty-six percent had kidnapped their children.... Another study reported many awards of custody to battering fathers, including one case in which the judge made his decision after walking past the shelter to which the mother and children had fled. The judge found the shelter to be an inappropriate living arrangement and concluded the father provided the better home.

Mahoney, *supra* note 1, at 44-45 (footnotes omitted).

¹²⁷ *See, e.g.*, Meera Somasundaram, *Woman Was Denied Court's Protection Before P.G. Slaying*, WASH. POST, Aug. 15, 1993, at B3 (describing unsuccessful efforts of woman, who was stabbed to death by her estranged husband, to obtain police protection). Such tragedies are not confined to Washington, D.C. In New Haven, Connecticut this year, "a 39-year-old woman was chased by her ex-husband through traffic ... and shot in the head as neighbors watched." Also, "a 19-year-old mother was gunned down by her ex-boyfriend as she cowered in ... [her] apartment. Both women had court orders to keep their partners away, but police did little in response to their complaints that they were being threatened and beaten." Thomas Pelton, *Cops plan conference on domestic violence*, NEW HAVEN REG., Oct. 14, 1993, at 1. *See generally* BROWNE, *supra* note 98, at 159.

on the door and eventually broke one of the door's glass panes. He continued to hammer on the door. When she opened the door, he fell on the floor and told her the police were after him. She then sought help:

I went to the phone ... and called my closest friends, a couple who lived a few (pg.532) blocks away. The man answered the phone. I said urgently that my husband was there and that I needed this friend to come over right away. He said OK and hung up. Fifteen or twenty minutes passed, and then his wife showed up. She said, "Allen wasn't going to come. He didn't see why you were bothering us. But I figured, if you had called, someone ought to check up and see what was going on."

The police arrived. They had traced his car to our house and followed a trail of blood to our door. They weren't going to arrest him. When I asked, they waited for his brother-in-law to come pick him up.... Finally everyone went home.

It was so frightening that a man I had known for five years, who knew how my ex-husband had been, had actually lied to me and said he was coming, then been willing not to show up. They lived four blocks away! My mother told me I should talk to the neighbors, try to line up more help for next time. So I went to my next door neighbor the next day and began, "About the noise last night.... " He looked at me very fiercely. "What noise? We didn't hear *anything!*"¹²⁸

As Don Kates has pointed out, the traditional function of the police has been to deter crime in general with patrols and apprehension of criminals *after* a crime has occurred.¹²⁹ "[T]he fact is that the police do not function as bodyguards for individuals."¹³⁰ Courts have frequently held that the police have no duty to protect individual citizens.¹³¹

An exception to this rule may be developing in cases like *Thurman v. Torrington*,¹³² in which Tracey Thurman, a battered woman, was awarded \$2.3 million in a suit against the City of Torrington and officers of its police department based on the Department's policy of nonintervention in domestic cases. This policy led to Thurman's partial paralysis as a result of a brutal attack by her husband in the presence of idle police officers. This probably is only a narrow exception, however, to a policy of nonintervention that denies protection to *women as a class*, a policy which is

¹²⁸ Mahoney, *supra* note 1, at 62-63.

¹²⁹ Don B. Kates, Jr., *Guns, Murders, and the Constitution* 19-21 (Policy Briefing, Pacific Research Institute for Public Policy, 1990); *see also* KLECK, *supra* note 2, at 121 ("[P]olice primarily respond reactively to crimes *after* they have occurred ... Police officers rarely disrupt violent crimes or burglaries in progress").

¹³⁰ Kates, *supra* note 6, at 123 n.28.

¹³¹ *See Id.* at 123 n.28, 124 n.33 (citing numerous state cases and statutes); *see, e.g.*, Warren v. Dist. of Columbia, 444 A.2d 1, 2, 4 (D.C. 1981) (rejecting claims of three women who had been raped, robbed, and beaten after calling police; court found that it was a "fundamental principle of American law that a government and its agents are under no general duty to provide public services, such as police protection, to any individual citizen"). *But see* Chambers-Castanes v. King County, 669 P.2d 451, 458 (Wash. 1983) (special duty could arise where victims were specifically assured that help was being sent).

¹³² 595 F. Supp. 1521 (D. Conn. 1984) (policy of treating women and children differently than men assaulted by a stranger was an equal protection violation). The case was later settled for \$1.9 million. *See* William C. Lhotka, *Woman Gets \$1.2 Million in Police Suit; Inaction Found on Domestic Abuse*, ST. LOUIS-POST DIS., Mar. 20, 1993, at 1A (comparing another domestic violence case to Tracey Thurman's case).

significantly different from a failure to respond due to a lack of police resources.¹³³ Thus, the Torrington police probably are not obligated to respond to all cases of domestic violence, as long as their failure to do so is due to understaffing rather than intentional (pg.533) discrimination against women.

Sarah Buel persuasively argues for the adoption of mandatory arrest statutes in more states.¹³⁴ She offers as evidence of their effectiveness the fact that "arrested offenders were about half as likely as non-arrested offenders to repeat their violence over a six-month follow-up period."¹³⁵ She notes that one study found that eighty-two percent of battered women requested that their batterer be arrested but police arrested only fourteen percent of these batterers.¹³⁶ One battered woman's story provides a compelling example of this problem:

He beat me up on our wedding night. I wound up with a black eye, a very bad black eye, and split lip. He was almost arrested that night I ran out of the house in my nightgown and flagged down a passing car and got them to take me to my father-in-law's house. When my father-in-law came back, the neighbors had called the police and the police were there. My father-in-law talked them out of taking him in.¹³⁷

While it seems clear that mandatory arrest statutes should be adopted,¹³⁸ the approximately 500,000 police officers in America cannot possibly protect all the women who are at risk of severe violence from their batterers every year.¹³⁹ Thus, battered women must be allowed to protect themselves.

D. *The Value of Firearms for Defense and Deterrence*

Overall, it is difficult to determine whether the dangers of accidental death or homicide outweigh the potential benefits of firearms ownership for the general population. There is some evidence, however, that a handgun may be an effective and relatively safe means of defense or deterrence for a battered woman who is attempting to separate from her abuser. When combined with the fact that police, friends, and neighbors often cannot or will not take action to protect a battered woman, this evidence makes it reasonable for a battered woman to choose to own and/or use a

¹³³ Cf. Kates, *supra* note 129, at 21 (discussing lack of police officers to act as bodyguards).

¹³⁴ For examples of mandatory arrest statutes, see CONN. GEN. STAT. ANN. § 46b-38b (West Supp. 1987); ME. REV. STAT. ANN. tit. 19, § 770(5) (1992).

¹³⁵ Sarah Mausolff Buel, Recent Development, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 215 (1988) (footnote omitted).

¹³⁶ *Id.* at 217 (citing Lee Bowker, *Police Services to Battered Women: Bad or Not So Bad?*, 9 CRIM. JUST. & BEHAV. 476, 485-86 (1982)).

¹³⁷ Mahoney, *supra* note 1, at 20.

¹³⁸ *But see* LAWRENCE W. SHERMAN, POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS 1-24 (1992) (discussing whether arrest deters domestic violence).

¹³⁹ See Kates, *supra* note 129, at 21. Two recent events illustrate the inadequate allocation of resources to help battered women in the United States. While Sweden recently allocated \$1.75 million to provide bodyguards for private citizens threatened by violence, *Sweden to Give Bodyguards to Women Threatened by Men*, REUTER LIB. REP., Jan. 10, 1992, available in LEXIS, Nexis Library, LBYRPT file, women's groups in California faced great difficulty in their attempt to raise the cost of a marriage license by five dollars to fund shelters for battered women. See Betty Dietz, *Laws to Protect Battered Women*, GANNETT NEWS SERV., Sept. 20, 1991, available in LEXIS, Nexis library, GNS file.

handgun for self-defense. A meaningful (pg.534) constitutional right to bear arms would allow her to make this choice.

1. *Benefits*

A firearm (and training in how to use it) may be the only way a battered woman can save her life and/or the lives of her children. Women generally cannot defeat male batterers in unarmed physical combat, because male batterers on average are forty-five pounds heavier and four to five inches taller than their victims.¹⁴⁰ In addition, "[i]n our society women suffer from a conspicuous lack of access to training in and the means of developing skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons."¹⁴¹

A handgun can equalize the physical disparity between a woman and her attacker.¹⁴² Possession of a firearm may be particularly valuable to a battered woman because she is more likely to be prepared for an attack.¹⁴³ A battered woman typically has

"a hypervigilance to cues of any kind of impending violence [and is] a little bit more responsive to situations than somebody who has not been battered might be." A woman who has been battered and then is threatened with more abuse is more likely to perceive the danger involved faster than one who has not been abused.¹⁴⁴

Thus, a firearm could be valuable to a battered woman as a means of defending against or deterring her abuser.

