

THE RIGHT OF THE INDIVIDUAL TO BEAR ARMS: A RECENT JUDICIAL TREND

by David I. Caplan[†]

INTRODUCTION

During 1981, courts in both Oregon and Indiana re-asserted their 1980 holdings that their respective state constitutional provisions for a right of the people to bear arms guaranteed an individual right to the private citizen. More specifically, the Oregon Supreme Court in *State v. Blocker*¹ re-asserted its 1980 holding in *State v. Kessler*² invalidating an Oregon state statute banning the private possession of certain arms, such as billy clubs. The Indiana Court of Appeals in *Shettle v. Shearer*³ reaffirmed its 1980 holding in *Schubert v. DeBard*⁴ that an applicant for a license to carry a handgun who claimed "self-defense" as a reason for the license could not constitutionally be required to demonstrate factually the "need" for the license. The *Kessler* and *Schubert* opinions both contain detailed discussions on the scope and policy of the right of the people to keep and bear arms as a private individual right. This article⁵ reviews the historical background of that right, and (pg.790) the consequent signaling of a judicial trend⁶ rejecting the exclusively collective right theory of the right of the people to keep and bear arms.

[†] B.S., with high distinction, Worcester Polytechnic Institute; M.S., Ph.D., Purdue University; LL.B., New York University. Member of the New York Bar. Mr. Caplan serves as voluntary counsel to the Federation of New York State Rifle & Pistol Clubs, Inc.

¹ 291 Or. 255, 630 P.2d 824 (1981).

² 289 Or. 359, 614 P.2d 94 (1980).

³ 425 N.E.2d 739 (Ind. Ct. App. 1981).

⁴ 398 N.E.2d 1339 (Ind. Ct. App. 1980), *leave to appeal denied*, No. 3-177A10 (Ind. Aug. 28, 1980).

⁵ See also C.L. Cantrell, *The Right to Bear Arms: A Reply*, 53 WISC. BAR BULLETIN 21 (1980); D.I. Caplan, *Handgun Control: Constitutional or Unconstitutional—A Reply to Mayor Jackson*, 10 N.C. CENT. L.J. 53 (1978); S.P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON U.L. REV. 1 (1981).

⁶ Other recent cases adopting the pro-individual view of the right to keep and bear arms include: *Rabbitt v. Leonard*, 36 Conn. Supp. 108, 110, 413 A.2d 489, 491 (Conn. Super. Ct. 1979) (under Connecticut constitution, a citizen has a "fundamental right to bear arms in self-defense, a liberty interest which must be protected by procedural due process"); *Motley v. Kellog*, 409 N.E.2d 1207 (Ind. Ct. App. 1980) (preliminary injunction ordering Chief of Police of Gary, Indiana, to make applications for handgun licenses available to citizens who desire to apply); *Archibald v. Codd*, 59 A.D. 2d 867, 399 N.Y.S. 2d 235 (1977), *leave to appeal denied*, 43 N.Y. 2d 649, 403 N.Y.S. 2d 1027 (1978) (no showing of "need" is required either for a pistol license limited to on-premises possession, at home or place of business, or for added pistols on such license); *Salute v. Pitchess*, 61 Cal. App. 3d 557, 132 Cal. Rptr. 345 (1976) (sheriff mandated to make investigation and determination on individual basis and not to reject wholesale all pistol-carry license applications submitted by private individuals).

The exclusively collective right theory stands for the proposition that the "right of the people to keep and bear arms"—as expressed in the second amendment of the United States Constitution,⁷ or as specified in various ways in thirty-seven state constitutions⁸ —is strictly limited to

⁷ The second amendment in the Bill of Rights of the Constitution reads: "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." U.S. CONST. amend. II. *See* 1 Stat. 21 (1845).

⁸ *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.

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.

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, § 1.

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. HAWAII CONST. art. I, § 15.

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. CONST., 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:... 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. CONST. § 1.

Louisiana: The right of each citizen to keep and bear arms shall not be 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, § 4.

Maine: Every citizen has the right to keep and bear arms for the common defense; and this right shall never be questioned. ME. CONST. art. 1, § 16.

Massachusetts: The people have a right to keep and bear arms for the common defence. And as, in times 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. CONST. pt. 1, art. 17.

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 where 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.

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. N.M. CONST. art. II, § 6.

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.

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.

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 defense 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 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 defence 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 people have the right to bear arms for their security and defense, but the Legislature may regulate the exercise of this right by law. UTAH CONST. art. I, § 6.

Vermont: That the people have a right to bear arms for the defence 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. 1, 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

guaranteeing a collective right of the (pg.791) (pg.792) (pg.793) organized militia or National Guard.⁹ However, both the Indiana and the Oregon courts rejected the exclusively collective right theory in favor of a theory that recognizes both a private individual constitutional right and a collective right.¹⁰ Because these decisions set forth with great clarity the underlying fundamental issues in a concrete context, a rather detailed review of the reasoning of these decisions is useful in understanding their important implications.¹¹ Moreover, the Oregon court in *State v. Kessler*¹² based its decision on an explicit acceptance of the English legal traditions of the right of self-defense and the right of the individual citizen to have arms for that purpose. Accordingly, this tradition will be explored first, followed by a review of the holdings of *Schubert* and *Kessler*.¹³ Finally, this article will explore the implications of these cases regarding the exclusively collective right theory of the right of the people to bear arms.(pg.794)

I. ENGLISH BACKGROUND ON ARMS POSSESSION

The first limitation in England on the right of a law-abiding person to keep and bear arms was enacted as one of the provisions in the 1181 Statute of Assize of Arms.¹⁴ It prohibited the possession and ordered the disposition of all coats of mail or breastplates in the hands of Jews.¹⁵ The next prohibition apparently came in the 1328 Statute of Northampton under King Edward III,¹⁶ and banned all private persons from using any force in public "in affray of the peace," or from going or riding armed in public at all.¹⁷ This Statute of Northampton was re-enacted with increased penalties

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.

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.

STATES WITHOUT CONSTITUTIONAL PROVISIONS:

Thirteen (13) states do not have (as of Nov. 1, 1982) constitutional provisions on the right to keep and bear arms. They are California, Delaware, Iowa, Maryland, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, West Virginia, and Wisconsin.

⁹ The exclusively collective right theory was first enunciated in *Salina v. Blaksley*, 72 Kan. 230, 232, 83 P. 619, 620 (1905).

¹⁰ *Schubert v. DeBard*, 398 N.E.2d 1339; *State v. Kessler*, 289 Or. 359, 614 P.2d 94.

¹¹ See also Comment, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U. CHI. L. REV. 185 (1970).

¹² 289 Or. 359, 614 P.2d 94.

¹³ *Schubert v. DeBard*, 398 N.E.2d 1339; *State v. Kessler*, 289 Or. 359, 614 P.2d 94.

¹⁴ Statute of Assize of Arms, art. 3 (1181), printed in W. STUBBS, SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY 154, 155 (8th ed. 1900).

¹⁵ *Id.*

¹⁶ 2 Edw. 3, ch. 3 (1328).

¹⁷ *Id.*:

That no Man great nor small, of what Condition soever he be, except the King's Servants in his Presence, and his Ministers in executing of the King's Precepts, or of their Office, and such as be in their Company assisting them, and also upon a Cry made for Arms to keep the Peace, and the same in such Places where such Acts happen, be so hardy to come before the King's Justices, or other of the King's Ministers doing their Office with Force and Arms, nor bring no Force in affray of the Peace, nor to go nor ride armed by Night nor by Day, in

Under King Richard II,¹⁸ in its re-enacted version the statute focused solely on going or riding armed, that is, regardless of an affray of the peace. Nevertheless, by 1686 the English common law courts had placed a judicial gloss on these statutes and required, for a conviction thereunder, that the accused had gone armed "malo animo" (with evil intent) or "to terrify the King's subjects."¹⁹ Specifically, in *Rex v. Knight*²⁰ the accused had been charged with violating the Statute of Northampton by "walk[ing] about the streets armed with guns, and go[ing] into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects."²¹ Under the judge's instructions, that an essential element of the crime of violating the Statute of Northampton (pg.795) was "go[ing] armed to terrify the King's subjects,"²² the jury acquitted the accused.²³ The court further noted that the Statute of Northampton was "but an affirmance" of the common law.²⁴ Interestingly, the same court alleged an elitist statutory policy that the carrying of arms implied that "the King [was] not able or willing to protect his subjects."²⁵ Nevertheless, the court imposed a judicial gloss on the Statute, that for a conviction the prosecution must prove that the carrying of arms was "to terrify the King's subjects"²⁶ or "with evil intent,"²⁷ in order to preserve the common law principle of allowing "Gentlemen to ride armed for their Security."²⁸

The reason for this judicial interpretation of the Statute of Northampton, requiring the element of evil intent in addition to going armed in public, may be understood from the judicial experience and societal conditions underlying the late nineteenth century observation of Jean Jules Jusserand, French ambassador to the United States, 1902-1915, and Pulitzer prize-winning historian, concerning fourteenth century England: "[M]anners being violent, the wearing of arms was prohibited, but honest folk alone conformed to the law, thus facilitating matters for the others"²⁹ That is, unilateral personal disarmament of law-abiding citizens simply did not work. Accordingly, despite the literal language of the Statute of Northampton, the English rule was that "persons of quality are in no [d]anger of offending [the Statute of Northampton] by wearing common [w]eapons."³⁰

Fairs, Markets, nor in the Presence of the Justices or other Ministers, nor in no Part elsewhere, upon Pain to forfeit their Armour to the King, and their Bodies to Prison at the King's Pleasure

¹⁸ 7 Rich. 2, ch. 13 (1383); 20 Rich. 2, ch. 1 (1396).

