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FEMINISTS AND FIREARMS: WHY ARE SO MANY WOMEN ANTI-CHOICE?

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“God made man and woman; Colonel Colt made them equal.”¹

INTRODUCTION

I am a feminist. I want a lot of things for women: equal pay; unfettered access to abortion prior to fetal viability; and a society that equally supports a woman’s choice to be a stay-at-home mom, a working mother, or childless. But most of all, I want men to stop beating and raping us. The well-founded, rational fear that most women experience at some point every day is the biggest reason for women’s subjugation.² I am ready and willing to defend my bodily integrity at the point of a gun, and I have the .357 Magnum to prove it; most women, however, are not.

I co-authored an amicus brief to the Supreme Court in *McDonald v. City of Chicago*,³ and asked several female professors if they would be interested in signing the brief.⁴ I explained in my introductory email, “[t]he brief takes a personal liberty/autonomy view of self-defense, and argues that women should be allowed to make their own decisions about the best way to protect their safety.”

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¹ Ann Coulter, *Annie’s Got Her Gun*, *GEORGE MAGAZINE*, Aug. 1999, at 43. See CAROL RUTH SILVER & DON B. KATES, *Self-Defense, Handgun Ownership, and the Independence of Women in a Violent, Sexist Society*, *RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT* 169 (Don B. Kates ed., 1979).

² “Women, particularly in big cities, live with a constant wariness. Their lives are literally on the line in ways men just don’t experience. . . . It is understandable that the perspectives of men and women on safety are so different – men and women live in different worlds. . . . At core, men are afraid women will laugh at them, while at core, women are afraid men will kill them.”

GAVIN DE BECKER, *THE GIFT OF FEAR* 76-77 (1997). See Lisa R. Hasday, *What the Violence Against Women Act Forgot: A Call for Women’s Self-Defense*, 13 *YALE J.L. & FEMINISM* 175, 181 (2001).

³ 130 S. Ct. 3020 (2010) (holding that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right to keep and bear arms).

⁴ Brief of Amici Curiae Women State Legislators and Academics in Support of Petitioners, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08-1521), 2009 WL 4099509 (cited by the Court at 3027, 3049).

One professor responded, “I’m a feminist who believes that we would all be better able to make our own decisions in a gun controlled environment, so I am not interested in signing the brief.” This made me wonder why the same people who advocate for choice in every other area of a woman’s life would deny her the right to protect her safety as she sees fit.

This article explores why so many women dislike guns,⁵ and why they should actually embrace firearm ownership. It next explains why women should support the constitutional right to keep and bear arms even if they remain hostile to guns themselves. Finally, the article proposes a presumption that women shall be issued concealed carry permits even in states with discretionary licensing systems.

I. WHY DO SO MANY WOMEN DISLIKE GUNS?

There is no universal reason to explain the anti-gun sentiment among women. Individual women may identify with, or be subconsciously influenced by, one or more of the following reasons to varying degrees, or, indeed, reasons not explored here.

One reason for women’s aversion to guns may be that they have different values and morals than men. Some scholars theorize that women value interdependence, community, connection with others, and trust; men value independence, autonomy, power, and aggression.⁶ The various explanations given for these differences are biological, evolutionary, psychological, and sociological. Whatever the cause, this theory could help explain women’s general dislike for guns. Firearms may be seen as antithetical to the female ideals of connection and trust, furthering instead the male ideals of independence, power, and aggression. Unlike men, women are thought to be—and are expected to be—pacifist and self-sacrificing.⁷ Of course, one wonders how long it will take before they ask themselves the famous Dr. Phil question: “How’s that been working out for you?”

Guns themselves are seen as symbols of masculinity and dominance.⁸ One law review article states: “[j]ust as sex is the ultimate weapon of patriarchy used to

⁵ See Mary Zeiss Stange, *From Domestic Terrorism to Armed Revolution: Women’s Right to Self-Defense as an Essential Human Right*, 2 J.L. ECON. & POL’Y 385, 405 (2006); Gallup, *The Big Guns*, Apr. 15, 2005 <http://www.gallup.com/video/15883/Big-Guns.aspx> (“The majority of women hold a negative opinion on the NRA, guns, and current gun control efforts.”).

⁶ See Arthur Austin, *A Primer on Deconstruction’s “Rhapsody of Word-Plays,”* 71 N.C. L. REV. 201, 224 (1992); Inge Anna Larish, *Why Annie Can’t Get Her Gun: A Feminist Perspective on the Second Amendment*, 1996 U. ILL. L. REV. 467, 477-78 (1996); Ashlie Warnick, *Ifeminism*, 101 MICH. L. REV. 1602, 1614 (2003) (reviewing LIBERTY FOR WOMEN: FREEDOM AND FEMINISM IN THE TWENTY-FIRST CENTURY (Wendy McElroy ed. 2002)); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 13-21 (1988).

⁷ See Linda C. McClain, *“Atomistic Man” Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1195 (1992); David C. Williams, *Constitutional Tales of Violence: Populists, Outgroups, and the Multicultural Landscape of the Second Amendment*, 74 TUL. L. REV. 387, 407 (1999).

⁸ See Austin, *supra* note 6, at 221-23; Erik Luna, *The .22 Caliber Rorschach Test*, 39 HOUS. L. REV. 53, 80-82 (2002).

penetrate and possess women, the gun's sole purpose is to intrude and wound its victim."⁹ Perhaps men are better able to identify with the concept of a bullet being expelled from a gun and penetrating its target. And most little girls do not look forward to their first gun as a rite of passage.¹⁰ Nor would one ever describe a woman experiencing an orgasm as "getting her gun off." Simply put, guns are phallic and give a feeling of power—two things women may not be able to relate to.

A more sinister explanation is that "gun control is, symbolically, male control."¹¹ Sociologist H. Taylor Buckner found that "[o]verall, the women who support gun control do so in the context of controlling male violence and sexuality."¹² Interestingly, "women who have been subjected to force (almost always by men) do *not* think that more gun laws will reduce violence against women."¹³ Women who have been victimized by men are all too aware of the damage a man can inflict with just his bare hands, feet, or common household items.

Women may also want to avoid being seen as having masculine traits such as gun ownership or proficiency because it is considered unladylike and unattractive.¹⁴ Moreover, some women might not be able to see themselves in the role of a protector or defender, and so delegate this responsibility to the man in their life or the police.¹⁵ These women may be willing to sacrifice some measure of security in order to stay within prescribed gender norms.

Another explanation for women's dislike of guns may be simple ignorance. Boys are far more likely than girls to be socialized with firearms, and women therefore have much less experience with guns than men do.¹⁶ Knowledge of and experience with firearms is negatively correlated with support for gun control, which intuitively makes sense: the more one knows about guns, the less afraid she is.¹⁷ People who believe that guns are unpredictable, or who anthropomorphize them as "having a mind of their own," would therefore be less likely to support gun

⁹ Alana Bassin, *Why Packing a Pistol Perpetuates Patriarchy*, 8 HASTINGS WOMEN'S L.J. 351, 352 (1997). The assertion may be inaccurate, but the comparison is illustrative.

¹⁰ "[F]irearm ownership and use are an important part of the socialization process for young males. In rural areas and small towns, a boy's introduction to guns and hunting is an important rite of passage," argues historian B. Bruce-Briggs. "The first gun at puberty is the bar mitzvah of the rural WASP." Luna, *supra* note 8, at 82 (citation omitted).

¹¹ H. Taylor Buckner, *Sex and Guns: Is Gun Control Male Control?* (Aug. 5, 1994) (unpublished manuscript), <http://www.tbuckner.com/SEXGUN.HTM>.

¹² *Id.*

¹³ *Id.*

¹⁴ See *id.* (citing Nyla R. Branscombe & Susan Owen, *Influence of Gun Ownership on Social Inferences About Women and Men*, 21 J. OF APPLIED SOC. PSYCHOL. 1567, 1575-84 (1991)); Larish, *supra* note 6, at 506; Luna, *supra* note 8, at 83.

¹⁵ "Defensive force is seen most appropriate in defense of honor, property, or family. Traditionally familiar images of self-defense are a soldier, a man protecting his home, family, or the chastity of his wife, or a man fighting off an assailant." Larish, *supra* note 6, at 499 (citation omitted).

¹⁶ See Luna, *supra* note 8, at 82.

¹⁷ See Buckner, *supra* note 11.

control if they were instructed in proper gun handling and informed about firearms' various safety features. Women who have never been taught to handle firearms may understandably be afraid of the unknown.