2. *Costs*

The authors of a widely reported recent study in the *New England Journal of Medicine* undoubtedly would dispute the conclusion that a firearm could be a valuable tool for protection.¹⁴⁵ After conducting an extremely sophisticated analysis of homicides occurring in the homes of victims,¹⁴⁶ the authors concluded (pg.535) that "[p]eople who keep guns in their homes appear to be at greater risk of homicide than people who do not."¹⁴⁷ In addition, the authors "did not find evidence

¹⁴⁰ Saunders, *supra* note 103, at 49.

¹⁴¹ State v. Wanrow, 559 P.2d 548, 558 (Wash. 1977).

¹⁴² See Philip Cook, *The Role of Firearms in Violent Crime: An Interpretive Review of the Literature*, in CRIMINAL VIOLENCE 236, 247 (Marvin E. Wolfgang & Neil Alan Weiler eds., 1982) ("Even in the hands of a weak and unskilled assailant a gun can be used ... without much risk of effective counterattack ... [and] because everyone knows that a gun has these attributes, the mere display of a gun communicates a highly effective threat."); Silver & Kates, *supra* note 7, at 141 ("[a]s to all forms of male attack, ... firearms, particularly handguns, offer women a high likelihood of successful resistance with a low likelihood of suffering serious injury, and ... no other form of resistance does so.").

¹⁴³ See generally Kates, *supra* note 6; KLECK, *supra* note 2, at 121-45.

¹⁴⁴ People v. Aris, 215 Cal. App. 3d 1178, 1194 (Cal. Ct. of App. 1989) (quoting testimony of expert witness, Dr. Lenore Walker).

¹⁴⁵ Arthur L. Kellermann et al., *Gun Ownership as a Risk Factor for Homicide in the Home*, 329 NEW ENG. J. MED. 1084 (1993).

¹⁴⁶ See *id.* at 1084-85 for a description of the study's methodology.

¹⁴⁷ *Id.* at 1090; see also *id.* at 1089 (Table 4) (homicide 2.7 times as likely where a gun or guns are kept in the home).

of a protective effect of keeping a gun in the home¹⁴⁸ Despite the authors' complicated analysis, there are several major flaws in this study which cast doubt on the usefulness of their conclusions.

First, the study does not distinguish justifiable homicides—for example, when a battered woman killed her abuser in self-defense—from unjustifiable homicides—when a battered woman is killed by her abuser, for example. The authors state without explanation that only 3.6% of the cases involved a homicide under legally excusable circumstances.¹⁴⁹ There is no way of telling, however, from the information given, whether those cases involved women who killed their abusers. This is important because, in over thirty percent of the cases the authors studied, the victim was killed by a spouse or an intimate.¹⁵⁰ Other studies have shown that, when a woman kills her husband, it is almost always the case that he abused her before he was killed.¹⁵¹ Homicides that involve women who kill their abuser should be counted as evidence of the protective effects of gun ownership. Because there is no evidence that Dr. Kellermann and his colleagues considered these incidents as evidence of the protective effects of gun ownership, their study is not particularly useful for analyzing the benefits of gun possession for battered women.

A second problem with the study is that it only measures the correlation between gun ownership and homicide in the home. It does not take into account the fact that guns are not even fired in at least half of the cases where they are used in self-defense.¹⁵² Even in cases where guns are fired in self-defense, over ninety-eight percent are merely warning shots or misses that do not wound the assailant.¹⁵³ In addition, assailants who are wounded by the shot survive eighty-five percent of the time.¹⁵⁴ The Kellermann study therefore only covers cases where the assailant was not disabled by a wound or deterred by a warning shot and subsequently killed the victim.¹⁵⁵ By definition this would be a case of unsuccessful use of a firearm for self-defense. (pg.536) Cases where the firearm use was successful and the assailant was disabled or deterred would not have been included in the study. Contrary to their claim that their methodology "was capable of demonstrating significant protective effects of gun ownership as readily as any evidence of increased risk,"¹⁵⁶ by limiting their study to cases involving homicides, the authors excluded the vast majority of situations where guns are used in self-defense. Thus, the study probably could not have accurately measured the protective effects of gun ownership.

In addition to the concerns raised by the *New England Journal of Medicine* study, there are several other possible risks that must be examined in order to determine whether it is reasonable for a battered woman to choose to possess a firearm for protection. One disturbing possibility is that an

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1086 (table 1).

¹⁵⁰ *Id.*

¹⁵¹ See *supra* note 103 and accompanying text.

¹⁵² KLECK, *supra* note 2, at 111, 146 (Table 4.1).

¹⁵³ *Id.* at 116.

¹⁵⁴ *Id.*

¹⁵⁵ It is difficult to estimate how often this would occur. Many studies of the effectiveness of resistance by victims do not distinguish between gun use and other forms of resistance, such as verbal or physical resistance. See Kates, *supra* note 6, at 147. "The only extant study specific to gun-armed civilian resisters found they suffered slightly lower rates of death or injury at the hands of criminals (17.8%) than did police (21%)." *Id.* at 147-48 (citation omitted) (noting, however, that the study involved only a very small sample); see also KLECK, *supra* note 2, at 123-30.

¹⁵⁶ Kellermann et al., *supra* note 145, at 1088 (noting that their case definition excluded "the rare instances in which an intruder was killed by a homeowner").

attacker could take a handgun away from a battered woman even if she knew how to use the gun and intended to use it.¹⁵⁷ Although this may be a significant risk for police officers confronting several attackers,¹⁵⁸ it is unlikely to occur often in the general population. As Professor Gary Kleck has noted, "[i]n the 1979-1985 [National Crime Survey] sample, it was possible to identify crime incidents in which the victim used a gun for self-protection and lost a gun to the offender(s). At most, one percent of defensive gun uses resulted in the offender taking the gun away from the victim"¹⁵⁹ Yet, it is reasonable to assume that the risk of losing a gun to an attacker would be greater for a battered woman who had not been able to separate from her abuser than for someone who had moved away, because the batterer could find the weapon in the house.

When risks are being addressed, it must also be noted that the value of a handgun for defense or deterrence cannot be estimated without considering the risk that someone could be shot accidentally. Firearms can be dangerous, particularly if they fall into the hands of an adolescent.¹⁶⁰ There were approximately 190 million guns in the United States in 1985,¹⁶¹ and 1649 people were accidentally killed by guns that year.¹⁶² The highest number of fatal (pg.537) gun accidents in 1980 involved adolescents ages fifteen to nineteen.¹⁶³ The danger for children is dramatically less than that for adolescents. In 1980, 316 children under fourteen were involved in fatal gun accidents.¹⁶⁴ Professor Kleck estimated that, in 1980, the probability of a child under age ten being involved in any kind of fatal gun accident in a gun-owning household was approximately one in 135,000.¹⁶⁵

After exhaustively surveying the statistics on gun accidents,¹⁶⁶ Professor Kleck concluded:

Gun accidents are generally committed by unusually reckless people with records of heavy drinking, repeated involvement in automobile crashes, many traffic citations, and prior arrests for assault.... Consequently, it is doubtful whether, for the average gun owner, the risk of a gun accident could counterbalance the benefits of keeping a gun in the home for

¹⁵⁷ See generally PAXTON QUIGLEY, ARMED AND FEMALE 216 (1989); cf. PETE SHIELDS, GUNS DON'T DIE—PEOPLE DO 49, 53 (1981). It is important to note that possessing a gun gives a battered woman the opportunity to resist an attack, but does not compel her to resist when it seems imprudent to do so. As Don Kates has noted, "a gun simply offers victims an option; a dangerous option to be used only with discretion" Kates, *supra* note 6, at 150 (footnotes omitted).

¹⁵⁸ See, e.g., Timothy Chou, *On the Firing Line: Female Gun Ownership Up In Violent Times*, L.A. TIMES, Mar. 1, 1993, at B1 (a spokesperson with Handgun Control, Inc. cited a 1991 FBI crime study that reported 25% of police officers killed by a gun were shot with their own weapon).

¹⁵⁹ KLECK, *supra* note 2, at 122. A rifle or shotgun could be more easily wrested away by someone who has a longer arm span, but that also is unlikely. See *id.*

¹⁶⁰ Cf. Patrick Mott, *Death Within Reach: Summer Triggers Rise in Accidental Shootings Among Children*, L.A. TIMES, June 14, 1990, at N1.

¹⁶¹ KLECK, *supra* note 2, at 50 (Table 2.1).

¹⁶² *Id.* at 60 (Table 2.7).

¹⁶³ Six hundred and ninety, or 35%, of the total for 1959. *Id.* at 309 (Table 7.4).

¹⁶⁴ *Id.* at 277.

¹⁶⁵ *Id.* at 278. Very small children (under age four) may not physically be able to fire "unmodified revolvers of even minimally adequate manufacturing quality, because small children's hand spans are too small to gain sufficient leverage and their hand strength is too slight to pull the trigger double-action (i.e., from an uncocked position) or to cock the hammer back for single-action firing." *Id.* at 279 (citation omitted).