¹⁹ *Rex v. Knight*, Comb. 38, 39, 90 Eng. Rep. 330; 3 Mod. Rep. 117, 87 Eng. Rep. 73, 74 (K.B. 1686).

²⁰ *Id.*

²¹ 3 Mod. Rep. at 117, 87 Eng. Rep. at 74.

²² *Id.* at 118, 87 Eng. Rep. at 74.

²³ *Id.* at 117, 87 Eng. Rep. at 74.

²⁴ *Id.* at 118, 87 Eng. Rep. at 74.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Rex v. Knight*, Comb. at 39, 90 Eng. Rep. at 330 ("malo animo").

²⁸ *Id.* The term "Gentleman" includes "one, who, without any title, bears a *coat of arms*, or whose ancestors have been freemen" G. JACOB'S NEW LAW DICTIONARY (10th ed. 1782). This definition would thus include in America all members of the militia; that is, "all citizens capable of bearing arms." *Presser v. Illinois*, 116 U.S. 252, 265 (1886). Compare *infra* note 100.

²⁹ J.J. JUSSERAND, A LITERARY HISTORY OF THE ENGLISH PEOPLE FROM THE ORIGINS TO THE RENAISSANCE 270 (1895).

³⁰ W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 136 (5th ed. London 1771); See also 1 RUSSELL ON CRIME 216 (12th ed. 1964).

Subsequent eighteenth century English decisions recognized the right to keep guns in the home for defense, as well as the right to (pg.796) carry ordinary arms in public in a peaceful manner, the forest and game laws notwithstanding. Thus, in 1738, a conviction for keeping a gun contrary to the 1707 Statute of Anne,³¹ which prohibited unqualified persons³² from possessing certain listed hunting devices "or any other Engines to kill and destroy the Game"³³ was quashed on appeal. The court reasoned that a gun "differs from nets and dogs, which can only be kept for an ill purpose."³⁴ The defendant had successfully argued that "a gun is necessary for defense of a house, or for a farmer to shoot crows."³⁵ Later, in a 1752 civil action for trover, plaintiff claimed that defendants had unlawfully converted his gun, while the defendants claimed that their seizure of the gun had been lawful because the lord of the manor where the gun had been kept had ordered them to seize it.³⁶ The court held that, since there was no allegation in defendants' plea that the gun had actually been used to kill any game, the plaintiff's demurrer to the defendants' plea should be sustained. Accordingly, the court rendered judgment for the plaintiff. One of the judges noted that "as a gun may be kept for the defence of a man's house, and for divers other lawful purposes, it was necessary [for defendants] to allege ... that the gun had been used for killing game."³⁷ Thus, Professor Edward Christian commented: "every one is at liberty to keep or carry a gun, if he does not use it for the destruction of game."³⁸ Accordingly, Professor Christian disagreed³⁹ with Blackstone's assertion that one of the purposes of the game laws was "prevention of popular insurrections and resistance to the government, by disarming the bulk of the people."⁴⁰ Professor Christian maintained that such a purpose "did not operate upon the minds of those who framed the game laws."⁴¹ On the other hand, Blackstone was probably referring to the Game Act of 1671⁴² enacted (pg.797) under Charles II, which prohibited any person who did not have an annual income of at least 100 pounds (except persons of or above the rank of esquire and owners or keepers of forests) from keeping any gun, bow, greyhound, setting dog, or long dog. This latter statute, however, did not judicially survive the English Bill of Rights of 1689,⁴³ with its provision for the right to keep arms.⁴⁴ At any rate, the Game Act of 1671 was not explicitly repealed by legislation until the 1831 Act to Amend the Game Laws.⁴⁵

³¹ 5 Anne, ch. 14 (1706, 1707 Gregorian calendar).

³² *E.g.*, persons not gamekeeper or lords, etc. *Id.*

³³ *Id.*

³⁴ *Rex v. Gardner*, 2 Strange 1098, 93 Eng. Rep. 1056 (K.B. 1739).

³⁵ *Id.*

³⁶ *Wingfield v. Stratford*, Sayer 15, 96 Eng. Rep. 787 (K.B. 1752).

³⁷ *Id.* at 16, 96 Eng. Rep. at 787 (Lee, C.J., concurring).

³⁸ 2 W. BLACKSTONE, COMMENTARIES 411 n.2 (E. Christian ed. 1794).

³⁹ *Id.*

⁴⁰ *Id.* at *412.

⁴¹ *Id.* at 411 n.2.

⁴² 22 & 23 Car. 2, ch. 25 (1670, 1671 Gregorian calendar).

⁴³ 1 W. & M., Sess. 2, ch. 2 (1688, 1689 Gregorian calendar).

⁴⁴ *Id.*

⁴⁵ 1 & 2 Will. 4, ch. 32 (1831). Except for the provisions dealing with powers of game-keepers, search warrants, and description of persons who are not allowed to have or keep for themselves any guns, bows, greyhounds, or other animals or things, the 1671 Game Act had been repealed in 1827. 7 & 8 Geo. 4, ch. 27 (1827).

II. ENGLISH BILL OF RIGHTS OF 1689: LEGISLATIVE HISTORY OF PROVISION FOR RIGHT TO HAVE ARMS

To understand the background of the 1689 English Bill of Rights' provision on the right to have arms,⁴⁶ it is important to review the earlier disarmament tactics of Charles II (1660-1686) and James II (1686-1688).⁴⁷ Specifically, the Militia Act of 1662,⁴⁸ which centralized the control of the militia in the King and his lord lieutenants, empowered these lieutenants or their deputies to authorize searches of the person and the home of anyone adjudged by these lieutenants or their deputies to be "dangerous to the peace of the Kingdom,"⁴⁹ and to "seize all arms in the custody or possession"⁵⁰ of these "dangerous" persons. This Militia Act of 1662 also provided for the abolition of a portion of the earlier militia system, the "trained bands."⁵¹_(pg.798)

Soon after ascending to the throne in 1686, King James II utilized a combination of the Militia Act of 1662⁵² and the Game Act of 1671⁵³ to inform his lieutenants that "a great many persons not qualified by law under pretence of shooting matches kept muskets or other guns in their houses,"⁵⁴ and the militia was ordered to "cause strict search to be made for such muskets or guns and to seize and safely keep them till further order."⁵⁵ After the Glorious Revolution and the flight of James II from England in 1688, a Convention Parliament met on January 22, 1689 to declare the rights of the people⁵⁶ in an instrument known as the Declaration of Right, which was, after the ascension of William and Mary, turned into a regular act of the legislature as a statute,⁵⁷ the Bill of Rights of 1689.

The provisions of the English Bill of Rights of 1689 touching on the right to have arms were originally proposed on February 2, 1689, by the House of Commons Committee "to bring in the general Heads of such Things as are absolutely necessary to be considered for the better securing our Religion, Laws and Liberties,"⁵⁸ and the House agreed upon the following:

5. The Acts concerning the Militia are grievous to the Subject

⁴⁶ 1 W. & M., Sess. 2, ch. 2 (1688, 1689 Gregorian calendar).

⁴⁷ For a more comprehensive treatment of the disarmament tactics of Charles II, aided by the enormous power of the royal proclamation, see, J.L. MALCOLM, *DISARMED: THE LOSS OF THE RIGHT TO BEAR ARMS IN RESTORATION ENGLAND*, 1-17 (1980).

⁴⁸ 13 & 14 Car. 2, ch. 3 (1662). An earlier enactment in 1661 had put control over "the militia and land forces of this kingdom," 13 Car. 2, ch. 6, ¶ 2 (1661) completely into the hands of the King, and had held harmless and had indemnified all those who, in carrying out earlier royal orders, had been found guilty of "assaulting, arresting, detaining or imprisoning any person suspected to be fanatick, sectary or disturber of the peace, or seizing of arms, or searching of houses for arms, or suspected persons." *Id.* at ¶ 3.