Misleading statistics, myths, and common misperceptions may also be partly to blame. For instance, a common claim is that a gun is more likely to be used against a family member than used in self-defense; however, the study on which that claim is based only counted defensive gun uses ("DGUs") that resulted in the criminal's death.¹⁸ This renders the study meaningless, since a criminal will usually run away as soon as he sees a gun, and no shots are ever fired.¹⁹ The resulting statistic is extremely deceptive because less than 1% of life-saving DGUs result in a criminal's death, which means that over 99% of life-saving DGUs were not counted in the study.²⁰ This is just one example of the many ways statistics can be manipulated to further an anti-gun agenda. If open-minded women educated themselves about guns and self-defense, they would discover that many of their fears are unfounded.

The saddest explanation is that society, including women, generally tolerates violence against women.²¹ Rape is ostensibly illegal, but "overwhelmingly permitted in fact."²² Domestic violence and rape survivors are still stigmatized, shamed, and blamed—even by other women. Women may be blaming survivors because they do not want to believe that they themselves could ever become a victim; the idea being that if the survivor did something "wrong" or "brought it on herself," then "it can't happen to me."²³ And women who convince themselves they will never be victims see no need for self-defense—for themselves or for anyone else.²⁴ Both men and women downplay the devastating effects of rape and domestic violence when they suggest that women should submit rather than defend their bodily integrity,²⁵ or tell them their self-defense efforts would be incompetent

¹⁸ See Lawrence Southwick, Jr., *Guns and Justifiable Homicide: Deterrence and Defense*, 18 ST. LOUIS U. PUB. L. REV. 217, 217 n. 6 (1999) (explaining why "this is a silly metric" and incorrect).

¹⁹ See David B. Kopel et al., *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 166 (2007).

²⁰ See Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 181 (1995).

²¹ See Larish, *supra* note 6, at 499; Amy J. Sepinwall, *Defense of Others and Defenseless "Others,"* 17 YALE J.L. & FEMINISM 327, 360 (2005).

²² Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1297 (1991).

²³ See Hasday, *supra* note 2, at 181-82.

²⁴ "Anti-gun people who refuse to accept the reality of the proven and very serious dangers of civilian disarmament are using denial to protect themselves from the anxiety of feeling helpless and vulnerable." Sarah Thompson, *Raging Against Self Defense: A Psychiatrist Examines the Anti-Gun Mentality*, THE BILL OF RIGHTS SENTINEL at 8 (Jews For the Preservation of Firearms Ownership, Inc., Hartford, WI) (Fall 2000).

²⁵ "Feminist pioneer Betty Friedan" believed "that lethal violence even in self-defense only engenders more lethal violence, and that gun control should override any personal need for safety." Ann Japenga, *Would I Be Safer With a Gun?*, HEALTH at 54 (Mar./Apr. 1994).

and counterproductive.²⁶ All of this should be offensive to an adult woman who considers herself a full-fledged person.

II. WHY FEMINISTS SHOULD EMBRACE FIREARMS

Some women's issues affect only a particular class of women: maternity leave and parental benefits affect only women who choose to become mothers, access to abortion affects only women of child-bearing age, and pay discrepancies affect only women in the work force. However, the fear of violence affects all women.²⁷ Some women may respond to this fear with denial or a pacifist determination to succumb rather than fight back, and that is their choice. Others may decide, after careful consideration, that their bodies and lives are worth defending. These women must have a full range of self-defense tools in order for their choice to be meaningful.

Pervasive acceptance of women's armed self-defense could help change the current rape culture and encourage women to take responsibility for their own safety, while working for equality and an end to patriarchy. Guns are safe when used by responsible adults, and are the most effective tool for self-defense.²⁸ Furthermore, removing restrictions on women's choices increases individual freedom and can lead to greater personal autonomy.

A. We're As Mad As Hell, and We're Not Going to Take This Anymore!

Women need to get angry about being targeted for victimization just because they are women.²⁹ Rape and domestic violence are not simply the results of many individual decisions; they are also a product of the patriarchal system that allows the systematic domination and disrespect of women.³⁰ Rape has been compared to lynching³¹ because

²⁶ See Stange, *supra* note 5, at 395 (describing the dangerous and paternalistic advice given to women who want to defend themselves).

²⁷ Some women may be disproportionately affected: single women, those who live in high-crime urban areas, women who have been victimized in the past, poor women who lack the financial resources to ensure safe housing and transportation, and the elderly or handicapped, to give just a few examples.

²⁸ See Linda Gorman & David B. Kopel, *Self-Defense: The Equalizer*, FORUM FOR APPLIED RESEARCH AND PUBLIC POLICY at 92 (Winter 2000); Kleck & Gertz, *supra* note 20, at 168.

²⁹ See MacKinnon, *supra* note 22, at 1301.

³⁰ "[S]exual assault is neither random, nor individualized violence. It is not coincidental that the vast majority of perpetrators are men and the vast majority of victims are women. The perpetuation of sexual assault is inseparable from traditional female oppression, and is both an expression of male dominance, and a method of maintaining it."

Wendy Rae Willis, *The Gun is Always Pointed: Sexual Violence and Title III of the Violence Against Women Act*, 80 GEO. L.J. 2197, 2199 (1992). Of course, the term "sexual assault" is a misnomer because rape is about power and control, not sex. A rape survivor has not experienced unwanted sex, but rather a loss of self-sovereignty and destruction of bodily integrity.

³¹ See MacKinnon, *supra* note 22, at 1303; Eric Rothchild, *Recognizing Another Face of Hate Crimes: Rape as a Gender-Bias Crime*, 4 MD. J. CONTEMP. LEGAL ISSUES 231, 263-34 (1993).

it is on the one hand pervasive and systemic (it is overwhelmingly women who are targeted for rape) and on the other hand arbitrary and random (all kinds of women are raped, young and old, regardless of race or class, in a broad variety of circumstances, thus making formulaic solutions like “avoid X to avoid rape” impossible),³²

so fear is omnipresent. Thus, men use rape to subjugate women, much like lynching was used to subjugate southern blacks: the knowledge that one could be targeted quells every member of the group.³³

Professor MacKinnon said it best: “[w]hat [women] need is change: for men to stop hurting them and using them because they are women, and for everyone to stop letting them do it because they are men.”³⁴ Feminists have worked for reforms aimed at recognizing women as people worthy of equality and respect, and this endeavor has been quite successful in some areas,³⁵ but there is still much work to be done.³⁶ Changing hearts and minds is the ultimate goal. However, until that dream becomes a reality, women’s armed self-defense may be both a strategy for achieving the goal, and a stopgap measure to prevent violence by men who refuse to see all women as fully human.

Rape is tolerated, in part, because most of the time only women are hurt and no one dies. If women began defending themselves with firepower, the authorities might sit up and take notice. This strategy provided some benefits for Ku Klux Klan victims in the 1930s:

[A]rmed self-defense brought police intervention which martyrdom would not have done. African-Americans, Catholics, Jews, immigrants, and radicals were neither popular nor powerful in the areas in which the KKK thrived. Public authorities and influential private citizens might well have been content to see unarmed victims brutalized or slain, if the violence could have been so confined. When victims arm themselves, however, authorities are compelled to act lest incidents lead to widespread bloodshed and disorder.³⁷

The point is simple: while protecting the powerless may not be a high priority for public authorities, preserving order is. Police are likely to pay more attention to a man’s death than a woman’s rape; perhaps society would care more about the latter if it had the potential to impact the former.

³² NANCY J. HIRSCHMANN, *THE SUBJECT OF LIBERTY: TOWARD A FEMINIST THEORY OF FREEDOM* 29 (2003).

³³ See MacKinnon, *supra* note 22, at 1303.

³⁴ *Id.* at 1294.

³⁵ See, e.g., *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (holding that sexual harassment is a form of sex discrimination).

³⁶ See, e.g., *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (striking down Indianapolis anti-pornography ordinance).

³⁷ Daniel D. Polsby & Don B. Kates, *Of Holocausts and Gun Control*, 75 WASH. U. L.Q. 1237, 1268 (1997).

Widespread firearm ownership would also show that women are serious about putting an end to gender-based violence, and willing to take responsibility for their own safety.³⁸ Should they have to? No. A woman should have the absolute right to walk down a dark, deserted city street at 2:00 in the morning, wearing a short skirt, without threat of assault.³⁹ But that is not currently a woman's reality. Though rape is never the victim's fault, women may be the only ones who can put a stop to it; more women should get a gun, learn how to use it, and cultivate a don't-mess-with-me attitude. Few men would dare assault a woman with a .38 in her hands and determination in her eyes—and those who do attempt it should immediately regret their decision.