¹⁶⁶ *Id.* at 269-305.

protection—the risk of an accident is quite low overall, and is virtually nonexistent for most gun owners.¹⁶⁷

Although there is some possibility that an accidental death could occur, a battered woman who chooses to obtain a firearm is not placing her family at a significant risk of being involved in a fatal gun accident, at least as long as she does not live in the same household as the batterer. If she does live in the same household as the batterer, perhaps because of the heightened danger she may face if she attempts to separate, the presence of the batterer, who may have a history of reckless behavior, could increase the likelihood of an accidental gun injury or death. However, it still may be reasonable for her to conclude that the risk of accidental death is outweighed by the risk that the batterer will intentionally kill or seriously injure her.

Given the potential value of gun ownership for a battered woman as a means of protection against extreme violence, I believe that it is reasonable for a battered woman to decide that she needs a firearm to protect herself and/or her children. If that is the case, she has a constitutional right to obtain such a weapon. The best thing society can do is to permit her to carry a firearm while also providing increased police protection; laws that will result in the lengthy imprisonment of her batterer; more shelters so that she has a place to stay when she leaves her abuser; a judicial system that will not take her children away because she is living in a shelter; and training in how to use (pg.538) and store the firearm¹⁶⁸ so that her children¹⁶⁹ (especially adolescents) cannot use it.¹⁷⁰ Currently, however, many battered women do not own a firearm. This must be taken into account when designing gun controls.

E. Battered Women Often Do Not Own a Firearm

In 1987, the last year for which statistics on firearm ownership by gender were reported by the U.S. Department of Justice, forty-six percent of those responding to a survey had a pistol, shotgun, or rifle in their home or garage.¹⁷¹ Those who reported having a gun or revolver in their home were then asked whether any of the guns personally belonged to them. Forty-seven percent of the men said that they owned a firearm while only fourteen percent of the women did.¹⁷²

Battered women who do not own a firearm but need one for self-defense have two choices. First, they can use someone else's weapon. Second, they can plan ahead and apply for a permit, purchase a handgun, and keep it hidden from their abuser, yet still accessible in case of a sudden escalation of violence. It seems highly unlikely that many battered women could accomplish such a feat before they were able to leave their home. It is far more likely that they would use their

¹⁶⁷ *Id.* at 304-05.

¹⁶⁸ There are limits to what firearms safety training can accomplish; however, Kleck notes that "some of the less reckless home accidents may be preventable through safety training, if programs could be successfully extended to reach the relevant gun owners." *Id.* at 300.

¹⁶⁹ Kleck concludes that "keeping a gun locked, whether loaded or not, whether stored away or not, appears to be a near-absolute protection against a child gun accident." *Id.* at 279.

¹⁷⁰ *See generally* H. R. 1133 & S. 11, 103d Cong., 1st sess. (1993) (Violence Against Women Act). *See, e.g.*, H.R. 2217, 103d Cong., 1st Sess. § 661 (1993) (Violent Crimes Control Act) (domestic violence grants).

¹⁷¹ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 168 (1987) (Table 2.49) (data provided by the National Opinion Research Center).

¹⁷² *Id.*

abuser's gun or a friend or relative's gun obtained at the last minute.¹⁷³ This is common in the case histories of battered women who kill their batterers.

In *State v. Norman*,¹⁷⁴ Judy Norman tried to leave her husband many times to escape his incredible brutality. In addition to beating and raping her, he forced her to engage in prostitution daily, eat dog food, bark like a dog, and sleep on the concrete floor like a dog.¹⁷⁵ He also threatened to kill her, cut out her heart, and cut off her breast.¹⁷⁶ Each time she left, he found her, took her home, and beat her.¹⁷⁷ The court's description of the two-day period (pg.539) before she shot him illustrates the difficulty many battered women face in getting assistance:

On the evening of 11 June 1985, at about 8:00 or 8:30 p.m., a domestic quarrel was reported at the Norman residence. The officer responding to the call testified that defendant [Judy Norman] was bruised and crying and that she stated her husband had been beating her all day and she could not take it any longer. The officer advised defendant to take out a warrant on her husband, but defendant responded that if she did so, he would kill her.¹⁷⁸ A short time later, the officer was again dispatched to the Norman residence. There he learned that defendant had taken an overdose of "nerve pills," and that Norman was interfering with emergency personnel who were trying to treat defendant. Norman was drunk and was making statements such as, "if you want to die, you deserve to die. I'll give you more pills," and "Let the bitch die.... She ain't nothing but a dog. She don't deserve to live." Norman also threatened to kill defendant, defendant's mother, and defendant's grandmother. The law enforcement officer reached for his flashlight or blackjack and chased Norman into the house. Defendant was taken to Rutherford Hospital.

....

On the advice of the [hospital] therapist, defendant did not return home that night, but spent the night at her grandmother's house.

The next day, 12 June 1985, the day of Norman's death, Norman was angrier and more violent with defendant than usual. According to witnesses, Norman beat defendant all day long....

Later that day, one of the Norman's daughters ... reported to defendant's mother that her father was beating her mother again. Defendant's mother called the sheriff's department, but no help arrived at that time. Witnesses stated that back at the Norman residence, Norman threatened to cut defendant's throat, threatened to kill her, and threatened to cut off

¹⁷³ *Fielder v. State*, 683 S.W.2d 565 (Tex. Ct. App. 1985), *rev'd*, 756 S.W.2d 309 (Tex. Crim. App. 1988), is one of the exceptions in that Pamela Fielder shot her abuser with her own gun.

¹⁷⁴ 366 S.E.2d 586 (N.C. Ct. App. 1988), *rev'd*, 378 S.E.2d 8 (N.C. 1989) (the Normans were married for 25 years).

¹⁷⁵ 366 S.E.2d at 587-89.

¹⁷⁶ *Id.* at 587-88.

¹⁷⁷ *Id.* at 589.

¹⁷⁸ There was some basis for her fear. Mr. Norman had just returned that morning after being arrested for driving under the influence and had escalated his violence against Mrs. Norman, *id.* at 587-88, apparently because he blamed her for his arrest. She testified that Mr. Norman had told her that "if she ever had him locked up, he would kill her when he got out[.]" and, if she had him committed, "he would see the authorities coming for him and before they got to him he would cut [her] throat." *Id.* at 589.

her breast. Norman also smashed a doughnut on defendant's face and put out a cigarette on her chest.¹⁷⁹

When Mr. Norman fell asleep, Mrs. Norman shot him with a gun she had taken from her mother's house.¹⁸⁰ Mrs. Norman was indicted for first degree murder, convicted of voluntary manslaughter and sentenced to six years in prison. The North Carolina Court of Appeals granted a new trial but the Supreme Court reversed, characterizing her fears as "indefinite ... concerning what her sleeping husband would do at some time in the future."¹⁸¹

Joyce E. McConnell discusses a case in which another woman also endured severe physical and sexual abuse.¹⁸² The woman's husband often engaged (pg.540) in a murder-suicide ritual with his loaded gun. He would force the woman to beg him not to kill them and then set the gun down and walk away. Later, he would order her to bring the gun to him and he would unload it. During the six weeks after their son was born, her husband increasingly went through the ritual, threatening their son and daughter as well. One day he changed the ritual by actually cocking the gun and acting more upset than normal. As she handed him the gun, she shot and killed him.¹⁸³ The woman was convicted of first degree murder and sentenced to life imprisonment.¹⁸⁴

As a citizen, a battered woman has a right to bear arms. The possibility that most battered women will not *own* a firearm yet may desperately need one must be taken into account in evaluating gun controls that appear to be otherwise reasonable. Additionally, the fact that a battered woman carried a gun for some time before she shot her abuser must not be used as proof that she acted aggressively rather than in self-defense.

III. BATTERED WOMEN AND GUN CONTROLS

As *citizens*, battered women are entitled to a right to keep and bear arms. As discussed above, when a battered woman attempts to separate from her abuser, she faces an incredible risk of being killed or seriously injured. Because of this danger, a battered woman often needs access to a firearm with very short notice. In this Part, I will argue that gun control statutes, such as lengthy waiting periods and certain permit/license requirements, that prevent a battered woman from obtaining a firearm for self-defense may violate her constitutional right to bear arms.

Many types of gun controls exist, ranging from waiting periods to purchase a firearm, to bans on certain types of firearms. Some of these laws, such as bans on assault rifles, are not relevant to the situation of battered women. Others, however, could make the difference between a battered woman's life and death.¹⁸⁵

¹⁷⁹ *Id.* at 588.

¹⁸⁰ *Id.* at 588-89.

¹⁸¹ 378 S.E.2d 8, 14 (N.C. 1989).

¹⁸² Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J. L. & FEMINISM 207, 237-39 (1992). The pseudonym Sheri Boyd was used in the article.

¹⁸³ The gun may have fired accidentally. *Id.* at 239.