⁴⁹ 13 & 14 Car. 2, ch. 3, ¶ 14 (1662).

⁵⁰ *Id.*

⁵¹ *Id.* at ¶ 20.

⁵² 13 & 14 Car. 2, ch. 3 (1662).

⁵³ 22 & 23 Car. 2, ch. 25 (1670, 1671 Gregorian calendar).

⁵⁴ Letter from Earl of Sunderland to Earl of Burlington (Dec. 6, 1686), reprinted in 2 *Calender of State Papers, Domestic Series, James II* 314 (Jan. 1686-May 1687).

⁵⁵ *Id.* See also J.L. MALCOLM, *supra* note 47, at 15 n.57.

⁵⁶ 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 40 (1971).

⁵⁷ *Id.* at 41. See also B. SCHWARTZ, *THE ROOTS OF FREEDOM, A CONSTITUTIONAL HISTORY OF ENGLAND 195-98* (1967).

⁵⁸ 10 H.C. JOUR. 15 (1688, 1689 Gregorian calendar).

6. The raising or keeping a Standing Army within this Kingdom in time of Peace, unless it be with the Consent of Parliament, is against the Law

7. It is necessary for the publick Safety, that the Subjects which are Protestants, should provide and keep Arms for their common Defence: And that the Arms which have been seized, and taken from them, be restored⁵⁹

It is thus clear, from the foregoing provisions, that the earlier arms seizures by the King and his militia⁶⁰ were prime motivating factors for the provisions on the right to keep arms, and that an (pg.799) armed populace was considered "necessary for the public safety."⁶¹ In any event, after some conferences with, and at the request of, the House of Lords, the House of Commons on February 11, 1689 modified the phrase "provide and keep," in provision 7, to "have,"⁶² and also deleted the word "common,"⁶³ and added the phrase "suitable to their Condition, and as allowed by Law," after the word "Defence."⁶⁴ As finally passed on February 12, 1689, by the House of Lords, the text of the English Bill of Rights' provision on the right to keep arms read: "[t]hat the Subjects which are Protestants may have Arms for their Defence, suitable to their Condition, and as allowed by Law."⁶⁵

Among other things, this legislative history demonstrates that the English Bill of Rights' provision on the right to keep arms was a reaction to previous seizures of privately held arms, and that the solemn understanding was reached that such seizures should never occur again. Thus, the initially proposed purpose of this right for their "common Defence"⁶⁶ was transformed into a right "for their Defence,"⁶⁷ that is, to include an individual right of armed self-defense as had obtained under the common law. It is noteworthy that an apparent attempt to restrict the right to keep and bear arms, in the United States Bill of Rights, to "the common defence"⁶⁸ was defeated just 100 years later, in the first Senate of the United States in the floor debates on the proposal for what became the second amendment.

Another English statute was enacted in 1689,⁶⁹ which was repealed in 1844,⁷⁰ banning any "papist or reputed papist"⁷¹ who refused to take an oath⁷² prescribed by the new regime of William (pg.800) and Mary from keeping any arms, except upon a demonstration before the justices of the peace

⁵⁹ *Id.* at 17.

⁶⁰ *See supra* notes 45-53 and accompanying text.

⁶¹ The American right to keep and bear arms likewise has been held to be for "maintaining the public security." *Presser v. Illinois*, 116 U.S. 252, 265 (1886).

⁶² 10 H.C. JOUR. at 25-26.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ 14 H.L. JOUR. 125 (1688, 1689 Gregorian calendar).

⁶⁶ *See supra* note 59 and accompanying text.

⁶⁷ *See supra* note 63 and accompanying text.

⁶⁸ 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1153-54 (1971).

⁶⁹ 1 W. & M., Sess. 1, ch. 15, ¶ 4 (1688, 1689 Gregorian calendar).

⁷⁰ 7 & 8 Vict., ch. 102 (1844).

⁷¹ 1 W. & M., Sess. 1, ch. 15, ¶ 4 (1688, 1689 Gregorian calendar).

⁷² *Id.* at ¶ 2, incorporating by reference the earlier oath prescribed in 30 Car. 2, ch. 1, ¶¶ 2-3 (1677), abjuring the doctrine of "transubstantiation of the elements of bread and wine into the body and blood of Christ" and declaring that "the invocation or adoration of the virgin Mary or any other saint, and the sacrifice of the mass, as they are now used in the church of Rome, are superstitious and idolatrous." *Id.* at ¶ 3.

that such arms were "necessary"⁷³ for the defense of "home or person."⁷⁴ This religiously discriminatory legislation, however, did not give rise to any reported litigation. Nevertheless, this legal history shows the essentially political nature of arms control legislation, as well as the intent of the English Bill of Rights of 1689 to guarantee a private individual the right to have arms for "self preservation and defence."⁷⁵

III. OPINION OF THE RECORDER OF LONDON, 1780, ON THE SCOPE OF THE RIGHT TO HAVE ARMS IN ENGLAND

In eighteenth century England, there were various voluntary armed associations dedicated to assisting constables in the apprehension of criminals and the suppression of riots,⁷⁶ it being considered "the right and duty of every subject, under common law, to help maintain the Queen's peace."⁷⁷ In 1780, one of the foremost of such associations, the London Military Foot Association, sought the advice of the Recorder of London⁷⁸ as to its legal standing.⁷⁹ His long, clearly reasoned reply was of wide interest, especially in view of the frequency with which such associations appeared for (pg.801) many years afterwards.⁸⁰ Further, his reply remains of interest because of its succinct and cogent interpretation of the scope of the English people's right to keep and bear arms. The Recorder stated:

It is a matter of some difficulty to define the precise limits and extent of the rights of the people of this realm to bear arms, and to instruct themselves in the use of them, *collectively*; and much more so to point out all the acts of that kind, which would be illegal or doubtful in their nature.

The right of his majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of this kingdom, not only as a *right*, but as a *duty*; for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And that this right, which every Protestant most unquestionably possesses

⁷³ 1 W. & M., Sess. 1, ch. 15, ¶ 4 (1688, 1689 Gregorian calendar).

⁷⁴ *Id.*

⁷⁵ 1 W. BLACKSTONE, COMMENTARIES * 144. *See also* Rex v. Dewhurst, 1 State Trials (n.s.) 529, 601 (1820), quoting approvingly the idea expressed by Blackstone that the English Bill of Rights provision on the right to have arms was "indeed a public allowance under due restrictions of the natural right of resistance and self preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." The "due restrictions" were the common law prohibitions against carrying dangerous and unusual weapons in public places "against the public peace, by terrifying the good people of the land" 4 W. BLACKSTONE, COMMENTARIES *149.

⁷⁶ 4 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 107 (1968).

⁷⁷ *Id.* at 105.

⁷⁸ JOWITT'S DICTIONARY OF ENGLISH LAW 1510 (2d ed. 1977), provides:

One of the justices of oyer and terminer, and a justice of the peace of the *quorum* for putting the laws in execution for the preservation of the peace and government of the City Being the mouth of the City, he delivers the sentences and judgments of the court therein, and also certifies and records the City customs, etc. He is chosen by the Lord Mayor and aldermen.

Id.

⁷⁹ L. RADZINOWICZ, *supra* note 76.

⁸⁰ *Id.*

individually, may, and in many cases must, be exercised collectively is likewise a point which I conceive to be most clearly established by the authority of judicial decisions and ancient acts of parliament, as well as by reason and common sense.

From the proposition, that the possession and the use of arms, to certain purposes, is lawful, it seems to follow, of necessary consequence, that it cannot be unlawful *to learn to use them* (for such lawful purposes) with *safety and effect ...* and, by the same mode of reasoning, from the right of using arms, in some cases, collectively and in *bodies*, follows the right of being collectively, as well as individually, *instructed* in the use of them, if it be true, which I apprehend it most clearly is, that the safe and effectual use of arms in collective bodies cannot be taught to separate individuals.⁸¹

Beyond this point, however, there were difficulties. The question arose: would it be lawful for a vast multitude of many thousands of armed men, "without any visible occasion or apparent lawful object, unauthorized by government or any magistrate, to assemble together, and march where they pleased, for the purpose, as they professed, of instructing and exercising themselves in the use of arms?"⁸² The Recorder answered: "[t]o this question, *stated in these unlimited terms*, I should certainly answer in the negative; because, in my opinion, an affirmative answer would amount to a (pg.802) dissolution of all government and a subversion of all law."⁸³ In short, there was no right to wanton behavior. Where then could a line be drawn, and how could the number and manner of assembling to exercise the use of arms be defined to determine the legality of such acts? The Recorder felt it impossible "to draw any such *precise line*, or to lay down any proposition respecting the legality of armed societies, which would hold true *at all times and in all cases, without qualification or restriction*. The circumstances of the case ... must decide upon the legality of every such meeting."⁸⁴

Four broad indications, however, were given for determining the legality of the activities of armed societies. First, the professed purpose and object of any such society had to be lawful. Second, they had to at all times, when assembled, conduct themselves in a peaceable and orderly manner and conform to their professed purpose; every breach of the peace on their part would have been greatly aggravated by the very circumstance of being committed by a body of armed men. Third, the numbers of such a society could not manifestly and greatly exceed the professed objects of their instruction. Fourth, they could not, in any case, except for the suppression of a sudden, violent, and felonious breach of the peace, proceed to act without the authority of the civil magistrates.⁸⁵ With these restrictions, the Recorder was clearly of the opinion that it was lawful, "and, in many cases, highly meritorious,"⁸⁶ for the citizens to instruct themselves in the use of arms in private, orderly societies. Besides "immediate self-defence,"⁸⁷ the lawful purposes for which arms could be used included the "suppression of violent and *felonious* breaches of the peace, the assistance of the civil

⁸¹ W. BLIZARD, *DESULTORY REFLECTIONS ON POLICE: WITH AN ESSAY ON THE MEANS OF PREVENTING CRIMES AND AMENDING CRIMINALS* 59-61 (1785) (emphasis in original).