Most men cannot comprehend the grievous harms of rape and domestic violence,⁴⁰ but a widespread movement to prevent victimization “by any means necessary” might help them begin to understand the consequences—both for women who are abused, and for men who attempt to harm an armed woman.⁴¹

If women defended themselves violently, the amount of damage they were willing to do to would-be assailants would be the measure of their seriousness about the limits beyond which they would not be pushed. If more women killed husbands or boyfriends who abused them or their children, perhaps there would be less abuse. A large number of women refusing to be pushed any further would erode, however slowly, the myth of the masochistic female which threatens all our lives.⁴²

It is reasonable to believe that violence against women would decrease once men begin to realize that attacking a seemingly-defenseless woman could be *their* destruction. The ideal, naturally, is a society of men and women who respect each

³⁸ See Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97, 180-81 (1997); Williams, *supra* note 7, at 432-33.

³⁹ Cf. EVE ENSLER, MY SHORT SKIRT, I AM AN EMOTIONAL CREATURE: THE SECRET LIFE OF GIRLS AROUND THE WORLD 123-25 (2010).

⁴⁰ Professor Kates has described his experience with classroom discussions: “Invariably, the proposition that women may defend against rape with deadly force was questioned or even denounced by male students. However, when reminded that women are not the only victims of rape, that homosexual rape is a frequent occurrence, the doubters invariably changed their attitudes.” Don B. Kates & Nancy Jean Engberg, *Deadly Force Self-Defense Against Rape*, 15 U.C. DAVIS L. REV. 873, 903-04 (1982). This shows that men are capable of recognizing the value of self-defense to prevent rape; however, most men seem to be incapable of appreciating the perpetual fear that women experience simply because they are women, and therefore targets for victimization.

⁴¹ “Though the legal system has mostly consoled and protected batterers, when a woman is being beaten, it's the batterer who has to be stopped; as Malcolm X used to say, ‘by any means necessary’—a principle women, all women, had better learn. A woman has a right to her own bed, a home she can't be thrown out of, and for her body not to be ransacked and broken into. . . . She has a constitutional right to a gun and a legal right to kill if she believes she's going to be killed. And a batterer's repeated assaults should lawfully be taken as intent to kill. Everybody's against wife abuse, but who's prepared to stop it?”

ANDREA DWORKIN, LIFE AND DEATH: UNAPOLOGETIC WRITINGS ON THE CONTINUING WAR AGAINST WOMEN 50 (1997).

⁴² Stange, *supra* note 5, at 390, quoting D. A. CLARKE, *A Woman With a Sword: Some Thoughts on Women, Feminism, and Violence*, TRANSFORMING A RAPE CULTURE 393, 401 (Emilie Buchwald, Pamela R. Fletcher, & Martha Roth, eds., Milkweed Editions, 1993).

other as equals and do not use the threat of violence to dominate and control any group. Until then, the best strategy may be to achieve “a social equilibrium of nonviolence” by arming women.⁴³ Offensive violence may beget more violence, but unyielding self-defense begets détente.⁴⁴ Peace would be preferable, but cessation of violence is essential.

B. Guns, For Lack of a Better Word, Are Good

A complete criminology of guns, with a discussion of the societal benefits of widespread firearm ownership by law-abiding Americans and the inefficacy of gun control, is beyond the scope of this article.⁴⁵ However, women should have some basic facts to aid them in their personal decision about gun ownership.

A woman must first consider whether having a gun will make her more or less safe if she is targeted for victimization. Research consistently shows that victims who resist with a gun are less likely to be injured during a rape or robbery, and less likely to have a rape attempt completed, compared to victims who do not resist or who resist without a weapon.⁴⁶ “[C]riminological studies find that, in confrontations with criminals, armed citizens usually win.”⁴⁷ Moreover, armed citizens usually win without ever firing a shot because criminals who discover that their intended victim is armed usually flee rather than picking a fight with someone who can fight back.⁴⁸ If a woman must shoot a criminal in order to protect herself, she is still unlikely to take a life because “roughly eighty-five percent of those wounded by gunshot survive if they get medical care.”⁴⁹

Many women are understandably concerned that having a gun in the home could lead to a family member’s accidental death. However, fatal gun accidents are extremely rare,⁵⁰ and “are generally caused by an unusually reckless subset of the

⁴³ Polsby & Kates, *supra* note 37, at 1248.

⁴⁴ See Catharine A. MacKinnon, *Toward Feminist Jurisprudence*, 34 STAN. L. REV. 703, 732 (1982) (“[S]ocial life would be more peaceful, with less need for extreme response, if women were equally trained in the means of violence—détente instead of pacification.”).

⁴⁵ A definitive work in this area is GARY KLECK, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* (1997). For more recent analyses, see Don B. Kates, *The Limits of Gun Control: A Criminological Perspective* in *SUING THE FIREARMS INDUSTRY: A LEGAL BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* (Timothy Lytton ed., 2005) and Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 HASTINGS L.J. 1339 (2009).

⁴⁶ Kleck & Gertz, *supra* note 20, at 151-52. See Kates & Engberg, *supra* note 40, at 879 (“While non-deadly resistance such as biting, scratching, kicking, hitting and screaming may dissuade some rapists, others will retaliate with extreme brutality.”); Polsby & Kates, *supra* note 37, at 1245 (“[W]hen intended victims resist robbers or rapists with firearms, they are only half as likely to be injured as those who submit, and are much less likely to be robbed or raped.”).

⁴⁷ Don B. Kates, *The Right to Arms: The Criminology of Guns*, 2010 CARDOZO L. REV. DE NOVO 86, 92 (2010).

⁴⁸ See *id.* at 93; Polsby & Kates, *supra* note 37, at 1246.

⁴⁹ Kates, *supra* note 47, at 93 (emphasis deleted).

⁵⁰ In 2007, the most recent data available, 613 people died due to a firearm accident, or 0.20 per 100,000 people. Compare this to the 43,945 people who died in motor vehicle accidents, or 14.59 per 100,000 people. WISQARS INJURY MORTALITY REPORTS, 1999 – 2007, CENTERS FOR DISEASE

population who often have a long record of violent crime, heavy drinking, and other types of accidents.”⁵¹ Women who have criminal records are unable to purchase a gun, and those with a history of heavy drinking or risky behavior should carefully consider whether having a gun would make them more or less safe, based on their personal situations.⁵²

Nor are guns particularly dangerous in homes with young children. Women can use a gun safe to keep their firearm out of a child’s hands, or a trigger lock to render the gun inoperable, or both. Seemingly innocuous household items can actually be a much greater threat. As Steven D. Levitt, of FREAKONOMICS fame, famously observed, “on average, if you own a gun and have a swimming pool in the yard, the swimming pool is almost 100 times more likely to kill a child than the gun is.”⁵³ Thirty-nine children under the age of ten died due to a firearm accident in 2007; while tragic, this is much smaller than the number of those who died in accidents involving motor vehicles (1190), suffocation (1150), drowning (637), or poisoning (65).⁵⁴ Naturally, women with children in the home will have to take safety precautions that single women living alone need not; again, this is an individualized decision.

Another common concern among women is that they, or someone in their household, will suddenly “snap” and shoot someone over a trivial matter. This may be partly due to fear of the unknown by women who have never felt the awesome power and responsibility of holding a loaded gun. Women who genuinely feel that they have the capacity to lose control and take a life without justification obviously should not have access to a firearm, and may also want to get rid of their kitchen knives. However, the idea that “ordinary people” commit murder just because they happen to have a gun handy is a myth; in fact, “murderers are highly aberrant. They tend to have lifelong histories of felony, extreme violence, and other hazardous behaviors (toward themselves as well as those around them), including car and gun accidents, substance abuse, and psychopathology.”⁵⁵ Women who live with violent intimate partners should not introduce a gun into the home, but could leave one with a trusted neighbor or in a safe-deposit box at their bank in case they need it in an emergency. A household comprised of law-abiding, mentally healthy,

CONTROL AND PREVENTION (CDC), http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html.

⁵¹ Brief of Women State Legislators and Academics, *supra* note 4, at 19, citing Gary Kleck, *Guns and Violence: An Interpretive Review of the Field*, 1 SOC. PATH. 12, 29 (1995) (internal quotation marks omitted).

⁵² See Sayoko Blodgett-Ford, *Do Battered Women Have a Right to Bear Arms?*, 11 YALE L. & POL’Y REV. 509, 536-37 (1993).

⁵³ *Pools More Dangerous Than Guns*, CHICAGO SUN-TIMES, July 28, 2001 (on file with author). See STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING 150 (2005) (“The likelihood of death by pool (1 in 11,000) versus death by gun (1 in 1 million-plus) isn’t even close: [a child] is roughly 100 times more likely to die in a swimming accident at [a house with a pool] than in gunplay at [a house with a gun].”).