¹⁸⁴ No evidence of her abuse was presented at the trial and the jury was not given a self-defense instruction. *Id.*

¹⁸⁵ For example, mandatory firearms seizure laws are important for battered women. An ordinance approved by the Boston City Council would direct police to "revoke firearm permits and confiscate weapons of alleged abusers who have had restraining orders issued against them in domestic violence cases." *Spouse abusers' guns to be seized in Boston*, WASH. TIMES, July 31, 1992, at A5. While Boston's ordinance could be extremely beneficial, a more broadly worded proposal in Connecticut could be used to prevent battered women from defending themselves with a firearm. Proposed Bill No. 6783, Conn. Gen. Assembly, Jan. Sess.

For wealthy or middle-class men, permit requirements and waiting periods (pg.541) may be reasonable, because their enemies typically will be strangers.¹⁸⁶ The delay involved in applying for a permit usually would not subject them to an increased risk of death, and they can easily secure references from friends and neighbors. Yet, lengthy waiting periods to purchase a firearm leave battered women dependent on the police, who cannot possibly provide twenty-four-hour protection.¹⁸⁷ Additionally, a permit/license statute may force battered women to risk alerting their abuser to the fact that they intend to leave the home. If the police are not careful in conducting a background investigation, the abuser could learn the new address of a woman who had separated. Thus, such statutes may be unconstitutional as applied to battered women.

A. *Waiting Periods*

Twenty-one states have established a mandatory waiting period (or effectively implement a waiting period)¹⁸⁸ to purchase a pistol or handgun. The length of time involved ranges from less than one day (in Virginia) to six months (in New York).¹⁸⁹

Waiting periods serve a different purpose than the background checks that usually accompany them, which can be completed in a few hours.¹⁹⁰ Waiting periods are designed to prevent violence by allowing someone who is upset to "cool off" before she can obtain a firearm and impulsively shoot at the (pg.542) object of her anger.¹⁹¹ After analyzing a 1982 study of Florida prison system inmates and the underlying premises supporting arguments for waiting periods, Professor Kleck concluded that "it is highly unlikely that waiting periods, by themselves, could prevent even

(1993) (authorizing "a peace officer to seize any firearm that is present when he makes an arrest for a family violence crime"). The Connecticut statute apparently would authorize the seizure of the firearm a battered woman kept to defend herself against her abuser, simply because he was arrested when he attempted to attack her.

¹⁸⁶ See *supra* note 99 and accompanying text.

¹⁸⁷ See discussion *supra* part II.C.

¹⁸⁸ For example, New York requires that the local firearm "licensing officer shall act upon any application for a license ... within six months of the date of presentation of such an application to the appropriate authority." N.Y. PENAL LAW § 400.00(4-a) (Consol. 1984 & Supp. 1992). In practice, it usually takes four to six months to get a general permit to buy a gun in New York. Nicholas Goldberg, *Gun City Gun Buyers' Promised Land Long Island Stores Offer No Waiting, Few Questions*, NEWSDAY, Aug. 3, 1988, at 7; Pat Wadsley, *Citizens Strap on their Guns Arms Bought for Self-Defense*, S.F. CHRON., Mar. 1, 1991, at B3.

¹⁸⁹ Alabama (48 hours, handguns), California (15 days, all guns), Connecticut (two weeks without a permit, all guns), District of Columbia (handguns banned), Hawaii (up to 16 days, all guns), Illinois (72 hours, handguns), Indiana (seven working days, handguns), Iowa (three days, handguns), Maryland (seven days, handguns and assault weapons), Massachusetts (wait for permit, first-time users, handguns), Michigan (wait for permit, first-time users, handguns), Minnesota (seven days, handguns), Missouri (up to seven working days, handguns), Nebraska (two days, handguns), New Jersey (30 days, all guns), New York (up to six months for permit, handguns), North Carolina (up to 30 days, handguns), Oregon (15 days, handguns), Pennsylvania (48 hours, handguns), Rhode Island (seven days, all guns), South Dakota (48 hours without permit to carry, handguns), Tennessee (up to 15 days, handguns), Virginia (instant background check on purchasers, handguns), Washington (five days, handguns), Wisconsin (three working days, handguns). *Waiting Period for Handguns*, WASH. POST, Aug. 18, 1993, at D3.

Congress recently passed a national five-business-day waiting period for handgun purchases. See Krauss, *supra* note 21.

¹⁹⁰ For example, Virginia employs an instant background check of applicants for handgun purchases and might be exempt from the waiting period recently approved by Congress. Donald P. Baker, *Va. Candidate Backs Wait of 5 Days to Buy Guns*, WASH. POST, July 9, 1993, at D2. The recently passed federal gun control legislation also provides for an instant nationwide computer check of a buyer's background. See Krauss, *supra* note 21.

¹⁹¹ See KLECK, *supra* note 2, at 333; see also *Debate: Gun Buyers Need a Cooling-off Period*, USA TODAY, Mar. 19, 1991, at 10A (stating that "[r]equiring a gun buyer to wait seven days is vital because it provides time for hot tempers to cool").

as many as one in 200 gun killings."¹⁹² If no harm resulted from waiting periods, and if their enforcement was not a burden on the limited resources of the criminal justice system, then even such a low rate of success would justify the imposition of waiting periods.

Battered women, however, may be harmed if they are forced to wait to purchase a firearm. A waiting period may prevent a battered woman who has separated from her batterer from arming herself, thereby leaving her to depend on family, friends, neighbors, and the police, who often cannot or will not protect her.¹⁹³

A woman in California is a tragic example of this problem.¹⁹⁴ She wears a steel-plated jaw because her six-foot-three-inch, 200-pound husband shattered her jaw while she was holding their baby in her arms.

[She] tried to press charges after she left the hospital, but sheriff's deputies and county mental health workers persuaded her not to because her husband had promised to attend counseling sessions. After two sessions, his mental health counselor refused to see him again out of terror; he threatened to kill her, and the counselor believes he meant it.

When his wife tried to reinstitute charges, the deputies told her it was too late to do so. This [wa]s untrue, she has at least three years to press charges on felonious assault. While the police refused to arrest him, he entered her property daily, prowled around the outside of her house, slept on her lawn at night and telephoned persistently, often 30 times a day.¹⁹⁵

The police refused to arrest the woman's husband for violating the restraining order, so she decided to purchase a pistol to protect herself. Under California law, however, she had to wait fifteen days. While she was waiting to obtain the permit, her husband repeatedly assaulted her at home and at work. Eventually, she obtained the handgun and told her abuser that she had it. Since then, he has not assaulted her, although he still telephones her and steals her mail.¹⁹⁶ Thus, the waiting period harmed her by forcing her to endure repeated assaults by such a dangerous person. It is doubtful that she "cooled off" during such assaults, or that she even needed to "cool off" at all.

A lengthy waiting period can infringe a battered women's federal and, in (pg.543) many cases, state constitutional right to bear arms. Ideally, a battered woman would be able to obtain a handgun quickly when she needed to defend herself against her abuser,¹⁹⁷ because a battered woman faces a higher risk of violence than most members of the general public, especially when she attempts to separate from her abuser. In addition, unlike most people, a battered woman usually knows her potential attacker very well and therefore can estimate her risk more accurately than other people.

¹⁹² KLECK *supra* note 2, at 333-35.

¹⁹³ *See, e.g.,* Silver & Kates, *supra* note 7, at 144-47.

¹⁹⁴ *See* Peter Alan Kasler, *A Victim of Gun Control*, N.Y. TIMES, July 13, 1991, at 21 (author is an NRA member, a firearms instructor, and a self-defense consultant).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ This exception to the normal waiting period also should be available to men who are in immediate danger from someone they know because men also have a right to bear arms for self-defense. In addition, a statutory distinction between men and women probably would violate the Equal Protection Clause. *See, e.g.,* Craig v. Boren, 429 U.S. 71 (1976) (holding unconstitutional on equal protection grounds Oklahoma Statute that allowed females over age of 18 to purchase 3.2% beer but prohibited males under 21 from purchasing 3.2% beer).

Thus, it makes sense to defer to her judgment in deciding how long she can safely wait to obtain a handgun.

An exception to the recently approved national waiting period is one step in the right direction toward protecting battered women's right to bear arms. This exception would be available to people who could prove to the police that their life was threatened. For example, the legislation approved by the House provides, in relevant part, that a person can obtain a handgun without waiting if

the [person who wants the handgun] has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the transferee, stating that the transferee requires access to a handgun because of a threat to the life of the transferee or of any member of the household of the transferee.¹⁹⁸

This would require that a battered woman locate the chief law enforcement officer for her area and persuade that officer that her life is threatened by her abuser. Yet, it provides no guidelines for the officer to use in making such a determination, and no means for review of the officer's determination. It also does not mandate that the officer make a determination within a certain period of time. Thus, although the proposal is a step in the right direction, I believe that it is inadequate for battered women. Battered women should be able to obtain a handgun simply by completing an application form and stating that they are in immediate danger from someone they can identify.