⁸² *Id.* at 61.

⁸³ *Id.* (emphasis in original).

⁸⁴ 4 L. RADZINOWICZ, *supra* note 76, at 108 (emphasis in original).

⁸⁵ *Id.*

⁸⁶ W. BLIZARD, *supra* note 81, at 63.

⁸⁷ *Id.*

magistrate in the execution of the laws, and the defence of the kingdom against foreign invaders."⁸⁸ Therefore, whenever those occasions occur, "the use of arms becomes not only the right, but the duty,"⁸⁹ of every citizen capable of bearing arms.

Finally, the Recorder of London reasoned that, to avoid being ^(pg.803) subject to the military command and discipline of the Crown, the London Association should "consider themselves as part of the *civil*, and not a *military association*, and confine themselves, in the present state of things, to those civil objects which will, upon the principles before laid down, sufficiently justify them *in exercising, and perfecting themselves in the use of arms*, without any commission whatever."⁹⁰ The Recorder thus emphasized the fundamental social value and the legality of purely civil bodies in the maintenance of internal law and order, and differentiated sharply between that function and the employment of the regular forces in opposing foreign enemies.⁹¹ On the other hand, the Recorder's starting point was the right of the private individual to have arms for self-defense purposes in cases of sudden, felonious attacks,⁹² *i.e.*, where there is no time to invoke the aid of established authority. In short, the Recorder's opinion re-affirmed the unqualified individual right to keep and bear arms as at common law, and the qualified collective right to bear arms.

IV. COMMON LAW AND CONSTITUTIONAL STANDARDS FOR THE RIGHT TO KEEP AND BEAR ARMS

As with other constitutional provisions, the right to keep and bear arms cannot be understood without reference to common law standards:

The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, ... but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.⁹³ ^(pg.804)

These same considerations apply to the state constitutional conventions. Thus the state provisions for a constitutional right to keep and bear arms are likewise illuminated by the common law. In particular, the right to keep and bear arms should, therefore, be interpreted in terms of the common law, both as to the type of arms which are constitutionally protected and as to the

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ 4 L. RADZINOWICZ, *supra* note 76, at 109 (emphasis in original).

⁹¹ *Id.* at 110.

⁹² *Id.* at 108.

⁹³ *Ex Parte Grossman*, 267 U.S. 87, 108-09 (1925). For example, current standards for the fourth amendment are controlled by "the common-law understanding." *Payton v. New York*, 445 U.S. 573, 591 (1980). *See also* *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 302 (1967) (unless "wholly irrational"); and compare *Grosjean v. American Press Co.*, 297 U.S. 233, 249 (1936) (unless "never accepted by the American colonists").

permissible conditions, manner, and mode under which the right may be exercised. It is, therefore, useful to look at the corresponding facets of the common law on keeping and bearing arms, as well as their adaptation to state constitutional provisions for a right to keep and bear arms.

The foregoing Recorder of London's opinion⁹⁴ is a thorough exposition of the common law principle that although the law-abiding person may not march with arms in groups whenever, wherever, and howsoever he pleases,⁹⁵ he is, nevertheless, entitled to keep ordinary arms at home and carry those arms "to protect himself when he is going singly or in a small party upon the road where he is travelling or going for the ordinary purposes of business."⁹⁶ As expounded by the thirteenth century scholar Henry de Bracton:

But whether it be armed force or unarmed force, all such force is not injurious, because some arms are used for protection, and what a person may do for the protection of his own person or of his own right he seems to have done justly. Likewise there are arms of peace and of justice, and arms of disturbance of peace and of injustice. There are likewise arms of usurpation of another's property, and such force may be called ablative, whence it will be allowable to him, who justly possesses, to repel with arms any one coming with arms against the peace [of the realm] to expel him, that by the arms of self-protection and of peace, which are the arms of justice, he may repel injury and unjust violence and arms of injury; but nevertheless with the moderation of such discretion, that he does not cause an injury, for he may not under such pretext kill a man, or wound him, or ill-treat him, if he can in any other way protect his possession. And therefore against him, who wishes to use his strength, he may resist with his utmost strength, with arms or without, according to the saying, when a strong man armed, &c : but nevertheless persons may not walk (pg.805) about with arms at all times [as they please] without some cause.⁹⁷

In the last century, the American authority on criminal law, Francis Wharton, paraphrasing the eighteenth century English Serjeant-at-Law William Hawkins, expounded upon the provisions in the 1328 Statute of Northampton⁹⁸ on using force and carrying arms in public places:

A [person] cannot excuse wearing such armor [dangerous and unusual weapons, in such a manner as will naturally cause terror to the people] in public by alleging that a particular person threatened him, and that he wears it for safety against such assault; but it is clear that

⁹⁴ See *supra* notes 79-92 and accompanying text.

⁹⁵ See *supra* notes 82-83 and accompanying text; cf. *Presser v. Illinois*, 116 U.S. 252 (1886) (upholding constitutionality of State requirement of license for armed parades in cities).

⁹⁶ *Rex v. Dewhurst*, 1 State Trials (n.s.) 529, 601-02 (1820).

⁹⁷ 4 H. DE BRACON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE f.162b, (3 T. Twiss trans. 23, 1880).

According to Professor Thorne, the fragment ("when a strong man armed, &c") is taken from Luke 11:21 [3 S. THORNE, BRACON ON THE LAWS AND CUSTOMS OF ENGLAND 21 n.9 (1977)], which reads: "When a strong man fully armed guards his residence, his belongings are undisturbed." In the original Latin used by Bracton, the word corresponding to the English term "strong man" is "fortis." The word "fortis" may also be translated as "mentally, *brave, courageous, ...*" CASSELL'S LATIN DICTIONARY 230 (1952). Bracton's works were often "cited by colonial Americans in trying to reach decisions based on English legal tradition." L. WRIGHT, MAGNA CARTA AND THE TRADITION OF LIBERTY 39 (1976).

It should be noted that the common law came into being during the reign of Henry II, 12th century (just before Bracton). Moreover, Henry II was a king "who trusted his people, and who had no standing army, but encouraged his subjects to be armed, as unpopular tyrants dare not do." G. TREVELYAN, A SHORTENED HISTORY OF ENGLAND 139 (1942). Thus it is no accident that the common law developed with a presupposition of the keeping of arms by the people in their homes.

⁹⁸ See *supra* notes 16-17 and accompanying text.

no one incurs the penalty of the statute [of Northampton, 1328, 2 Edw. 3, ch. 3] for assembling his neighbors and friends in his own house, to resist those who threaten to do him any violence therein, because a man's house is his castle.⁹⁹

As William Hawkins explained:

[Y]et it seems certain That in some Cases there may be an Affray where there is no actual Violence; as where a Man arms himself with *dangerous and unusual Weapons in such a Manner as will naturally cause a Terror to the People*, which is said to have been always an Offense at Common Law, and is strictly forbidden by many Statutes

[T]hat no Wearing of Arms is within the Meaning of this Statute (of Northampton, 1328, 2 Edw. 3, ch. 3), unless it be accompanied with such circumstances as are apt to terrify the People; from whence it seems clearly to follow, that Persons of Quality are in no Danger of offending against this Statute by wearing *common Weapons* or having their usual (pg.806) Number of Attendants with them, for their Ornament or Defence, in such Places, and upon such Occasions, in which it is the common Fashion to make use of them, without causing the least Suspicion of an Intention to commit Any act of Violence or Disturbance of the Peace

[And] that no person is within the Intention of the said Statute, who arms himself to suppress dangerous Rioter, [sic] Rebels, or Enemies, and endeavors to suppress or resist such Disturbers of the Peace or Quiet of the Realm¹⁰⁰

Of particular interest here was the clear exemption, from the ban of the statute, of "common weapons" as opposed to "dangerous and unusual weapons in such a manner as will naturally cause a terror to the people." Sir William Blackstone, echoing this approach, wrote:

The offense of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land, and is particularly prohibited by the Statute of Northampton, 2 Edw. 3, c. 3, upon pain of forfeiture of the arms, and imprisonment during the king's pleasure.¹⁰¹

Interestingly, in 1914 the Irish Court for Crown Cases Reserved quashed a conviction¹⁰² under the Statute of Northampton¹⁰³ on the ground that the indictment under that statute was defective in alleging merely that the defendant "did go about on the public road ... armed,"¹⁰⁴ in that the indictment failed to "negative lawful occasion, and conclude *in terrorem populi* [to the terror of

⁹⁹ 3 F. WHARTON, A TREATISE ON CRIMINAL LAW 2061-62 (11th ed. 1912) (paraphrasing W. HAWKINS, *supra* note 30).