⁵⁴ CDC website, *supra* note 50.

⁵⁵ Randy E. Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1244-45 (1996).

reasonably prudent people is not at any great risk for a “heat-of-the-moment” murder simply because there is a readily accessible firearm.⁵⁶

Some women harbor the mistaken belief that their gun is likely to be taken away at the crucial moment and used against them. Perhaps this myth comes from watching too many movies where a weak-willed woman refused to pull the trigger and allowed an attacker to wrest the gun from her limp grasp. In reality, the vast majority of women who undertake the responsibility of carrying a weapon are capable of using it competently and decisively when threatened. “At most, one percent of defensive gun uses result[] in the offender taking the gun away from the victim.”⁵⁷ Women who choose to carry a gun would do well to remember the tenth rule of gun fighting: “someday someone may kill you with your own gun, but they should have to beat you to death with it because it is empty.”⁵⁸

Finally, women may want to consider the average 911 response time in their community.⁵⁹ As the saying goes, “when seconds count, the police are only minutes away.”⁶⁰ In addition to the time it will take for police to arrive on the scene, a woman deciding whether to purchase a gun for self-defense should consider how long it will take her to get through to a 911 operator and relay the nature of her emergency—and perhaps her location, if using a cell phone—before police are dispatched, as well as the possibility of being put on hold.⁶¹ And even if police arrive within just a few minutes, it may take them much longer to make their way to the victim and provide assistance.⁶² In a best-case scenario, when the criminal is not in charge of the scene and the victim is able to call 911 and wait for police, even a short wait as a sitting duck will undoubtedly feel like an eternity.⁶³ Some women may find this preferable to keeping a gun in their home or on their person; others will not.

⁵⁶ “There are *no* homicide studies finding that most murderers—or many murderers, or even a few murderers—are ordinary sane people who killed in a moment of passion. The dozens of homicide studies dating back to the Nineteenth Century invariably show the overwhelming majority of murderers are long-time criminals with long prior records—and the rest are mentally deranged.”

Kates, *supra* note 47, at 89.

⁵⁷ Blodgett-Ford, *supra* note 52, at 536, quoting GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 122 (1991).

⁵⁸ *Rules of Gunfighting*, THE GUN ZONE, <http://www.thegunzone.com/gunfighting.html> (last visited Dec. 13, 2010). While humorous, these “rules” also contain valuable, practical advice.

⁵⁹ See Brief of the International Law Enforcement Educators and Trainers Association (ILEETA) et al. as Amici Curiae in Support of Respondent at 19-21, *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008)(No. 07-290) (giving examples of average police response times).

⁶⁰ “We cannot expect perfection from the police; after all, they travel by automobile or by foot, not by teleportation.” Dave Kopel, *911 Is a Joke... or Is It? Let's Find Out*, TCS DAILY, Jan. 5, 2005, available at http://www.ideasinactiontv.com/tcs_daily/2005/01/911-is-a-joke-or-is-it-lets-find-out.html.

⁶¹ See *id.*; Brief of the ILEETA, *supra* note 59, at 21.

⁶² See Robert Davis, *The Price of Just A Few Seconds Lost: People Die*, USA TODAY, May 20, 2005, available at <http://www.usatoday.com/news/nation/ems-day2-cover.htm> (reporting that official emergency response times generally do not include the time between when responders arrive on the scene and when they reach the victim).

⁶³ See Brief of the ILEETA, *supra* note 59, at 21.

Every woman must do a careful cost-benefit analysis before deciding whether armed self-defense is the best option for her. Certainly, the risks will outweigh the benefits for some: a woman who lives with an abusive partner or a suicidal teenager, for example, would logically choose to remain unarmed, or keep her firearm elsewhere, as discussed above. Others may decide that the proven benefits of armed self-defense outweigh the relatively minuscule risks. Gun ownership can bring great peace of mind and serve as a powerful symbol of how a woman feels about individual sovereignty and protecting her bodily integrity.⁶⁴

C. Choice Begets Freedom, Freedom Begets Autonomy

There was a time in this country when women had few choices about any facet of their lives—perhaps the biggest choice a woman would ever make involved which man to marry as she moved from her father’s house to her husband’s house. American women today have many important choices: whether to pursue higher education, where and what kind; with whom to share her life and whether she ought to marry; her vocation; where she will live; whether to become a mother; and even how to vote, thanks to the Nineteenth Amendment, ratified a mere ninety years ago. Choices are necessary for the freedom “to do, not do, become, or not become something.”⁶⁵ Freedom to make choices, as well as freedom from external forces such as patriarchy and violence, are both necessary for autonomy: the ability of an individual to define her own conception of the good and exercise control over her own life.⁶⁶

There are many factors that can reduce a woman’s choices in life, and therefore her freedom. Economic status, education level, others’ prejudice, even past choices, can all reduce available choices; this is unfortunate, but perhaps unavoidable. However, there is no reason for a government to reduce the self-defense choices available to an individual, because “gun control laws do not reduce crime.”⁶⁷ Women can be trusted to make good decisions for themselves, even—perhaps *especially*—in difficult situations.

⁶⁴ See Polsby & Kates, *supra* note 37, at 1242; Stange, *supra* note 5, at 397; Williams, *supra* note 7, at 429.

⁶⁵ HIRSCHMANN, *supra* note 32, at 37, quoting GERALD MACCALLUM, *Negative and Positive Freedom*, CONCEPTS IN SOCIAL AND POLITICAL PHILOSOPHY 301 (Richard Flathman ed., 1973).

⁶⁶ See HIRSCHMANN, *supra* note 32, at 37 (discussing various theories of the relationship between freedom and autonomy). Though “feminists have long viewed the concept of autonomy as antithetical to feminist values . . . autonomy can signify women’s ability and opportunity to be self-governing.” Anne C. Dailey, *Feminism’s Return to Liberalism*, 102 YALE L.J. 1265, 1280 (1993).

⁶⁷ James D. Wright, *Second Thoughts About Gun Control*, 91 THE PUB. INTEREST 23, 27 (1988). See Kates & Cramer, *supra* note 45, at 1365:

“[G]un bans simply do not control or reduce criminal behavior. In 2004, the National Academy of Sciences released an evaluation based on its review of 253 journal articles, ninety-nine books, forty-three government publications, and some empirical research of its own. It could not identify any gun control that had reduced violent crime, suicide, or gun accidents. Neither could a 2003 evaluation of then-extant studies by the Centers for Disease Control. . . .”

The most morally or politically difficult choices to allow may be the most important for a woman in crisis. Abortion rights and gun rights “allow what might be crucial private choices in extreme personal crises. However we come down politically, in truly desperate circumstances many of us might want for ourselves or someone we love the option offered by these two most controversial rights.”⁶⁸ The vast majority of women, if they were honest with themselves, could imagine a worst-case scenario in which they might want the option of an abortion. The same holds true for guns, and in fact, may involve less of a moral dilemma because the criminal aggressor has a malicious intent that the fetus lacks.⁶⁹ Therefore, even women who currently have no desire to own a gun should support the right to keep and bear arms, just as women not currently experiencing an unwanted pregnancy should support abortion rights. Since the crucial moment for an individual cannot be predicted in advance, the rights must always be available and meaningful—rather than a hollow guarantee, full of sound and fury, signifying nothing.

Both freedom *from* and freedom *to* are necessary for women’s autonomy. Achieving freedom *from* the forces of patriarchy and its resulting evils will continue to be a long, difficult, uphill climb. By contrast, the freedom “*to do, not do, become, or not become something*” can be easily realized by removing the restrictions on women’s choices.⁷⁰

III. POLITICAL CONSIDERATIONS

Women who remain unconvinced of the practical benefits of firearm ownership should nonetheless support Second Amendment rights for political purposes.

A. Consistency Promotes Credibility

Refusal to honor the Second Amendment endangers all constitutional rights because “[i]f we treat fundamental rights as a buffet, savoring particular morsels, while rejecting others, the ideal of fundamental rights is damaged and all rights are at risk.”⁷¹ The rights most prized by feminists are perhaps the most vulnerable because they are not enumerated in the text of the Constitution. The Supreme Court has said that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and

(footnotes omitted). The government bears the burden of proving the necessity of any infringement of a fundamental right; existing research does not support any significant deprivation of a law-abiding American’s right to keep and bear arms.

⁶⁸ Johnson, *supra* note 38, at 98.

⁶⁹ *See id.*, at 182-84.