It is, of course, possible that some women could lie in order to take advantage of an exception to a waiting period. Even so, this type of fraud would defeat the purpose of a waiting period only in limited circumstances: (pg.544) if the purchaser later impulsively used her weapon to shoot and she would not have used the gun had she been allowed to calm down. These two elements probably would not occur for more than one in 200 people.¹⁹⁹

Since battered women usually call the police and/or seek help from friends, neighbors, relatives, or medical centers before they use a firearm to shoot their abusers,²⁰⁰ it may be possible for police to screen out many false applications. The police could ask the applicant to answer questions similar to the following:

1. Are you in danger of being hurt by someone you know?
2. Has that person injured you before?
3. When?
4. How many times?
5. Did you tell anyone?
6. Who?

¹⁹⁸ See H.R. 1025 § 2(a)(1) (1993). This language will be codified at 18 U.S.C. § 922(s)(1)(B); cf. HAW. REV. STAT. ANN. § 134-9(a) (1992) ("In an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property, the chief of police of the appropriate county may grant a license to an applicant ... to carry a pistol or revolver ... concealed on the person Where the urgency or the need has been sufficiently indicated, [the police chief can grant a license to carry the pistol or revolver] unconcealed on the person").

¹⁹⁹ I have calculated this maximum probability by assuming that every person who lied also shot but would not have shot if she had "cooled off." Cf. KLECK, *supra* note 2, at 333-35 (estimating that a waiting period alone could prevent at most one in 200 gun killings).

²⁰⁰ See *supra* part II.C.

7. Can we call these people to talk to them?
8. Did you go to a doctor?
9. What did you tell the doctor had happened?²⁰¹
10. Did you call the police?
11. When?
12. What did the police do?

If the applicant had separated from her abuser, the police could check her claims by calling the people she had told about the violence. In so doing, the officers would need to keep her current address confidential so that her abuser would not discover it by questioning the people the police talked to. The police could issue the permit before they checked her claims, but if it later appeared that she lied,²⁰² she could be subject to imprisonment or a fine.²⁰³ The same system would apply to a male applicant who claimed to be in danger from someone he knew.

Of course, this approach does give the police a certain amount of discretion, which individual police officers could use to avoid helping battered (pg.545) women. In *Schubert v. DeBard*,²⁰⁴ an Indiana court held that it was a violation of the state constitution²⁰⁵ for a police superintendent to refuse to issue a license to carry a handgun because he believed that the applicant did not actually need the gun for self-defense. According to the court:

Such an approach contravenes the essential nature of the constitutional guarantee. It would supplant a right with an mere administrative privilege which might be withheld simply on the basis that such matters as the use of firearms are better left to the organized military and police forces even where defense of the individual citizen is involved.²⁰⁶

Because several former employers felt that the applicant had "mental problems," the court remanded for a new hearing.²⁰⁷ The *Schubert* court probably also would have found an exception such as that contained in federal waiting period bills, for example, H.R. 1025,²⁰⁸ unconstitutional because it places no limits on the ability of the police chief to refuse to waive the waiting period.

Giving the police the ability to decide, based on relatively subjective criteria, who qualifies as an exception to the waiting period requirement may result in arbitrary application of the laws. New York's permit requirement provides a useful example of such arbitrary application. Although New York City has some of the strictest gun control laws in the country, many rich or famous people

²⁰¹ I have included this question because, for many reasons, a battered woman may not describe the source of her injuries accurately. Cf. Carole Warshaw, *Limitations of the Medical Model in the Care of Battered Women*, in *VIOLENCE AGAINST WOMEN* 134 (1993).

²⁰² For example, if she claimed to have gone to a doctor's office 10 times in the last year, but the office had no record of her visits.

²⁰³ Cf. MASS. GEN. LAWS ANN. ch. 140, § 131 (West 1993) ("Any person who files an application with any intentional false answer to the questions on the application shall be punished by a fine of not less than five hundred nor more than one thousand dollars and by imprisonment for not less than six months nor more than two years in a jail or house of correction.").

²⁰⁴ 398 N.E.2d 1339 (Ind. App. 1980).

²⁰⁵ See *infra* APPENDIX for the text of Indiana's constitutional right to bear arms provision.

²⁰⁶ 398 N.E.2d at 1341.

²⁰⁷ *Id.* at 1340-41.

²⁰⁸ See *supra* text accompanying note 198.

easily can receive a permit to carry a firearm, apparently regardless of whether they face more danger than people living in crime-ridden neighborhoods.²⁰⁹

Los Angeles's concealed weapon license requirement provides another example of the abuse of police discretion. Although the Los Angeles Police Department is required to issue a license to carry a concealed gun to every applicant who has both good character and "good cause," during the past twenty years the Department did not issue a single concealed weapon permit.²¹⁰ Then, in 1992, it issued one permit—to its new police chief who had just arrived from Philadelphia and had not yet been certified as a California peace officer.²¹¹

It is possible that an exception for battered women could not be administered in such a way as to minimize the opportunity for police discretion. In light of the extreme danger battered women face when they attempt to separate (pg.546) from an abuser, and because of the small chance that waiting periods actually prevent crime, waiting periods longer than a few days should be struck down if they cannot be applied in such a way as to exempt battered women.²¹²

B. Permit Requirements to Carry or Own a Gun

Some states have statutes that can be used to punish a person who carries or owns²¹³ a firearm without a permit or license. For example, in Connecticut, "[n]o person shall carry any pistol or revolver upon his person, except when such person is within his dwelling house or place of business, without a permit to carry the same."²¹⁴ The terms "pistol" and "revolver" refer to "any firearm having a barrel less than twelve inches in length."²¹⁵ The penalty for violating this permit law is a maximum fine of \$1000 and imprisonment for one to five years.²¹⁶ New York, New Jersey, Massachusetts, North Carolina, Michigan, Indiana, and Hawaii also require a permit/license to own, carry, and/or purchase a handgun.²¹⁷

²⁰⁹ Don B. Kates, Jr., *The Battle Over Gun Control*, 84 THE PUB. INT. 42, 43-45 (Summer 1986).

²¹⁰ John Hurst, *L.A. to End Ban on Concealed Weapon Permits*, L. A. TIMES, Sept. 8, 1993, at B1.

²¹¹ *Id.*; Telephone Interview with Don B. Kates, Jr., Attorney for the plaintiff in *Lake v. City of San Fernando*, No. PC008329 (L.A. Super. Ct. filed Sept. 24, 1992) (Sept. 26, 1993).

²¹² Unless the individual right to bear arms contained in the Fourteenth Amendment was read to restrict the federal government as well as state governments, the national five-day waiting period which was recently approved by Congress, *see supra* note 21, would be constitutional.

²¹³ It is important to note the distinction between carrying (bearing) a gun and owning (keeping) a gun. Don Kates has pointed out that, although the right to own a gun and the right to carry a gun off one's own premises are both constitutionally protected, the right to carry a gun has been subject to far more regulation. Kates, *supra* note 13, at 267.

²¹⁴ CONN. GEN. STAT. ANN. § 29-35(a) (West 1992).

²¹⁵ CONN. GEN. STAT. § 29-27 (Supp. 1992).

²¹⁶ CONN. GEN. STAT. § 29-37 (Supp. 1992).

²¹⁷ *See* HAW. REV. STAT. ANN. § 134-4 (1993) (permit required to possess a firearm); IND. CODE ANN. § 35-47-2-1 (Burns 1992) (license required to "carry a handgun in any vehicle or on or about his person, except in his dwelling, or on his property or fixed place of business"); MASS. GEN. LAWS ANN. ch. 140, § 131A, ch. 269, § 10 (West 1993) (license required to carry or possess a firearm) (2.5 to five years in state prison or one to 2.5 years in a jail or house of correction); MICH. COMP. LAWS ANN. §§ 28.422, 750.232a(1) (West 1993) (license required to purchase, carry, or transport a pistol) (fine of up to \$100 and/or imprisonment for no more than 90 days); N.C. GEN. STAT. § 14-402 (1992) (license or permit required to purchase a pistol) (fine of \$50 to \$200 and/or imprisonment for 30 days to six months); N.J. STAT. ANN. §§ 2C:584, 2C:39-5 (West 1993) (permit required to purchase "or otherwise acquire" a handgun) (violation a crime of the third degree); N.Y. PENAL LAW § 400.00 (McKinney 1993) (license required to carry, possess, repair and dispose of firearms) (any violation a Class A misdemeanor).