¹⁰⁰ W. HAWKINS, *supra* note 30, at 135-36 (emphasis added). Almost identical language is found in 1 W. RUSSELL, A TREATISE ON CRIMES AND MISDEMEANORS, Book II, ch. 26, 589 (6th ed. 1896), and in 1 RUSSELL ON CRIME 266 (12th ed. 1964). As to the limitation to "persons of quality" it should be remembered that the famous Chapter 39 of *Magna Carta* was originally intended merely "as a written confirmation of the baronial right, recognized by feudal custom, not to be tried by inferiors, but only by men of baronial rank." B. SCHWARTZ, THE ROOTS OF FREEDOM 18 (1967). See also *supra* note 28.

¹⁰¹ 4 W. BLACKSTONE, COMMENTARIES *149.

¹⁰² Rex v. Smith, [1914] 2 Ir. R. 190.

¹⁰³ 2 Edw. 3, ch. 3 (1328), and see *supra* note 17 for text thereof.

¹⁰⁴ [1914] 2 Ir. R. at 201.

the populace]."¹⁰⁵ The Attorney General unsuccessfully argued that the indictment was sufficient in view of the evidence at trial because, "it being usual for persons to be unarmed, the presence of an armed man, particularly with such a dangerous weapon as is proved here, must be 'apt to terrify' those with whom he comes in (pg.807) contact,"¹⁰⁶ *i.e.*, the simple fact of being armed inherently would "bring terror upon others;"¹⁰⁷ the weapon in question being a "loaded revolver."¹⁰⁸ In rejecting this argument of the Attorney General, the Irish Court thus considered a revolver to be a common weapon within the meaning and protection of the common law.

The distinction between the absolute right to keep arms and the more qualified right to carry arms, pursuant to the common law and the Statute of Northampton,¹⁰⁹ was also discussed by Sir Edward Coke. Lord Coke, "widely recognized by the American colonists 'as the greatest authority of his time on the laws of England',"¹¹⁰ cogently wrote:

And yet in some cases a man may not onely [sic] use force and arms, but assemble company also. As any man may assemble his friends and neighbors, to keep his house against those that come to rob him, or kill him, or to offer him violence in it, and is by construction excepted out of this Act [Statute of Northampton], ... for a man's house is his castle, & *domus sua cuique est tutissimum refugium* [a home is for everyone his safest refuge]; for where shall a man be safe, if it be not in his house? And in this sense it is truly said

Armaque in armatos sumere jura sinunt. [The laws allow taking up arms against armed persons.]

But he cannot assemble force, though he be extremely threatened, to goe with him to Church, or market, or any other place, but that is prohibited by this Act [Statute of Northampton, 2 Edw. 3, ch. 3 (1328)].¹¹¹

In support of this approach, Coke cited the 1506 Yearbook case which had originated the doctrine that a man's house is his castle in the following terms:

If one is in his house, and hears that such a one will come to his house to beat him, he may assemble folk of his friends and neighbors to help him, and aid in the safeguard of his person; but if one were threatened that if he should come to such a market, or into such a place, he should (pg.808) there be beaten, in that case he could not assemble persons to help him go there in personal safety, for he need not go there, and he may have a remedy by

¹⁰⁵ *Id.* at 204.

¹⁰⁶ *Id.* at 199.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 201.

¹⁰⁹ See *supra* note 17 for text thereof.

¹¹⁰ *Payton v. New York*, 445 U.S. 573, 594 (1980), quoting from A. HOWARD, *THE ROAD FROM RUNNYMEDE* 118-19 (1968).

¹¹¹ 3 E. COKE, *INSTITUTES* 161-62 (5th ed. 1671). Similar language is found in a case reported by Lord Coke himself, *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603), quoted in *Payton v. New York*, 445 U.S. at 596 n.44.

surety of the peace. But a man's house is his castle and his defense, and where he has a peculiar right to stay¹¹²

In critiquing and limiting the sweep of the potential restriction on self-defense in public places contained in the 1506 Yearbook case, Professor Beale wrote in 1903:

If ... the Court means that the defendant went simply because he was threatened, and was quite willing to meet trouble half-way, we should have a case of mutual combat [and duty to retreat] and the conclusion of the Court would be right; but if he went in the ordinary course of business, the opinion cannot be supported.¹¹³

The "true doctrine,"¹¹⁴ according to Beale, had been expressed by the Supreme Court of California¹¹⁵ in these terms:

One who expects to be attacked is not always compelled to employ all the means in his power to avert the necessity of self-defence before he can exercise the right of self-defence. For one may know that if he travels along a certain highway he will be attacked by another with a deadly weapon and be compelled in self-defence to kill his assailant, and yet he has the right to travel that highway, and is not compelled to turn out of his way to avoid the expected unlawful attack.¹¹⁶

And a "well reasoned" opinion,¹¹⁷ according to Beale, had been delivered by the Supreme Court of Missouri,¹¹⁸ similarly upholding the right of self-defense in public places with arms, in these terms:

If the mere expectation of an assault from an adversary is to deprive the expectant of the right of self-defence, merely because he goes armed in the vicinity of his enemy, or goes out prepared upon the highway where he is likely at any moment to meet him, then he has armed himself in vain, and self-defence ceases wherever expectation begins. We do not so understand the law. The very object of arming one's self is not to (pg.809) destroy expectation of a threatened attack, but to be prepared for it should it unfortunately come.¹¹⁹

¹¹² Anon., Y.B. Trin. 14 Hen. 7 (1499), reported in Y.B. 21 Hen. 7, f. 39, pl. 50 (1506), translated in J. BEALE, JR., A SELECTION OF CASES AND OTHER AUTHORITIES UPON CRIMINAL LAW 569 (2d ed. 1907).

¹¹³ Beale, Jr., *Homicide in Self-Defence*, 3 COLUM. L. REV. 526, 543 (1903). Beale believed strongly that the law was and should be: "One whose life is threatened may therefore go about his lawful business regardless of the threats, and may arm himself for his own protection without thereby forfeiting any right to protect himself." *Id.*

¹¹⁴ *Id.*

¹¹⁵ *People v. Gonzales*, 71 Cal. 569, 12 P. 783 (1887).

¹¹⁶ *Id.* at 578, 12 P. at 787.

¹¹⁷ See Beale, Jr., *supra* note 113, at 544.

¹¹⁸ *State v. Evans*, 124 Mo. 397, 28 S.W. 8 (1894).

¹¹⁹ *Id.* at 411, 28 S.W. at 11.

It should be stressed that Professor Beale was no champion of the "Macho" spirit; rather, he was a staunch advocate of the minority American rule¹²⁰ requiring retreat as far as possible with safety, even from a sudden murderous assault (absent a larcenous intent), before using deadly force in defense against the murderous assault. Indeed he derided the contrary rule (not requiring retreat) prevalent in "the West and South,"¹²¹ as founded in "the ethic of the duelist, the German officer, and the buccaneer."¹²² Nevertheless, even Beale would not require a person to constrict his ordinary business travels in an effort to avoid criminal threats.¹²³ Otherwise the criminals would dictate the ordinary course of business travels. Accordingly, there was no doubt at common law that an individual was permitted to carry common arms "to protect himself when he is going singly or in a small party upon the road where he is travelling or going for the ordinary purposes of business."¹²⁴ The 1506 Yearbook case forbade a person only to "assemble persons to help him go there."¹²⁵

With this common law background in mind, it is important to realize that a right to keep and bear arms inherently carries with it the right to use those arms for various lawful purposes. For example, the American constitutional right to keep and bear arms has been squarely held to protect the right to use those arms in self-defense in the home against burglars:

The Constitutions of the United States and Louisiana give us the right to keep and bear arms. It follows logically, that to keep and bear arms gives us the right to use the arms for the intended purpose for which they were manufactured.¹²⁶ (pg.810)

As to the type of arms protected by state constitutional provisions for a right to keep and bear arms, common law standards were adopted by the Texas Supreme Court in 1875 in connection with the then thirteenth section of the Texas Bill of Rights ("Every person shall have the right to keep and bear arms in the lawful defense of himself or the State, under such regulations as the Legislature may prescribe.")¹²⁷ The court stated:

[W]e do not adopt the opinion ... that the word "arms," in the Bill of Rights, refers only to the arms of a militiaman or soldier The arms which every person is secured the right to keep and bear (in the defense of himself or the State, subject to legislative regulation), must be *such arms as are commonly kept*, according to the customs of the people, and are appropriate for open and manly use in self-defense, as well as such as are proper for the defense of the State.¹²⁸

¹²⁰ See Perkins, *Self-Defense Re-Examined*, 1 U.C.L.A. L. REV. 133, 150-51 (1954) ("substantial minority of jurisdictions"). See also R. PERKINS, CRIMINAL LAW 1009 (2d ed. 1969).