⁷⁰ “The presence of options themselves, objectively defined, is key to freedom; I may not want many, or even any, of the alternatives available, but I am nevertheless freer than if there was only one option. If choice is paramount in the definition of freedom, then the more choices I have, the freer I am.”

HIRSCHMANN, *supra* note 32, at 5-6.

⁷¹ Johnson, *supra* note 38, at 129.

substance.”⁷² It is reasonable to presume that if specific guarantees in the Bill of Rights are ignored when they are politically undesirable, those penumbras disappear—and with them, women’s rights to use contraception or choose abortion.

Additionally, people who argue for unenumerated rights, while ignoring or discounting any meaningful interpretation of the Second Amendment, instantly lose credibility with those who take the text of the Constitution seriously. The doctrine of substantive due process is a judicial contrivance; it is a fruit that grows from the tree of constitutional text.⁷³ Those who advocate for new rights under substantive due process, but deny the individual right protected by the Second Amendment, want to cut down the tree and still reap the fruit.⁷⁴ This one misstep can destroy an otherwise persuasive argument.

In court, an advocate owes a duty of candor to the tribunal, and this actually advances her client’s interests: a judge or jury is more likely to rule her way if they trust that she is being honest with them on the law and the facts. Similarly, women’s rights advocates can strengthen their case for the rights they want by respecting the rights that are guaranteed by the actual text of the Constitution; the judiciary, legislatures, and public opinion will be more responsive to an argument that is intellectually honest and consistent.⁷⁵

B. A Fountainhead for Expanded Women’s Rights

Women have won many legal battles in the last forty years,⁷⁶ but true liberty and equality remain elusive.⁷⁷ None of the various strategies employed by feminist legal pioneers have won the war.⁷⁸ Equal protection has not protected women from

⁷² *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

⁷³ See *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3061-62 (2010) (Thomas, J., concurring); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980) (“Familiarity breeds inattention, and we apparently need periodic reminding that ‘substantive due process’ is a contradiction in terms—sort of like ‘green pastel redness.’”).

⁷⁴ See, e.g., Alana Chazan, *Good Vibrations: Liberating Sexuality from the Commercial Regulation of Sexual Devices*, 18 TEX. J. WOMEN & L. 263, 299 (2009) (arguing that the sale of sex toys should be protected under the doctrine of substantive due process, while calling the majority decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), “the essence of judicial activism” for its interpretation of constitutional text).

⁷⁵ “Foolish liberals who are trying to read the Second Amendment out of the Constitution by claiming it’s not an individual right or that it’s too much of a public safety hazard don’t see the danger in the big picture. They’re courting disaster by encouraging others to use the same means to eliminate portions of the Constitution they don’t like.”
Barnett & Kates, *supra* note 55, at 1146-47. See also Johnson, *supra* note 38, at 191. A constitutional amendment is the only principled way to repeal the individual right to keep and bear arms without endangering other protected liberties.

⁷⁶ See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

⁷⁷ “[F]acial sex classifications may be relatively peripheral to women’s inequality, including by law. For claims based on sex, what the constitutional inequality net is made to catch has always been relatively rare and is now virtually extinct, while sex inequality, including through law, remains predatory and flourishing.” MacKinnon, *supra* note 22, at 1299-1300.

⁷⁸ See *id.*, at 1286-97.

the discriminatory effects of laws dealing with pregnancy or abortion.⁷⁹ The “undue burden” standard transforms the “right to abortion” into a “right to choose abortion, subject to restrictions designed to impede and disparage the choice.”⁸⁰ The “right to privacy” implies that women should keep quiet about reproductive matters and take care of their shameful business behind closed doors.⁸¹ Substantive due process is a legal fiction, and its amorphous protections are subject to the opinions of five justices of the Supreme Court.⁸²

The Privileges or Immunities Clause of the Fourteenth Amendment should provide textual support for protection of natural rights, but it has been virtually read out of the Constitution by the Supreme Court, beginning with the *Slaughter-House Cases*.⁸³ The Due Process Clause of the Fourteenth Amendment has been polluted by unprincipled use of substantive due process and should be abandoned for more fertile ground. Therefore, the almost identical text of the Fifth Amendment’s Due Process Clause provides the most practical and productive support for a right to bodily integrity and individual autonomy.

The Fifth Amendment provides that no person shall “be deprived of life, liberty, or property, without due process of law. . . .”⁸⁴ The “liberty” component of this clause is broad enough to protect an individual’s rights to make her own medical decisions about abortion and contraception, engage in consensual sexual behavior,⁸⁵ and defend her bodily integrity by any means necessary. More importantly, unless one person’s liberty intrudes on another’s rights, no amount of

⁷⁹ See *Geduldig v. Aiello*, 417 U.S. 484 (1974); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 985 (1984); Rothschild, *supra* note 31, at 272-73.

⁸⁰ See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (upholding 24-hour waiting period, informed consent, and parental consent requirements for women desiring an abortion, and reporting and recordkeeping requirements for abortion providers); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding federal ban on intact D&E abortion despite its lack of a health exception).

⁸¹ “The rhetoric of privacy, as opposed to equality, blunts our ability to focus on the fact that it is women who are oppressed when abortion is denied.” Law, *supra* note 79, at 1020.

⁸² See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3062 (2010) (Thomas, J., concurring); *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 130 S. Ct. 2592, 2608 (2010) (“[B]ecause Substantive Due Process is such a wonderfully malleable concept . . . even a firm commitment to apply it would be a firm commitment to nothing in particular.”).

⁸³ 83 U.S. 36 (1873). See *McDonald*, 130 S. Ct. at 3060-61 (Thomas, J., concurring). *McDonald* presented an excellent opportunity for the Court to restore meaning to the Privileges or Immunities Clause; since the Court did not seize it there, it is highly unlikely it would do so to protect women’s rights.

⁸⁴ U.S. CONST. amend. V. These are natural rights which no legitimate government has the authority to take from an individual, absent an extraordinarily compelling reason. Of course, there are limited circumstances when it is appropriate to infringe these rights: a dangerous criminal may be deprived of life in order to protect public safety and deter crime, see *Gregg v. Georgia*, 428 U.S. 153 (1976); one person’s liberty may be curtailed if it intrudes on another’s liberty or safety, *cf.* *New York v. Ferber*, 458 U.S. 747 (1982) (holding that child pornography is not entitled to First Amendment protection, rather than recognizing a liberty interest in freedom from exploitation); and a government may use its eminent domain power to take private property necessary for a large-scale public project such as a highway, *but see Kelo v. City of New London*, 545 U.S. 469 (2005) (overstepping proper bounds of eminent domain power).

⁸⁵ *Cf.* Chazan, *supra* note 74.

“process” is sufficient to justify a significant deprivation of the right.⁸⁶ This approach is markedly different from substantive due process because the substance comes from the guarantee of “liberty,” and any infringement, such as requiring a license for concealed carry, would require a showing of actual process—a procedural, not substantive protection.

Legally and politically, the best strategy to accomplish this shift is to argue for a right to bodily integrity in the context of self-defense. There can be no legitimate governmental interest in depriving a woman of the right to resist rape or death, just as there can be no legitimate interest in interfering with an individual’s reproductive autonomy or private, consensual sexual conduct.⁸⁷ The advantage of presenting a self-defense argument to gain recognition of the right to bodily integrity is that conservatives and liberals alike profess respect for the right of self-defense. Liberals may hate guns, but only the most hard-hearted would condemn a woman for successfully using one in self-defense.⁸⁸ Self-defense could be the ideal common ground to build a foundation for expanded women’s rights.

C. Recognizing Diversity of Opinion Increases Women’s Political Clout

Professor Nicholas Johnson has called pro-choice on abortion, anti-choice on guns “the ‘standard position’ of the left.”⁸⁹ It seems to be the standard position for feminists as well. One problem with our current two-party system is that groups whose views generally line up with one party can be easily taken for granted.

The Democratic Party is now seen as the presumptive choice for feminists.⁹⁰ The prevailing feeling among many women seems to be that the Democratic Party may not be perfect, but the Republican Party is not an option. In fact, all federal

⁸⁶ “[N]o amount of process can legitimize some deprivations.” McDonald, 130 S. Ct. at 3090 (Stevens, J., dissenting). There must be a safeguard for individual liberties. In 1932, Justice Brandeis wrote, “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting). This is true in some areas of law; for example, lawmakers in a largely rural state may decide it makes sense to issue driver’s licenses to children under age 16. However, this theory does not justify a state’s denial of natural rights. The Ninth Amendment, though treated as an inkblot or used to get a laugh at a cocktail party full of lawyers, is a clear indication that the framers of our Constitution believed there are certain rights which no government (local, state, or federal) may take from “the people”: an “unambiguous [] refer[ence] to individual rights, not ‘collective’ rights.” *District of Columbia v. Heller*, 128 S. Ct. 2783, 2790 (2008).