Although they are not required by statute to do so, local police departments often impose additional requirements for handgun permits. For example, the police department in New Haven requires applicants for a pistol permit to submit, among other things: three letters of reference "from persons [not relatives] who can testify as to [the applicant's] character and suitability to possess a pistol permit"; "a certificate of successful completion of a course in pistol safety, NRA certified"; notarization of the application; and a twenty-five dollar fee.²¹⁸ It could be very difficult for a battered woman who has separated from her abuser (or who intends to separate from her abuser) to (pg.547) obtain such letters and complete an NRA pistol safety course without alerting her abuser to her current residence (or to her plans to leave). Even worse for a battered woman who is attempting to separate from her abuser, the New Haven Police Department states that "[t]he normal waiting period [for a permit] is between eight and ten weeks from [the] time [the] application is received by the firearms unit."²¹⁹ During this period a battered woman who attempts to separate from her abuser could face a heightened risk of death.²²⁰

Just as lengthy waiting periods can prevent a battered woman from obtaining a firearm to defend herself, the permit/license requirements discussed above also can violate a battered woman's right to keep and bear arms, unless they are applied in such a way as to exempt battered women.²²¹

IV. JURY INSTRUCTIONS REGARDING THE RIGHT TO BEAR ARMS

If there is no explicit exemption for battered women in the gun control statutes, a battered woman who shoots her abuser may be charged with violating a firearms statute, such as a permit/license requirement, and/or with a more general crime, such as murder, manslaughter, or assault. Many authors have discussed the inadequacy or misapplication of traditional doctrines of self-defense for battered women charged with murder or manslaughter.²²² Without entering this important discussion, I will argue that, under two different circumstances, a battered woman may be constitutionally entitled to a jury instruction regarding her right to bear arms. First, if she is charged with violating a gun control statute, the jury should be instructed that it must acquit her if

²¹⁸ Requirements for a Pistol or Dangerous Weapon Permit, Department of Police Service, New Haven, Connecticut (copy on file with the *Yale Law & Policy Review*).

²¹⁹ *Id.*

²²⁰ See discussion *supra* part II.B.

²²¹ See discussion regarding possible exemptions *supra* part III.A.

²²² A battered woman who kills her abuser may not be acquitted unless she can prove she was in imminent danger of death or great bodily harm or that she was temporarily insane. See, e.g., *State v. Kelly*, 478 A.2d 364 (1984); *People v. Jones*, 191 Cal. App. 2d 478 (Cal. Ct. App. 1961). The legal obstacles battered women face in proving that they acted in self-defense have been discussed in numerous law review articles and books. See generally GILLESPIE, *supra* note 107 (discussing the application of the law of self-defense to battered women); *Developments in the Law—Legal Responses to Domestic Violence: V. Battered Women Who Kill Their Abusers*, 106 HARV. L. REV. 1574 (1993); Michael Dowd, Essay, *Dispelling the Myths About the "Battered Woman's Defense": Towards a New Understanding*, 19 FORDHAM URB. L.J. 567 (1992); Walter W. Steele & Christine W. Sigman, *Reexamining the Doctrine of Self-Defense to Accommodate Battered Women*, 18 AM. J. CRIM. L. 169 (1991); Cathryn Jo Rosen, *The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill*, 36 AM. U. L. REV. 11 (1986); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 635-42 (1980). According to Michael Dowd, Director of the Pace University Battered Women's Justice Center, the average sentence for a woman who kills her spouse or companion is 15 to 20 years but the average sentence for a man who kills an intimate is two to six years. Nancy Gibbs, *Til Death Do Us Part*, TIME, Jan. 18, 1993, at 38, 42.

it finds that she had to violate the statute in order to *obtain*²²³ a firearm (pg.548) for self-defense. Second, if she is on trial for shooting her abuser, the jury must be instructed that it cannot consider the fact that she armed herself as proof that she acted with offensive purpose.

A. *Violation of a Gun Control Law*

When a battered woman is charged with violating a gun control statute such as a waiting period or a license/permit requirement,²²⁴ the jurors should be instructed that they must acquit her if she had to violate the statute because she was in danger of being attacked by her abuser at any time and needed to carry the firearm for self-defense. The immediacy requirement is appropriate for this charge because such statutes only delay the time when a woman can bear arms for self-defense but do not completely eliminate her right to do so.²²⁵ Thus, a delay of a month in applying for a permit normally would be excessive.²²⁶ There are cases holding (usually on statutory rather than constitutional grounds) that male defendants who were charged with violating a gun control statute were entitled to a jury instruction regarding their right to bear arms for self-defense.

In *People v. King*,²²⁷ the Supreme Court of California reversed a male defendant's conviction for possessing, following a prior felony conviction, a firearm capable of being concealed on the person. The defendant had been at a party at a friend's house when several drunk and disorderly men tried to break in and join the party after most of the guests had left. The woman who had accompanied the defendant to the party handed him a ".25 caliber Italian Burretta [sic]" automatic pistol that she had carried in her purse.²²⁸ The defendant first shot in the air in an attempt to frighten away the invaders. They thought that he was firing blanks and charged toward the door. He then shot at the men and injured one, who reported him to the police. The defendant was (pg.549) charged with two counts of assault with a deadly weapon and one count of violating the concealed firearm statute.

The jury was instructed regarding self-defense on the assault counts and returned a verdict of not guilty on these counts. The trial court, however, refused to give a self-defense instruction on the firearm statute and the defendant was convicted on that count.

²²³ Use of the firearm is not at issue when a defendant is charged with carrying a concealed weapon or carrying a firearm without a permit. The only question is whether the defendant was justified in carrying the weapon concealed or in obtaining a firearm before getting a permit.

²²⁴ License/permit statutes often exempt individuals who carry a pistol or revolver in their own homes. *See, e.g.*, CONN. GEN. STAT. § 29-35(a) (1992); MASS. GEN. LAWS ANN. ch. 269, § 10 (West 1993). However, a battered woman who has recently separated and is living with friends, relatives, or at a new address could be prosecuted under such statutes. *Cf. State v. Bailey*, 551 A.2d 1206 (Conn. 1988) (although Janet Bailey, who was attempting to protect a friend from her abusive husband, had moved some of her belongings to her friend's house, jurors decided that her "home" was her previous residence).

²²⁵ A two-week waiting period would force a battered woman to wait *at least* two weeks before obtaining a gun while a permit requirement would force a battered woman to wait until the police could process her application, which could be much longer than two weeks. *See, e.g., supra* note 219 and accompanying text (discussing eight-to-ten-week waiting period in New Haven, Connecticut).

²²⁶ *Cf. State v. Bailey*, 551 A.2d at 1220 (Conn. 1988) (Janet Bailey acknowledged that she had owned the pistol for "a couple of months.").

²²⁷ 582 P.2d 1000 (Cal. 1978) (en banc).

²²⁸ *Id.* at 1003. The court's discussion of the situation at this point is yet another example of the traditional assumption that guns are for men to use to defend their women. The court accepted without explanation the statement that the woman gave her pistol to her date and then "began looking for a stick with which to protect herself." *Id.* It apparently made sense to the Justices that a woman would carry a pistol in her purse but prefer to use a stick for self-defense.

The Supreme Court of California analyzed legislative intent²²⁹ and held that the use of a concealable firearm in defense of self or others in an emergency situation was a defense to a charge of violating the concealed firearm statute.²³⁰ The court went on to state that the trial court had erred in refusing to give a self-defense instruction on the concealed firearm charge.²³¹

In another case, *Conaty v. Solem*,²³² Patrick Conaty fought with a man named Woodhouse in Conaty's apartment. Woodhouse threatened to kill Conaty and the other tenants, including Conaty's girlfriend. Conaty called the police and told an officer that Woodhouse had threatened him and that he would shoot Woodhouse if he returned. After the officer left, Conaty borrowed a shotgun and shells from another tenant and, when Woodhouse returned and refused to leave the building, Conaty shot three feet to the side of Woodhouse. Conaty was convicted of possessing a firearm after having been convicted of a violent crime, and for recklessly discharging a firearm. He was sentenced to fifteen years in prison on the first count and one year on the second. Conaty claimed that he was denied effective assistance of counsel because his lawyer failed to request a self-defense jury instruction.²³³ The court found that Conaty's Sixth Amendment rights were denied and granted his writ of habeas corpus:

Simply because a defendant is not permitted to be in possession of a firearm does not mean he is necessarily guilty of violating a statute prohibiting possession of a firearm if he should come into control of the firearm for purposes of self-defense. This is especially true if the statute does not expressly demonstrate a legislative attempt to supersede the self-defense statutes by precluding such a person from claiming self-defense. Under the appropriate factual setting, this defense is available.²³⁴

The court also cited Article VI, Section 24 of the South Dakota Constitution, which provides that: "The right of the citizens to bear arms in defense (pg.550) of themselves and the State shall not be denied," and the South Dakota Code, which describes the availability of self-defense as a legitimate defense.²³⁵

Jury instructions regarding a battered woman's right to bear arms are critical because, without such instructions, a conviction for violating a gun control statute is virtually assured. Lengthy sentences can be imposed for such crimes²³⁶ and police or prosecutors cannot be relied upon to

²²⁹ The court did not analyze any constitutional rights to bear arms, however.

²³⁰ 582 P.2d at 1008.