¹²¹ Beale, Jr., *Retreat From a Murderous Assault*, 16 HARV. L. REV. 567, 577 (1903).

¹²² *Id.*

¹²³ See Beale, Jr., *supra* note 113. See *supra* notes 113-17 and accompanying text.

¹²⁴ Rex v. Dewhurst, 1 State Trials (n.s.) 529, 602 (1820).

¹²⁵ See Anon., *supra* note 112.

¹²⁶ McKellar v. Mason, 159 So.2d 700, 702 (La. App.), *aff'd* 245 La. 1075, 162 So.2d 571 (1964).

¹²⁷ State v. Duke, 42 Tex. 455, 458 (1875) (a case cited as among "some of the more important opinions" in United States v. Miller, 307 U.S. 174, 182 (1939)).

¹²⁸ *Id.* (emphasis added).

Later, in 1912, the highest court of New York State held constitutional a statutory ban against possession of certain (but not all) weapons because "the act in question relates to instruments which are ordinarily used for criminal and improper purposes and which are not amongst those *ordinary legitimate weapons of defense and protection* which are contemplated by the Constitution and the Bill of Rights."¹²⁹ Similarly implementing the common law standard of "common weapons"¹³⁰ as the type of arms embedded in the Michigan state constitutional provision that "[e]very person has a right to bear arms for the defense of himself and the State,"¹³¹ the Supreme Court of Michigan in 1931 declared:

Some arms, although they have a valid use for the protection of the State by organized instructed soldiery in times of war or riot, are too dangerous to be kept in a settled community by individuals, and, in times of peace, find their use by bands of criminals and have legitimate employment only by guards and police. Some weapons are adapted and recognized by the common opinion of good citizens as proper for private defense of person and property. Others are the peculiar tools of the criminal. The police power of the State to preserve public safety and peace (pg.811) and to regulate the bearing of arms cannot fairly be restricted to the mere establishment of conditions under which all sorts of weapons may be privately possessed, but it may take account of the character and ordinary use of weapons and interdict those whose customary employment by individuals is to violate the law. The power is, of course, subject to the limitation that its exercise must be reasonable and it cannot constitutionally result in the prohibition of the possession of those *arms which, by the common opinion and usage of law-abiding people, are proper and legitimate to be kept upon private premises for the protection of person and property.*¹³²

Accordingly, the Supreme Court of Michigan in 1931 upheld a statutory ban on such weapons as blackjacks, bombs, and rockets,¹³³ because the statute did not ban "ordinary guns, swords, revolvers, or other weapons usually relied upon by good citizens for defense or pleasure."¹³⁴ This approach echoed that of Justice Oliver Wendell Holmes in writing for the United States Supreme Court in the 1914 case of *Patson v. Pennsylvania*,¹³⁵ in which the Court upheld a ban on the possession in the hands of aliens of rifles and shotguns, as a hunting control measure, because the ban did not extend to pistols that presumably would be "needed occasionally for self-defence."¹³⁶ Thus the common law exemptions of "common weapons"¹³⁷ from the ban of the Statute of Northampton¹³⁸ had been firmly established as American standards for constitutionally protected arms by the middle of the present century.

¹²⁹ *People v. Persce*, 204 N.Y. 397, 403, 97 N.E. 877, 879 (1912) (emphasis added).

¹³⁰ 1 W. HAWKINS, *supra* note 30, at 136.

¹³¹ *People v. Brown*, 253 Mich. 537, 538, 235 N.W. 245, 246 (1931), *quoting* MICH. CONST. art. 2, § 5 (a case cited among "some of the more important opinions" in *United States v. Miller*, 307 U.S. 174, 182 (1939)).

¹³² 253 Mich. at 541, 235 N.W. at 246-47 (emphasis added).

¹³³ *Id.* at 544, 235 N.W. at 247-48.

¹³⁴ *Id.* at 542, 235 N.W. at 247.

¹³⁵ 232 U.S. 138 (1914).

¹³⁶ *Id.* at 143.

¹³⁷ *See supra* notes 30, 100, 130 and accompanying texts.

¹³⁸ *See supra* notes 16, 17, 103, 109 and accompanying texts.

V. THE INDIANA *SCHUBERT* DECISION

*Schubert v. DeBard*¹³⁹ involved the Indiana gun control law which provided that, before the Superintendent of State Police may issue a pistol-carrying license, an investigation must be made concerning the applicant.¹⁴⁰ If it appeared to the Superintendent "that the applicant has a proper reason for carrying a handgun and is of good character and reputation and a proper person to be so (pg.812) licensed,"¹⁴¹ then the Superintendent "shall issue to the applicant either a qualified or an unlimited license to carry any handgun or handguns lawfully possessed by the applicant."¹⁴² In *Schubert* the applicant for a pistol-carrying license had been denied the license by the Superintendent of Indiana State Police on the sole ground of lack of sufficient "need."¹⁴³ The trial court upheld¹⁴⁴ the Superintendent on the ground that he had properly exercised administrative discretion delegated to him by the statutory provision of "proper reason" for carrying a handgun. The Indiana Court of Appeals, however, held in 1980 that the statutory delegation of these powers and duties to the Superintendent could not be constitutionally construed as allowing him to deny a pistol-carrying license merely because the applicant had failed to demonstrate, to the satisfaction of the Superintendent, that he "needed"¹⁴⁵ to defend himself. The Indiana Supreme Court subsequently declined to review this decision.¹⁴⁶

In *Schubert*, the Superintendent had held a hearing on the issue of the pistol-carrying license applicant's "need" for self-protection and had denied the license solely on the administrative finding that "*the evidence disclosed* that ... applicant does not have a proper reason to be so licensed."¹⁴⁷ The Superintendent contended that the statutory specification for "a proper reason for carrying a handgun,"¹⁴⁸ as a prerequisite for a pistol-carrying license vested in him the power and duty: (1) to evaluate the facts underlying an applicant's assertion of "self-defense"¹⁴⁹ as a stated reason for desiring the license, and (2) to grant or deny the license upon the basis of an administrative evaluation of whether or not the applicant "needed"¹⁵⁰ to defend himself. The *Schubert* majority¹⁵¹ held that this approach of the Superintendent, of factually evaluating (pg.813) the sufficiency of an applicant's "need" for a pistol-carrying license, "contravenes the essential nature of the constitutional

¹³⁹ 398 N.E.2d 1339 (Ind. Ct. App. 1980).

¹⁴⁰ IND. CODE ANN. § 35-23-4.1-5 (Burns 1979).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ 398 N.E.2d at 1341 n.5.

¹⁴⁴ *Id.* at 1339.

¹⁴⁵ *Id.* at 1341.

¹⁴⁶ No. 3-177A10 (Ind. Aug. 28, 1980).

¹⁴⁷ 398 N.E.2d at 1342 (Staton, J., dissenting).

¹⁴⁸ IND. CODE ANN. § 35-23-4.1-5 (Burns 1979).

¹⁴⁹ 398 N.E.2d at 1341.