⁸⁷ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

⁸⁸ As the gun-rights adage goes, “Gun control is the theory that a woman found dead in an alley, raped and strangled with her own pantyhose, is somehow morally superior to a woman explaining to police how her attacker got that fatal bullet wound.” WOMEN AGAINST GUN CONTROL, <http://www.wagc.com/> (last visited Nov. 16, 2010). Gun control advocates may object to the incendiary rhetoric, but given a choice between the two, presumably even they would prefer the latter situation.

⁸⁹ Johnson, *supra* note 38, at 99-100.

⁹⁰ Despite Sarah Palin’s recent attempt to appropriate the label, many feminists reject the notion that it applies to these new “Mama Grizzlies.” See, e.g., Gloria Steinem, *Big Think Interview with Gloria Steinem*, BIG THINK, Nov. 5, 2010, available at <http://bigthink.com/ideas/24812> (Sarah Palin “has frequently talked about ‘mama grizzlies’ as being kind of representing [*sic*] right-wing women and that is such a libel on mama grizzlies, who are so different.”).

candidates endorsed by the National Organization for Women PAC in 2010 had one thing in common—no, they were not all women—they were all Democrats.⁹¹ Given the monopoly the Democratic Party seems to have over the feminist vote, they have no real motivation to work harder for a feminist agenda.

If feminist leaders and organizations recognized the validity of alternative positions, including support for gun rights, women might feel liberated to cast their vote based on other issues that matter to them, such as the economy, national security, crime, education, and taxes. The Republican and Democratic parties would have to compete for the “woman” vote.⁹² Women would benefit in the long run if both parties felt compelled to consider our viewpoint on all issues, not just those directly affecting our uteruses.

IV. GETTING THE GUNS: A “SHALL-ISSUE” PRESUMPTION FOR WOMEN

Thirty-five states currently require permits for concealed carry, and issue them to anyone meeting specified criteria; these are called “shall-issue” states.⁹³ Three states do not require a permit for concealed carry.⁹⁴ The remaining states either refuse to issue permits—“no-issue”⁹⁵—or leave it to the discretion of state or local officials—“may-issue.”⁹⁶ People living in no-issue or may-issue states can have their right to bear arms denied for any reason, or no reason at all.⁹⁷

According to the Supreme Court, “[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day, and . . . individual self-defense is ‘the *central component*’ of the Second Amendment right.”⁹⁸ The means of effective self-defense are at least as important outside the home as inside it. May-issue and no-issue states are clearly infringing the right to bear arms.⁹⁹

⁹¹ 2010 NOW PACs Voting Guide: All Federal Races, National Organization for Women Political Action Site, <http://www.nowpacs.org/2010/federal.html> (last visited Oct. 10, 2010).

⁹² Similarly, Al Sharpton has “warned of the dangers of the Democratic Party taking black votes for granted.” *Democratic Candidates Offer Grim View of America*, FOX NEWS, Sept. 10, 2003, <http://www.foxnews.com/story/0,2933,96889,00.html>.

⁹³ See NATIONAL RIFLE ASSOCIATION INSTITUTE FOR LEGISLATIVE ACTION, <http://www.nraila.org/maps/rtc.jpg>.

⁹⁴ Alaska, Arizona, and Vermont do not require permits. Alaska and Arizona have shall-issue permit systems for reciprocity with other states. *See id.*

⁹⁵ Illinois, Wisconsin, and the District of Columbia prohibit concealed carry. *See id.*

⁹⁶ Alabama and Connecticut have fairly-administered discretionary policies. California, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, and Rhode Island arbitrarily or regularly deny their residents the right to carry. *See id.*

⁹⁷ According to the U.S. Census Bureau, a total of 108,129,266 people lived in these twelve states and the District of Columbia in 2009 (the most recent data available), accounting for 35.2% of the U.S. population. State and County Quickfacts, U.S. Census Bureau, <http://quickfacts.census.gov/qfd/index.html> (last visited Oct. 10, 2010).

⁹⁸ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3023 (2010) (footnote omitted).

⁹⁹ *See Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1515-24 (2009).

This is unacceptable. All people have a natural right to self-defense, and law-abiding Americans have a constitutional right to carry firearms for that purpose.¹⁰⁰

Denial of a concealed carry permit has especially harsh consequences for women, but these laws are impervious to a disparate impact challenge. Absent “purposeful discrimination,” disparate impact is not fatal to facially gender-neutral laws that disadvantage women.¹⁰¹ Until the Supreme Court recognizes a right to concealed carry, gun rights advocates have no choice but to chip away at oppressive state laws.¹⁰²

While advocates should continue to fight for shall-issue policies in every state, an intermediate step could be to suggest a rebuttable presumption that women who meet the specified criteria shall be issued a permit. Women have a greater need for effective means of self-defense, are less likely to be violent,¹⁰³ and cannot depend on the government for protection or restitution. Therefore, a rebuttable presumption in favor of their need and suitability to carry a firearm would be an appropriate first step toward universal shall-issue policies.

Creating a special benefit for women is unconstitutional if it violates the Equal Protection Clause of the Fourteenth Amendment. However, a rebuttable presumption does not create an automatic benefit for women; it is merely a thumb on the scales in favor of granting the permit.¹⁰⁴ It is much less radical than Congress’s determination that the differences between men and women justify the Military Selective Service Act, which requires only men to register for the draft.¹⁰⁵ A rebuttable presumption in favor of granting a concealed carry permit to women

¹⁰⁰ “[T]he people’ protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”

United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990). The right should not be limited to citizens, or extended to illegal aliens, but should belong to those who have formed sufficient ties with our national community to be considered “Americans.”

¹⁰¹ See Personnel Adm’r of Massachusetts v. Feeney, 442 U.S. 256, 273-74 (1979) (“the Fourteenth Amendment guarantees equal laws, not equal results.”).

¹⁰² When confronted with the issue in an appropriate case, the Supreme Court should rule that a discretionary licensing scheme is an unconstitutional infringement of the fundamental right to keep *and bear* arms. A “shall-issue” system would likely pass constitutional muster, as the Court could find that it is necessary to achieve the compelling governmental interest in promoting public safety.

¹⁰³ In 2009, women committed only 10.3% of murders (where the offender’s sex was known). *Crime in the United States, 2009*, U.S. DEP’T OF JUSTICE – FEDERAL BUREAU OF INVESTIGATION, Sept. 2010, http://www2.fbi.gov/ucr/cius2009/offenses/expanded_information/homicide.html. See Kates & Engberg, *supra* note 40, at 894 (“the dangers of a *per se* privilege to resist [rape] with deadly force are minimized by the fact that those to whom the privilege is granted are, by their very aversion to violence, the least likely to abuse it.”).

¹⁰⁴ Moreover, the only people disadvantaged by this presumption are the criminals who may be thwarted by an armed woman. Gun rights advocates arguing for shall-issue policies in every state would likely prefer this rebuttable presumption for women to a completely disarmed populace. See Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1396-97 (1986).

¹⁰⁵ The Military Selective Service Act was ruled constitutional by the Supreme Court in *Rostker v. Goldberg*, 453 U.S. 57 (1981).

in may-issue states should pass constitutional muster because of the physical and sociological differences between men and women.¹⁰⁶

A. Disparate Impact of May-Issue and No-Issue Policies on Women

No-issue policies ensure that only criminals are armed. May-issue policies vary greatly and can in practice allow permits for everyone, no one, only the rich and politically-connected,¹⁰⁷ or those who can prove an economic reason, such as regularly carrying large amounts of cash for work.¹⁰⁸ These policies generally deprive women of the right to carry a weapon.¹⁰⁹ This disproportionately harms women who need a weapon to overcome their physical disadvantage, and suffer greater consequences from an attack if they survive.

A gun may be the only effective means of self-defense for most women against most men. It has been called “the great equalizer” because it is the only tool that enables a smaller, weaker person to defend herself against a stronger attacker.¹¹⁰ The average woman is five inches shorter and 27 pounds lighter than the average man.¹¹¹ This inequity is compounded by the fact that women are, on average, significantly weaker than men their own size.¹¹²

¹⁰⁶ Discussing a danger reduction argument for bans on demographic groups, Professor Volokh observed, “[p]resumably race-based restrictions and likely even sex-based restrictions would violate the Equal Protection Clause, though of course violent crime is highly correlated with sex, and in considerable measure with race.” Volokh, *supra* note 99, at 1512-13. A rebuttable presumption does not require the kind of equal protection analysis that would be used to evaluate a total ban based on race or sex.