²³¹ *Id.*

²³² 422 N.W.2d 102 (S.D. 1988).

²³³ The court applied the standard set in *Strickland v. Washington*, 466 U.S. 668 (1984), which is highly deferential in its scrutiny of counsel's performance. *Strickland* requires the convicted defendant to prove both that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

²³⁴ *Conaty*, 422 N.W.2d at 104 (citations omitted).

²³⁵ *Id.*

²³⁶ *See, e.g.*, CONN. GEN. STAT. § 29-37(a) (Supp. 1993) (up to \$1000 fine and imprisonment for one to five years); MASS. GEN. LAWS ANN. ch 269, § 10 (Supp. 1993) (any person who knowingly has in his possession a firearm, loaded or unloaded, without either having a license or "being present in or on his residence or place of business ... shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than one year nor more than two and one-half years in a jail or house of correction. The sentence imposed ... shall not be reduced to less than one year, nor suspended, nor shall any person convicted ... be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served one year of such sentence Prosecutions commenced under this subsection shall neither

prevent battered women who shoot their abusers from being convicted of violating these statutes. The danger that arbitrary or inappropriate selection criteria will be used is too great.²³⁷

B. *Arms Bearing and Mens Rea*

The right to bear arms is related to the right to use arms in self-defense. When a society gives its citizens the right to bear arms for defensive purposes, it allows each citizen to decide *ex ante* that she needs a weapon for protection. The society does not waive its right to condemn *ex post* the citizen's use of that weapon if she shoots offensively or without proper justification. However, it would seriously weaken the right to bear arms if juries were allowed to use the sole fact that a person armed herself as proof of offensive purpose.²³⁸ Thus, battered women who are charged with committing murder or assault also are entitled to a jury instruction regarding their right to bear arms for self-defense. Although this instruction is available in some states for male defendants, when a battered woman requested such an instruction, her request was (pg.551) denied.

In *Summers v. State*,²³⁹ a male defendant was convicted of attempted murder and murder for shooting two men after a fight in a bar. The trial court refused the defendant's request that the jury be instructed as follows:

You are instructed that the Wyoming Constitution absolutely entitles citizens of the State of Wyoming to bear arms in defense of themselves.

....

One who has reasonable grounds to believe that another will attack him, and that the anticipated attack will be of such a character as to endanger his life or limb, or to cause him serious bodily harm, has a right to arm himself for the purpose of resisting such attack.

If the Defendant armed himself in reasonable anticipation of such an attack, that fact alone does not make the Defendant the aggressor or deprive the Defendant of the right of self-defense.²⁴⁰

Instead, the trial court gave the jury the following instructions regarding self-defense:

be continued without a finding nor placed on file.").

²³⁷ For example, lesbians, poor women, and black women could be disproportionately selected for prosecution. *Cf. State v. Bailey*, 551 A.2d 1206, 1207-08 (Conn. 1988) (upholding Janet Bailey's convictions for first degree assault and carrying a pistol without a permit, Connecticut Supreme Court quoted extensively from trial testimony regarding allegation that Janet Bailey was a lesbian); Sharon Allard, *Rethinking Battered Women Syndrome: A Black Feminist Perspective*, 1 U.C.L.A. WOMEN'S L.J. 191 (1991); Lenore E. Walker, *A Response to Elizabeth M. Schneider's Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RIGHTS L. REP. 223, 224 (1986) (discussing how expert testimony has been unable to overcome race and class bias against black or very poor battered women).

²³⁸ *But see* R.I. GEN. LAWS § 11-47-4 (1992) ("In the trial of a person for committing or attempting to commit a crime of violence the fact that he was armed with or had available a pistol or revolver without license to carry the same ... shall be prima facie evidence of his intention to commit said crime of violence."). I believe this statute violates Article I, Section 22 of the Rhode Island Constitution, which provides that "[t]he right of the people to keep and bear arms shall not be infringed."

²³⁹ 725 P.2d 1033 (1986), *aff'd on reh'g*, 731 P.2d 558 (Wyo. 1987).

²⁴⁰ *Summers*, 725 P.2d at 1043-44.

[I]f the Defendant had reasonable grounds to believe and actually did believe that he was in imminent danger of death or serious bodily harm from which he could save himself only by using deadly force against his assailant, he had the right to use deadly force in order to defend himself. "Deadly force" means force which is likely to cause death or serious bodily harm.

....

The claim of self-defense is not necessarily defeated if the Defendant used greater force in the heat of the fear generated in him by the alleged assault upon him than a reasonable person would have used while acting in a calm and rational manner.²⁴¹

The Supreme Court of Wyoming viewed the defendant's requested instructions favorably and held that the instructions actually given covered all of the principles embodied in the requested instructions, *except the principle that the jury could not find premeditation based on the fact that the defendant had armed himself*. However, because the defendant was convicted of second degree murder, which did not include an element of premeditation, the court found this error harmless.²⁴²

Based on the court's analysis, a defendant charged with a crime that includes an element of premeditation, for example, a battered woman charged with murdering her abuser, would be entitled to such an instruction.

An unsuccessful request for a right to bear arms instruction was involved (pg.552) in *Commonwealth v. Nelson*,²⁴³ which was an early case involving a battered woman. In that case, Mary Ellen Nelson was convicted of voluntary manslaughter for killing her husband and was sentenced to pay a fine of five dollars and be committed to the State Industrial Home for Women for an indeterminate sentence.²⁴⁴

In *Nelson*, the defendant had been at home watching television when her husband came home and began arguing with her. He tried to hit her with a poker but missed. He then caught her and beat her. As she bent over to pick up her glasses, he hit her so hard with the poker that she went blind in one eye. She went to the upstairs bedroom and closed the door. When she thought it was safe, she opened the door. Her husband stuck his foot in the door and cut her arm with a knife. She managed to shut the door and block it with a dresser. She then took a pistol out of the dresser. She left the bedroom and started to go downstairs. Her husband heard her coming and started up the stairs carrying the poker. She shot him in the head and he was killed instantly.

The court stated that the defendant "could have telephoned the police or the neighbors, or could have called to the neighbors, or called out the window for help if she felt she needed help."²⁴⁵ *The court emphasized the fact that the defendant knew the gun was loaded and that she knew how to use it.*²⁴⁶

At trial, the history of violence in Mrs. Nelson's marriage was not fully developed. The defendant stated in direct examination that: "My husband ... and me got along fine until about a year

²⁴¹ *Id.* at 1044 (instruction regarding right to use self-defense for aggressors who withdraw and are pursued omitted).

²⁴² *Id.* at 1044-45.

²⁴³ 152 A.2d 913 (Pa. 1959).

²⁴⁴ *Id.* at 914.

²⁴⁵ *Id.* *But see supra* part II.C for a discussion of the lack of protection from friends, neighbors, and the police.

²⁴⁶ *Nelson*, 152 A.2d at 914.

ago, and then little arguments started, but they never amounted to too much."²⁴⁷ On cross-examination, she admitted that they had had many arguments, and that during one of the arguments, a year before she killed her husband, she had shot him in the leg when "he had picked up a shoe and told her she had to go out with him drinking."²⁴⁸

On appeal, the defendant challenged the trial court's failure to instruct the jury regarding her right to go downstairs for a legitimate purpose and her right to bear arms for her protection. The court held that this claim was adequately covered by the instructions given,²⁴⁹ which were "eminently fair to the defendant, and clearly and correctly set forth the law of self-defense"²⁵⁰ The court also noted that no objection was made to the charge.²⁵¹ However, it was a violation of Mrs. Nelson's right to bear arms if the jury used (as the (pg.553) court apparently did) the fact that Mrs. Nelson knew the gun was loaded and knew how to use it as evidence of her criminal intent.²⁵² Mrs. Nelson should have been entitled to a *Summers*-type instruction.

Because of the influence of cultural stereotypes, a jury instruction regarding the right to bear arms is even more important for a battered woman such as Mrs. Nelson than for a male defendant such as Mr. Summers. Nyla Branscombe, an assistant professor of psychology, studied some of the ways that cultural stereotypes influence the evaluation of violent social acts.²⁵³ She found that in experiments involving stranger rape and date rape, women who behaved most inconsistently with the female stereotype, i.e., by resisting their assailant both verbally and physically, were perceived as having been *more* guilty of precipitating the attack.²⁵⁴ Also, women who competently shot a burglar were blamed more than women who wielded the gun incompetently and made a lucky hit.²⁵⁵ The reverse was true for male homeowners who shot burglars. She concluded that "men and women who act 'in character' with social expectations make it harder, by their conformity, to imagine any outcome other than what does occur. So they're held less responsible for it."²⁵⁶

Under this model, juries would be more sympathetic to the male defendants in *King* or *Summers* because, unlike Mrs. Nelson, those defendants were conforming to societal norms by using firearms to protect themselves and "their women." When a battered woman is a defendant, the jury needs a right to bear arms instruction to help counteract societal bias against women who do not act stereotypically.²⁵⁷

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ The actual instructions were not reported.