¹⁵⁰ *Id.*

¹⁵¹ *Schubert v. DeBard* was a 2 to 1 decision with Judge Hoffman filing a separate concurring opinion. *Id.* at 1342.

guarantee."¹⁵² The Indiana Constitution, adopted in 1851, provides that "the people shall have a right to bear arms, for the defense of themselves and the State."¹⁵³

The *Schubert* majority was of the opinion that the general and ordinary sense of the words used, as well as the framers' intention evinced by the legislative history of the right to bear arms provision of the Indiana State Constitution, led to the conclusion that the Superintendent of State Police could not, consistent with the Constitution, look behind the pistol-carrying license applicant's stated reason of "self-defense" and then deny the license on the grounds of an insufficient factual showing by the applicant of "need" to defend himself.¹⁵⁴ The *Schubert* majority alluded to the 1850 constitutional debate over this Indiana provision for a right of the people to bear arms and noted that one stage of that debate had opened with "[t]he twelfth [now 32nd] section, providing that no law should restrict the right of the people to bear arms, *whether in defense of themselves or of the State*, next came up in order."¹⁵⁵

The statutory requirement of "proper reason" for a pistol-carrying license was interpreted by the *Schubert* court as having been satisfied by the applicant's assigned reason of "self-defense" which stood "unrefuted"¹⁵⁶ by the Superintendent, such assigned reason being "constitutionally a 'proper reason' within the meaning of [the Indiana statute]."¹⁵⁷ The *Schubert* court thus interpreted the Indiana statutory requirement of "proper reason" for a pistol-carrying license as a delegation of authority to the Superintendent of State Police that was very narrow in scope because of the Indiana constitutional provision for "the right of the people to bear arms for the defense of themselves and the State."¹⁵⁸ Because, however, of an unresolved question as to the applicant's suitability of character (pg.814) to be licensed, an issue which had arisen at the hearing conducted by the Superintendent, the *Schubert* court remanded the case to the Superintendent for a new hearing and determination on that question.¹⁵⁹

Interestingly, one of the two judges in the *Schubert* court stated in a concurring opinion¹⁶⁰ that he would have joined in the 1958 dissent of Judge Emmert in *Matthews v. State*.¹⁶¹ In *Matthews*, the Indiana Supreme Court, in a 4 to 1 decision, upheld the facial constitutionality of the Indiana statutory pistol licensing scheme, with Judge Emmert dissenting on the basis of the Indiana constitutional provision for the right of the people to bear arms.

The dissenting judge in *Schubert*, Judge Staton, was sharply critical of the *Schubert* majority for allegedly failing to follow the legal principles previously enunciated in *Matthews*. The majority in that case had stated that the question of whether a pistol-carrying license applicant satisfied the statutory requirement of having a "'proper reason for carrying a pistol and [of being] of good character and reputation and a suitable person to be so licensed' are questions of fact; and the

¹⁵² *Id.* at 1341.

¹⁵³ IND. CONST. art. I, § 32.

¹⁵⁴ 398 N.E.2d at 1341-42.

¹⁵⁵ *Id.* at 1341, *citing* 2 DEBATES IN INDIANA CONVENTION 1391 (1850), and noting that the debate focused upon whether special language should be required to permit the legislature to regulate the carrying of concealed weapons.

¹⁵⁶ 398 N.E.2d at 1341.

¹⁵⁷ *Id.* (referring to the Indiana gun control statute, IND. CODE ANN. § 35-23-4.1-5 (Burns 1979)).

¹⁵⁸ 398 N.E.2d at 1341.

¹⁵⁹ *Id.* at 1341-42.

¹⁶⁰ *Id.* at 1342.

¹⁶¹ 237 Ind. 677, 148 N.E.2d 334 (1958).

Legislature may delegate the function of determining these facts upon which the execution of the legislative policy, as expressed in the Act, is dependent."¹⁶² More specifically, the 4 to 1 majority in *Matthews* had stated that "the Superintendent of State Police, with his special training and experience, and with the facilities which he has at his command for securing information, is capable and qualified to determine whether an applicant for a license to carry a pistol has a 'proper reason' therefor, and whether he is a 'suitable person' to have a pistol in his possession at will."¹⁶³ Accordingly, Judge Staton contended that under the *Matthews* decision the Indiana Supreme Court had thus "rejected the very proposition of law that the [*Schubert*] majority has tendered here today: that the Superintendent's capacity to evaluate the factual basis for an applicant's stated need of self-defense (pg.815) violates ... the Indiana Constitution."¹⁶⁴ In sharp reply, the *Schubert* majority maintained that allowing a denial of a license grounded solely upon an administrative determination by the Superintendent of an insufficiency of the factual basis or showing of need by the applicant would "supplant a right with a 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."¹⁶⁵

Judge Staton further complained that "the upshot of the Majority's approach, were it given effect, would be the deregulation of handguns,"¹⁶⁶ and that subsequent to the *Matthews*¹⁶⁷ decision "numerous studies have confirmed that handgun restrictions promote the public safety and welfare."¹⁶⁸ Judge Staton cited four such studies.¹⁶⁹ Of these four studies, however, all done in the 1960's, only two of them were statistical, factual studies: the 1969 staff report of Newton and Zimring to the National Commission on the Causes and Prevention of Violence entitled *Firearms and Violence in American Life*,¹⁷⁰ and the 1969 Geisel study entitled *The Effectiveness of State and Local Regulation of Handguns: A Statistical Analysis*.¹⁷¹ This latter Geisel study was severely criticized, as statistically dubious, in a subsequent comprehensive statistical study by Douglas Murray,¹⁷² which pointed out the mathematical defects and weaknesses in the Geisel study.¹⁷³ Not least among such defects was the Geisel mathematical determination (pg.816) of weighting coefficients

¹⁶² *Id.* at 684, 148 N.E.2d at 337. In 1973, the Indiana legislature replaced the phrase "suitable person" with "proper person." 1973 Ind. Acts P.L. 333, § 5. The phrase "proper reason" remained unchanged. *See Schubert v. DeBard*, 398 N.E.2d at 1343 n.1.

¹⁶³ 237 Ind. at 684-85, 148 N.E.2d at 337.

¹⁶⁴ 398 N.E.2d at 1344.

¹⁶⁵ *Id.* at 1341.

¹⁶⁶ *Id.* at 1344.

¹⁶⁷ 237 Ind. 677, 148 N.E.2d 334.

¹⁶⁸ 398 N.E.2d at 1344.

¹⁶⁹ Final Report, *National Commission on the Causes and Prevention of Violence* (1969); Newton & Zimring, *Firearms and Violence in American Life* 62-67 (Staff Report to the National Commission on the Causes and Prevention of Violence, No. 7, 1969); Mosk, *Gun Control Legislation: Valid and Necessary*, 14 N.Y.L. FORUM 694 (1968); Geisel, *The Effectiveness of State and Local Regulation of Handguns: A Statistical Analysis*, 1969 DUKE L.J. 647.

¹⁷⁰ Newton & Zimring, *supra* note 169.

¹⁷¹ Geisel, *supra* note 169.

¹⁷² Murray, *Handguns, Gun Control Laws and Firearm Violence*, 23 SOC. PROBS. 81 (1975).

¹⁷³ Geisel, *supra* note 169.

by "random testing,"¹⁷⁴ which could "produce weights that are the result of chance correlation with the dependent variables and consequently are probably useful for only this one set of data, severely limiting the generalizability of their [Geisel] conclusions."¹⁷⁵ In other words, Geisel had failed to firmly establish the statistical criteria for his analysis before analyzing the data, such prior establishment of criteria being essential for an unbiased determination of correlations, or of any other statistical inferences, from a given sample set of data. Moreover, Douglas Murray's comprehensive analysis showed no "significant effect [of gun control laws] on lowering rates of violence associated with firearms,"¹⁷⁶ as well as "no significant effect [of gun control laws] on access to firearms."¹⁷⁷ Moreover, Franklin Zimring, one of the authors of the 1967 staff report to the National Commission on the Causes and Prevention of Violence¹⁷⁸ cited by Judge Staton, recently stated, in response to a question posed on the efficacy of gun control laws as a deterrent to violent crime, that "this whole notion of cause and effect is suspect. Criminologists are very much like forecasting economists and gypsy fortunetellers. We cannot explain gun-related behavior, so how can we say what has affected it, either up or down."¹⁷⁹

The basic disagreement between the *Schubert* majority¹⁸⁰ and dissenting Judge Staton thus concerned the proper scope of power delegated to the Superintendent of State Police by virtue of the statutory specification that a pistol-carrying license applicant have (pg.817) "a proper reason for carrying a handgun"¹⁸¹ in view of the Indiana Constitution's provision that the "people shall have a right to bear arms, for the defense of themselves and the State."¹⁸² Judge Staton was of the opinion that there was no constitutional impediment to the Superintendent's using his training, experience, and investigatory capabilities to go behind a bare "self-defense"¹⁸³ assertion by the applicant, and then making an independent finding of fact as to whether there was sufficient evidence that the applicant had a "genuine need to carry a handgun."¹⁸⁴ On the other hand, the *Schubert* majority held that the Indiana constitutional provision for a right to bear arms constricted the scope of authority delegated by the statute to the Superintendent, to the extent of forbidding him, in the fact-finding process, to evaluate the actual degree of need for the pistol-carrying license, while still allowing him to deny the license if he found, based upon his expertise, that there was substantial evidence that the

¹⁷⁴ Murray, *supra* note 172, at 83.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 91.