¹⁰⁷ For example, New York residents Donald Trump and Arthur O. Sulzberger (chairman of the *New York Times*), and California residents Dianne Feinstein and Sean Penn. JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERTANDING CRIME AND GUN CONTROL LAWS* 15 (2d ed. 2000); Sean Penn, *Pistol-Packin’ Peacenik*, *THE SMOKING GUN*, <http://www.thesmokinggun.com/archive/pennpermit1.html> (last visited Oct. 10, 2010).

¹⁰⁸ See Clayton E. Cramer & David B. Kopel, “*Shall Issue*”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 682-85 (1995); Jeffrey Snyder, *Fighting Back: Crime, Self-Defense, and the Right to Carry a Handgun*, CATO POLICY ANALYSIS NO. 284 (1997), <http://www.cato.org/pubs/pas/pa-284.html>.

¹⁰⁹ Even in places where some permits are granted, “police chiefs tend to grant” discretionary licenses “primarily to men.” Williams, *supra* note 7, at 437.

¹¹⁰ See Robert L. Barrow, *Women With Attitude: Self Protection, Policy, and the Law*, 21 T. JEFFERSON L. REV. 59, 72 (1999) (“a gun, the great equalizer, is especially advantageous to women”); Gorman & Kopel, *supra* note 28, at 92 (“Only a gun can allow a 110-pound woman to defend herself easily against a 200-pound man.”); Wright, *supra* note 67, at 32.

¹¹¹ “In 1999–2002 mean weight of men 20 years and over was almost 190 pounds while among women the mean weight was approximately 163 pounds. Mean height for men in 1999–2002 was approximately 69 inches and for women was approximately 64 inches.” CYNTHIA L. OGDEN ET AL., *MEAN BODY WEIGHT, HEIGHT, AND BODY MASS INDEX, UNITED STATES 1960–2002*, U.S. DEP’T OF HEALTH AND HUMAN SERVICES 2 (2004), <http://www.cdc.gov/nchs/data/ad/ad347.pdf>.

¹¹² “On average women are weaker than men of comparable height. Muscles form a lower proportion of female body weight than of male body weight (36% and 43%, respectively). Women can develop arm muscles only 75% to 85% the strength of men’s muscles. Generally, actual differences in average strength tend to be greater because women do not exercise their upper bodies adequately to develop their potential strength while men are more likely to engage in vigorous exercise to develop strength closer to their potential. Men also have more power available for explosive events than women.” See Larish, *supra* note 6, at 494 n. 213 (citations omitted). U.S. Army requirements are illustrative. See

Few women possess the self-defense skills to defend themselves from an unarmed man, as most rapists are.¹¹³ Firearms are “the only weaponry which allows the weak to defend against victimization and aggression by the strong.”¹¹⁴ Depriving everyone of the right to bear arms will harm some male victims, perhaps fatally, but the burden of disarmament falls even more heavily on women who are generally smaller, weaker, and have not been trained in combat or even boyish horseplay.¹¹⁵ Advising women to defend against rape using items from their handbags, such as “nail file, rat tail comb, teasing brush, pens and pencils, keys, [or] anything rigid,”¹¹⁶ makes women less safe because they may have an unrealistic conception of their ability to fight back, and resistance with non-lethal weapons often provokes a more violent attack.¹¹⁷

The risk of rape that women face has been compared to the risk of being mugged that men face.¹¹⁸ This comparison is inapt for at least two reasons that are relevant here, as well as a host of reasons that are not. Both rape and robbery have the potential for unexpected and unprovoked violence, even when the victim submits without protest.¹¹⁹ Absent this kind of violence, the most serious consequence of robbery is mere property loss; men who are mugged may lose their wallet, watch, or other material things that can be replaced. Rape, even absent additional violence, is “destructive of the human personality”¹²⁰ and “short of homicide, it is the ultimate violation of self.”¹²¹ Women who survive rape often suffer psychological trauma that can last for years—indeed, a lifetime.¹²² Since women are in danger of being raped wherever they are, denying them the right to carry a concealed weapon to prevent this kind of devastating harm is reprehensible.¹²³

Army Push-up Standards, available at <http://www.army.mil/usapa/eforms/pdf/A705.pdf> (last visited Oct. 10, 2010). To pass the biannual fitness test, a male between the ages of seventeen and twenty-one must complete at least forty-two push-ups (with points awarded maxing out at seventy-one repetitions). *Id.* A female in the same age group need only complete nineteen repetitions to pass (with points maxing out at forty-two repetitions). *Id.*

¹¹³ Only 8% of rapists possessed a weapon of any kind from 1993 to 2001, while only 3.4% had a firearm. CRAIG PERKINS, WEAPON USE AND VIOLENT CRIME, U.S. DEP’T OF JUSTICE 2 (2003), <http://bjs.ojp.usdoj.gov/content/pub/pdf/wuvvc01.pdf>.

¹¹⁴ Kates, *supra* note 47, at 92.

¹¹⁵ A firearms ban “weaken[s] the weak and strengthen[s] the strong relative to one another.” Polsby & Kates, *supra* note 37, at 1241.

¹¹⁶ Illinois State Police Website, Sexual Assault - If You Are Confronted, <http://www.isp.state.il.us/crime/saconfronted.cfm> (last visited Oct. 10, 2010). The website also advises attempting to dissuade a rapist by telling him you are pregnant or “have VD or AIDS,” “putting your fingers into you [*sic*] throat and making yourself vomit,” and “us[ing] your imagination.”

¹¹⁷ Kates & Engberg, *supra* note 40, at 879, n. 19.

¹¹⁸ See, e.g., HIRSCHMANN, *supra* note 32, at 25 (discussing Camille Paglia’s suggestion that “risking rape is part of the deal of liberation”).

¹¹⁹ See Kates & Engberg, *supra* note 40, at 879-80, n. 20.

¹²⁰ Coker v. Georgia, 433 U.S. 584, 612 (1977) (Burger, J., dissenting).

¹²¹ *Id.* at 597 (plurality opinion).

¹²² For an excellent discussion of the consequences of rape, see PAXTON QUIGLEY, ARMED & FEMALE 40-53 (1989).

¹²³ “[S]elf-defense has to take place wherever the person happens to be. Nearly any

Second, women are often blamed for their rape because they “put themselves in a dangerous situation.” A woman who is raped while walking home alone late at night “should have known better;” somehow, she is to blame because she dared to venture from the confines of her home after dark. Yet a man who is mugged while walking home alone late at night is considered an innocent victim. Women’s liberty and freedom of movement are restricted far more than men’s because the consequences of the crimes are vastly different, and we blame only women for “allowing” themselves to become victims.¹²⁴ Having the choice to carry a gun would empower women to navigate the world outside their home with much less fear of victimization and blame.¹²⁵

B. Societal Benefits of Concealed Carry By Women

Widespread concealed carry may provide self-defense and psychological benefits for individual women, and other benefits for women as a whole. Some of these societal benefits could be realized if more women simply obtained a concealed carry permit, regardless of whether they actually choose to carry on a regular basis.

Allowing law-abiding citizens to carry concealed weapons has been shown to deter violent crime.¹²⁶ According to economist John Lott, “the [deterrent] effect is especially pronounced for women. An additional woman carrying a concealed handgun reduces the murder rate for women by about three to four times more than an additional man carrying a concealed handgun reduces the murder rate for men.”¹²⁷

Lott also found that “rapists are particularly deterred by handguns.”¹²⁸ Every woman who carries a gun is making the world a little bit safer for her sisters: “[c]itizens who have no intention of ever carrying concealed handguns in a sense get a ‘free ride’ from the crime-fighting efforts of their fellow citizens.”¹²⁹ This should be encouraged.

Women may be able to achieve some deterrent effect by simply learning how to shoot, obtaining concealed carry permits, and publicizing the number of women

prohibition on having arms for self-defense in a particular place . . . is a substantial burden on the right to bear arms for self-defense. . . . Often, people need to defend themselves against robbers, rapists, and killers outside and not just in the home. Two-thirds of all rapes and sexual assaults, for instance, happen outside the victim’s home, and half happen outside anyone’s home.”

Volokh, *supra* note 99, at 1515-18.

¹²⁴ See HIRSCHMANN, *supra* note 32, at 24.

¹²⁵ See Paxton Quigley, *Of Arms and the Woman*, 15 FORUM FOR APPLIED RESEARCH & PUB. POL’Y 88, 89 (2000).