²⁵⁰ *Nelson*, 152 A.2d at 917.

²⁵¹ *Id.* at 914.

²⁵² *Cf.* *State v. Delossantos*, 559 A.2d 164 (Conn.), *cert. denied sub nom.* *Delossantos v. Connecticut*, 493 U.S. 866 (1989); *State v. Watson*, 345 A.2d 532, 542-43 (Conn. 1973), *cert. denied sub nom.* *Watson v. Connecticut*, 416 U.S. 960 (1974) (holding unconstitutional portion of Conn. Gen. Stat. § 29-38 that made presence of weapon in vehicle prima facie evidence of violation of the statute). *But see* *State v. Daniel*, 391 S.E.2d 90 (W. Va. 1990) (instruction that allows jury to infer malice and deliberation from intentional use of deadly weapon does not violate citizen's constitutional right to keep and bear arms).

²⁵³ Nyla Branscombe, *Don't Shoot Too Well, Dear*, EXPLORE, Summer 1991, at 12.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Expert testimony also is needed to remedy societal ignorance of the prevalence and patterns of battering. *See generally* GILLESPIE, *supra* note 107, at 157 ("When a battered woman kills her batterer and is made to stand trial for homicide, she often faces in court a prosecutor who pounds away at her story using every myth, stereotype, and misconception about battered women and domestic violence to convince the jury that she did not act in self-defense."); Elizabeth M. Schneider, *Describing and Changing:*

V. CONCLUSION

The Fourteenth Amendment to the United States Constitution and many state constitutions guarantee each citizen an individual right to keep and bear (pg.554) arms for self-defense. Although this right is not absolute, restrictions such as lengthy waiting periods and certain permit/license requirements are unreasonable unless they are modified or applied in a manner that incorporates the needs of battered women. In the meantime, if a battered woman is charged with violating such a statute, the jury should be instructed to acquit her if she had to violate the statute in order to obtain a firearm for self-defense.

A battered woman who shoots her abuser also may be charged with violating a more general criminal law, such as murder, manslaughter, or assault. In that case, the jury may infer an offensive purpose from the mere fact that the woman armed herself. Thus, the jury should be instructed regarding the woman's right to bear arms for self-defense.

There are risks in arguing for a real right to bear arms for battered women. This analysis could be used by gun control opponents to bolster challenges to otherwise reasonable restrictions on the right to bear arms²⁵⁸ and could contribute to the tendency to view battered women as exceptions, rather than our mothers, sisters, friends, neighbors, and ourselves.

Although the arguments presented in this Note may be misused, this does not mean that the needs of battered women should go unmentioned in the debate over gun controls. The right to bear arms is a constitutional right, and constitutional rights should not be ignored simply because they have troubling implications.

In 1868, violence against Blacks and abolitionists helped spark a constitutional amendment to guarantee that the privileges and immunities of all *citizens* of the United States, including the individual right to bear arms, would not be infringed. Over seventy-two years ago the Nineteenth Amendment made women full citizens. It is past time for battered women to have a real right to bear arms.(pg.555)

APPENDIX²⁵⁹

STATE CONSTITUTIONAL RIGHT- TO-BEAR-ARMS PROVISIONS²⁶⁰

Women's Self-Defense Work and the Problem of Expert Testimony on Battering, 9 WOMEN'S RTS. L. REP. 195 (1986).

²⁵⁸ Examples of reasonable gun controls include laws prohibiting felons, those convicted of violent misdemeanors, juveniles, or mentally impaired individuals from carrying firearms. *See, e.g.*, KLECK, *supra* note 2, at 437-39. Kleck proposes a "workable gun control strategy" that would include: a national instant records check, regulations on the private transfer of guns, prohibitions on the possession of guns by felons, those convicted of violent misdemeanors, persons under 18 (and perhaps persons repeatedly involved in alcohol-related crimes), and a permit requirement. *Id.* at 431-45. These laws would cover both long guns and handguns and would be national in scope to avoid cross-jurisdictional "leakage." *Id.* at 432; *cf.* Richard Tapscott, *Governors Sign Regional Pact to Fight Gunrunning*, WASH. POST, Aug. 16, 1993, at D1 (discussing agreement between Delaware, Maryland, New Jersey, and Virginia).

²⁵⁹ Source: Sayoko Blodgett-Ford & J. Drake Turrentine, *Gun Controls and the Connecticut Constitution*, 66 CONN. BAR. J. 425 (1992). Reprinted with permission of the *Connecticut Bar Journal*.

²⁶⁰ The following states do not have constitutional right-to-bear-arms provisions: California, Iowa, Maryland, Minnesota, New Jersey, and Wisconsin.

Alabama: "That every citizen has a right to bear arms in defense of himself and the state." ALA. CONST. art. I, § 26.

Alaska: "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." ALASKA CONST. art. I, § 19.

Arizona: "The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men." ARIZ. CONST. art. II, § 26.

Arkansas: "The citizens of this State shall have the right to keep and bear arms for their common defense." ARK. CONST. art. II, § 5.

Colorado: "The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons." COLO. CONST. art. II, § 13.

Connecticut: "Every citizen has a right to bear arms in defense of himself and the state." CONN. CONST. art. I, § 15.

Delaware: "A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use." DEL. CONST. art. I, § 20.

Florida: "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law." FLA. CONST. art. I, § 8(a). Subsections (b) through (d) specify firearms regulations.^(pg.556)

Georgia: "The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne." GA. CONST. art. I, § I, para. VIII.

Hawaii: "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." HAW. CONST. art. I, § 17.

Idaho:

The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony,

IDAHO CONST. art. I, § 11.

Illinois: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed." ILL. CONST. art. I, § 22.

Indiana: "The people shall have a right to bear arms, for the defense of themselves and the State." IND. CONST. art. I, § 32.

Kansas: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power." KAN. BILL OF RIGHTS, § 4.

Kentucky:

All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

....

Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.

KY. BILL OF RIGHTS, § I, para. 7.

Louisiana: "The right of each citizen to keep and bear arms shall not be ^(pg.557) abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person." LA. CONST. art. I, § 11.

Maine: "Every citizen has a right to keep and bear arms for the common defense; and this right shall never be questioned." ME. CONST. art. I, § 16.

Massachusetts:

The people have a right to keep and to bear arms for the common defence [sic]. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.

MASS. DECL. OF RIGHTS, pt. I, art. XVII.

Michigan: "Every person has a right to keep and bear arms for the defense of himself and the state." MICH. CONST. art. I, § 6.

Mississippi: "The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons." MISS. CONST. art. III, § 12.

Missouri: "That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons." MO. CONST. art. I, § 23.

Montana: "The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons." MONT. CONST. art. II, § 12.

Nebraska:

All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are ... the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof.

NEB. CONST. art. I, § 1.^(pg.558)

Nevada: "Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes." NEV. CONST. art. 1, § II, para. 1.

New Hampshire: "All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state." N.H. CONST. part 1, art. 2-a.

New Mexico:

No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.

N.M. CONST. art. II, § 6.

New York: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms cannot be infringed." N.Y. BILL OF RIGHTS, § 4.

North Carolina:

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; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.

N.C. CONST. art. I, § 30.

North Dakota:

All individuals are by nature equally free and independent and have certain inalienable rights, among which are ... to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

N.D. CONST. art. I, § 1.

Ohio: "The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power." OHIO CONST. art. I, § 4.^(pg.559)

Oklahoma: "The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons." OKLA. CONST. art. II, § 26.

Oregon: "The people shall have the right to bear arms for the defence [sic] of themselves, and the State, but the Military shall be kept in strict subordination to the civil power." OR. CONST. art. I, § 27.

Pennsylvania: "The right of the citizens to bear arms in defence [sic] of themselves and the State shall not be questioned." PA. CONST. art. I, § 21.

Rhode Island: "The right of the people to keep and bear arms shall not be infringed." R.I. CONST. art. I, § 22.

South Carolina:

A Well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in the manner prescribed by law.

S.C. CONST. art. I, § 20.

South Dakota: "The right of the citizens to bear arms in defense of themselves and the state shall not be denied." S.D. CONST. art. VI, § 24.

Tennessee: "That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." TENN. CONST. art. I, § 26.

Texas: "Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime." TEX. CONST. art. I, § 23.

Utah: "The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the ^(pg.560) legislature from defining the lawful use of arms." UTAH CONST. art. I, § 6.

Vermont: "That the people have a right to bear arms for the defence [sic] of themselves and the State—and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power." VT. CONST. ch. I, art. 16.

Virginia:

That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

VA. CONST. art. I, § 13.

Washington: "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men." WASH. CONST. art. I, § 24.

West Virginia: "A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use." W. VA. CONST. art. III, § 22.

Wyoming: "The right of citizens to bear arms in defense of themselves and of the state shall not be denied." WYO. CONST. art. I, § 24.