¹²⁶ John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1 (1997).

¹²⁷ JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* 165 (3d ed. 2010).

¹²⁸ *Id.* at 66.

¹²⁹ *Id.* at 165.

eligible to carry a weapon—even if many of them never actually carry concealed. This is not mere theory:

In October 1966, the Orlando Police Department began conducting highly-publicized firearms safety training for women, after observing that many women were arming themselves in response to a dramatic increase in sexual assaults in the area. Orlando rapes fell by 88% from 1966 to 1967. Burglary fell by 25%. Not one of the 2,500 trained women actually ended up firing her weapon; the deterrent effect of the publicity sufficed. . . . That same year, rape increased by 5% in Florida and by 7% nationally.¹³⁰

For purposes of reducing stranger-rape attempts, making criminals believe that women are likely to be armed may be even more important than actually arming them. Thus, women who feel uncomfortable carrying a firearm could still “do their part” by contributing to the number of women with concealed carry permits. Publicizing a growing number of female permit holders could change a potential rapist’s mental calculus by increasing the perceived costs associated with attacking a seemingly defenseless woman.¹³¹

C. A Government That Disclaims Liability Cannot Monopolize the Tools of Protection

The government cannot prevent all crime.¹³² Even if every police officer in the country were smart, honest, and completely committed to ending violence against women, they could not stamp out rape or domestic violence. And even if police departments had the resources to station an officer on every city block and in every home and business, most people would consider this an unacceptable intrusion. Simply put, police officers cannot be everywhere all the time. Expecting the police to prevent crime is unrealistic and impractical.¹³³

While preventing crime is aspirational, punishing offenders is mandatory for any civilized society. Punishing people for crimes already committed has several benefits: it signals society’s disapproval of the behavior; deters others from committing a similar crime, because they too might be apprehended and prosecuted; and if the offender is sent to prison, prevents him from committing any more crimes during that time.

¹³⁰ Brief of the ILEETA, *supra* note 59, at 17-18. It is impossible to determine how many of those 2500 women carried their weapon on a regular basis; ultimately, it doesn’t matter for deterrence purposes as long as criminals believe they could be carrying.

¹³¹ “Banning firearms reduces the risk and thus the cost to the perpetrator of crime. As basic economics would predict, when the cost falls, the supply rises.” Gorman & Kopel, *supra* note 28, at 99. Conversely, increasing potential costs leads to a reduction in crime.

¹³² “[G]overnment may abolish self-defense if, and only if, government provides citizens with complete security. To state the obvious, no government in the world is currently capable of providing the necessary replacement for the right of self-defense.” Kopel et al., *supra* note 19, at 133.

¹³³ “The state’s inability to stop imminent criminal attacks justifies, and indeed compels, a right to armed self-defense to fill the gap.” Johnson, *supra* note 38, at 118.

Unfortunately, the American criminal justice system is not perfect. We are particularly bad at holding rapists criminally responsible. Due to societal and system failures, most rapes are not reported to the police. Of those that are, most of the offenders are not punished. According to the Rape, Abuse & Incest National Network:

60% of rapes/sexual assaults are not reported to the police. . . . If a rape is reported, there is a 50.8% chance of an arrest. If an arrest is made, there is an 80% chance of prosecution. If there is a prosecution, there is a 58% chance of a conviction. If there is a felony conviction, there is a 69% chance the convict will spend time in jail. So even in the 39[-40]% of attacks that are reported to the police, there is only a 16.3% chance the rapist will end up in prison. Factoring in unreported rapes, about 6% of rapists will ever spend a day in jail. 15 of 16 walk free.¹³⁴

Granted, the number of unreported rapes is an estimate, based on U.S. Department of Justice statistics, and the other numbers will vary slightly from year to year and by jurisdiction. What can be determined for sure is this: our criminal justice system is bad at punishing rapists.¹³⁵ Our failure to consistently punish likely contributes to the prevalence of rape and the high recidivism rate.

Not only does our government fail to punish rapists criminally, it also disclaims all civil tort liability to survivors.¹³⁶ In 1989, the Supreme Court “held that the so-called ‘substantive’ component of the Due Process Clause does not require the State to protect the life, liberty, and property of its citizens against invasion by private actors.”¹³⁷ Case law shows that repeatedly informing the police about specific threats,¹³⁸ calling police during a violent and heinous crime lasting for hours,¹³⁹ failure to remove a child from his father’s custody despite documented instances of severe abuse,¹⁴⁰ and refusing to enforce a restraining order,¹⁴¹ are all insufficient to trigger an affirmative duty by the state.¹⁴²

¹³⁴ *Reporting Rates*, RAINN, <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited Oct. 10, 2010).

¹³⁵ The causes of this dismal failure are beyond the scope of this article, but include the way survivors are treated when they do report (often compared to being raped a second time, because of the trauma caused by the process), society’s attitude toward rape (outrage in theory, but often tolerance in practice), and the patriarchal society we live in. See DWORKIN, *supra* note 41, at 55 (referring to the trial as “the second rape” and media coverage as “a third rape”).

¹³⁶ See *Castle Rock v. Gonzales*, 545 U.S. 748 (2005); *DeShaney v. Winnebago County*, 489 U.S. 189 (1989); *Warren v. Dist. of Columbia*, 444 A.2d 1 (D.C.App. 1981); *Riss v. City of New York*, 22 N.Y.2d 579 (N.Y.1968).

¹³⁷ *Castle Rock*, 545 U.S. at 755 (stating the holding of *DeShaney*) (internal quotation marks omitted).

¹³⁸ *Riss v. City of New York*, 22 N.Y.2d 579 (N.Y.1968).

¹³⁹ *Warren v. District of Columbia*, 444 A.2d 1 (D.C. App. 1981).

¹⁴⁰ *DeShaney v. Winnebago County*, 489 U.S. 189 (1989).

¹⁴¹ *Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

¹⁴² In a statement before the Inter-American Commission on Human Rights, the plaintiff in *Castle Rock v. Gonzales* said:

“Had I known that the police would do nothing to locate Rebecca, Katheryn, and Leslie

A state has an affirmative duty to protect someone confined to a prison or psychiatric hospital, because the state has “rendered these people helpless to help themselves or to seek help from persons unconnected to the government.”¹⁴³ No-issue and may-issue policies effectively render people “helpless to help themselves” when away from their homes, and women should not be required to depend on a man or the kindness of strangers. The dissenting judge in *Riss* criticized the paradox presented by the majority’s decision in that case:

What makes the city’s position particularly difficult to understand is that, in conformity to the dictates of the law, Linda did not carry any weapon for self-defense. . . . Thus, by a rather bitter irony she was required to rely for protection on the City of New York which now denies all responsibility to her.”¹⁴⁴

Such a result is callous at best.

Each state must choose a path: either allow women the means of effective self-defense, or assume a duty to protect them. The former approach would empower women and help prevent them from experiencing irreparable harm in the first place, without causing a drain on city coffers.¹⁴⁵

CONCLUSION

Women must get angry about being targets for abuse, believe that their bodily integrity and lives are worth defending, and act accordingly. The Aquarian idea that “we would all be better able to make our own decisions in a gun controlled environment” ignores one crucial fact: a gun is the only equalizer that gives women a fighting chance against their male aggressors. Perhaps someday “peace will guide the planets and love will steer the stars,”¹⁴⁶ but our current reality necessitates a woman’s right to defend herself by any means necessary. Until men declare a truce in the war against women, we can settle for *détente*.

or enforce my restraining order, I would have taken the situation into my own hands by looking for my children with my family and friends. I might have even bought a gun to protect us from Simon’s terror. Perhaps if I had taken these measures, I would have averted this tragedy. But then I might be imprisoned right now. That is the dilemma for abused women in the United States.”

Jessica Gonzales’ three daughters were murdered by her husband, from whom she was separated, after police refused to enforce the restraining order against him. *Jessica Gonzales’ Statement Before the IACHR*, AMERICAN CIVIL LIBERTIES UNION, Mar. 2, 2007, <http://www.aclu.org/human-rights-womens-rights/jessica-gonzales-statement-iachr>.

¹⁴³ *DeShaney*, 489 U.S. at 205 (Brennan, J., dissenting).

¹⁴⁴ *Riss*, 22 N.Y.2d at 584-85 (Keating, J., dissenting).

¹⁴⁵ See *Weiner v. Metro. Transp. Auth.*, 55 N.Y.2d 175, 182 (N.Y.1982); Barrow, *supra* note 110, at 100-01.

¹⁴⁶ THE 5TH DIMENSION, AQUARIUS/LET THE SUNSHINE IN (Soul City Records 1969).