¹⁷⁷ *Id.*

¹⁷⁸ See *supra* note 169 and accompanying text.

¹⁷⁹ *Studies on Gun Law Divided on Impact*, N.Y. Times, Jan. 21, 1981, at A17, col. 1. See also Briggs, *The Great American Gun War*, 45 PUB. INTEREST 37, 38 (1976) ("[N]o policy research worthy of the name has been done on the issue of gun control [E]ven the most elementary methods of cost-benefit analysis have not been employed."); Wright & Rossi, *Weapons and Violent Crime, Executive Summary* 8 (1981) ("[E]xisting knowledge about weapons, crime, and the relationships between them is, in general, *not* adequate as a basis for policy formulation. Even the most basic descriptive questions—for example, the actual number of firearms in private hands, or the crime reduction effects, if any, of weapons measures enacted in the past—remain essentially unanswered to any useful degree of precision."); Kessler, *Enforcement Problems of Gun Control: A Victimless Crime Analysis*, 16 CRIM. L. BULL. 131, 133 (1980) ("[R]esults are mixed.").

¹⁸⁰ See *supra* note 151.

¹⁸¹ IND. CODE ANN. § 35-23-4.1-5 (Burns 1979).

¹⁸² IND. CONST. art. I, § 32.

¹⁸³ 398 N.E.2d at 1344.

¹⁸⁴ *Id.*

applicant, in fact, had an improper reason for carrying a handgun.¹⁸⁵ Absent finding such improper reason, the *Schubert* majority would allow a pistol-carrying license to be denied only if there was a valid finding by the Superintendent that the applicant was deficient in the statutory personal character requirements of "good character and reputation and a proper *person* to be so licensed."¹⁸⁶ Accordingly, the *Schubert* majority remanded the cause for a determination of these personal character requirements.¹⁸⁷ In so doing, the *Schubert* majority, confronted by a state constitutional guarantee of the individual's right to bear arms, treated a license to carry a pistol in public places somewhat analogously to the federal courts' treatment of permits to speak and disseminate information, in a public forum ("speech plus"): precise, open, and accessible licensing.¹⁸⁸ (pg.818)

VI. THE OREGON *KESSLER* DECISION

A month before the Indiana Supreme Court unanimously refused to review the court of appeals decision in *Schubert*,¹⁸⁹ the Oregon Supreme Court unanimously handed down a landmark decision in *State v. Kessler*.¹⁹⁰ In *Kessler*, the court held that an Oregon statute¹⁹¹ banning the private possession of various listed weapons was unconstitutional in view of the provision in the Bill of Rights of the Oregon constitution for a right to bear arms.¹⁹²

In *Kessler*,¹⁹³ the police had entered the defendant's apartment at his own request and had inadvertently found two "billy clubs;"¹⁹⁴ a "billy" being included in the statute's proscribed list of weapons. Mr. Kessler was indicted and convicted for possession of the two billy clubs. The intermediate court of appeals in Oregon rejected defendant's constitutional attack, that the statute was violative of the right to bear arms, on the ground that the statute was a reasonable exercise of the

¹⁸⁵ *Id.* at 1342 (Staton, J., dissenting).

¹⁸⁶ *Id.* at 1340, *citing* IND. CODE ANN. § 35-23-4.1-5(a) (Burns 1979) (emphasis added).

¹⁸⁷ *Id.* at 1342.

¹⁸⁸ *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (license tax unconstitutionally burdensome on dissemination of religious books and pamphlets from house to house); *Cox v. New Hampshire*, 312 U.S. 569 (1941) (permit system for parades constitutional so long as discretion in licensing official was limited to uniform, nondiscriminatory standards of time, place and manner to prevent confusion by overlapping parades); *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976) (municipal ordinance requiring advance written notice to police by any person desiring to canvass, solicit, or call from house to house for a charitable or political purpose held void for vagueness); *Village of Schaumburg v. Citizens for a Better Environment*, 440 U.S. 620 (1980) (requirement that 75% of proceeds of charitable organization must be used directly for charitable purposes held facially unconstitutional); *International Soc. for Krishna Consciousness v. Rochford*, 585 F.2d 263 (7th Cir. 1978) (regulations adopted by city commissioner of aviation restricting distribution of literature at airports held unconstitutionally vague as well as overly restrictive as to time allotted (1/2 hour per day) for registration of persons wishing to distribute materials); *Wright v. Chief of Transit Police*, 558 F.2d 67 (2d Cir. 1977) (total ban on sale of newspapers by hand on city subways could not stand without exploration of alternative possibilities short of total ban). *Kunz v. New York*, 340 U.S. 290 (1957) (local ordinance, requiring a permit to conduct a religious meeting on New York city streets but containing no standard to guide administrative action in granting or denying the permit, held unconstitutional).

¹⁸⁹ 398 N.E.2d 1339.

¹⁹⁰ 289 Or. 359, 614 P.2d 94 (1980).

¹⁹¹ OR. REV. STAT. § 166.510(1) (1965).

¹⁹² "The people shall have the right to bear arms for the defence of themselves and the State, but the Military shall be kept in strict subordination to the civil power." OR. CONST. art. I, § 27.

¹⁹³ 289 Or. at 359, 614 P.2d at 94.

¹⁹⁴ *Id.* at 370, 614 P.2d at 99.

"police power of the State to curb crime."¹⁹⁵ The intermediate Oregon court approvingly quoted an abbreviated portion of the 1931 Michigan Supreme Court's basic theory in *People v. Brown*:^(pg.819)

Some arms, although they have a valid use for protection of the State by organized and instructed soldiery in times of war or riot, are too dangerous to be kept in a settled community by individuals and, in time of peace, find their use by bands of criminals, and have legitimate employment only by guards and police.¹⁹⁶

The Supreme Court of Oregon unanimously reversed the conviction of Mr. Kessler, under the statute banning private possession of certain weapons, on the ground that the Oregon constitutional provision¹⁹⁷ guaranteed to the individual person the right to possess any "hand-carried weapon commonly used by individuals for personal defense,"¹⁹⁸ such as billy clubs. The court hastened to add that the legislature could, consistent with the constitution, ban the possession of any arms by felons and the carrying of any arms by anyone in a concealed manner.¹⁹⁹

The unanimous *Kessler* court²⁰⁰ reasoned that the wording of the Oregon constitutional provision, on the right to bear arms,²⁰¹ differed both from that of the second amendment of the United States Constitution,²⁰² which has "not yet been held to apply to state limitations on the bearing of arms,"²⁰³ and from those of many other state constitutional provisions on the right to keep and/or bear arms.²⁰⁴ Nevertheless, all these state constitutional provisions share a common historical background.²⁰⁵ Specifically, the Oregon provision regarding the right to bear arms was taken from the 1851 Indiana Constitution—which provision on this score had been taken unchanged from the Bill of Rights of the original 1816 Indiana Constitution.²⁰⁶ In turn, the drafters of the Indiana Bill of Rights in 1816 borrowed freely from the wording of other state constitutions—most notably of Kentucky, Ohio, Tennessee, ^(pg.820) and Pennsylvania, all drafted between 1776 and 1802.²⁰⁷ Moreover, the constitutions adopted by the original colonies generally included a bill or declaration of rights, many of them patterned largely on the English Bill of Rights of 1689,²⁰⁸ which contained a list of alleged illegal actions of James II followed by a declaration of the rights of the people.

¹⁹⁵ State v. Kessler, 43 Or. App. 303, 307, 602 P.2d 1096, 1097 (1979), quoting *People v. Brown*, 253 Mich. 537, 543, 235 N.W. 245, 247 (1931).

¹⁹⁶ 43 Or. App. at 307, 602 P.2d at 1097.

¹⁹⁷ OR. CONST. art. I, § 27.

¹⁹⁸ 289 Or. at 371, 614 P.2d at 100.

¹⁹⁹ *Id.* at 370, 614 P.2d at 99.

²⁰⁰ *Id.* at 359, 614 P.2d at 94.

²⁰¹ OR. CONST. art. I, § 27, *supra* note 192 and accompanying text.

²⁰² U.S. CONST. amend. II 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." *See* 1 Stat. 21 (1845).

²⁰³ 289 Or. at 362, 614 P.2d at 95.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 363, 614 P.2d at 96.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

Among the illegal actions specified in the list and noted by the *Kessler* court were the assertions that James II:

[D]id endeavor to subvert and extirpate the Protestant religion and Laws and Liberties of this Kingdom

5. By raising and keeping a Standing army within this Kingdom in Time of Peace without the Consent of Parliament and quartering Soldiers contrary to Law.

6. By causing several good Subjects, being Protestants, to be disarmed at the same Time when Papists were both armed and employed contrary to Law.²⁰⁹

The parallel provisions of the declaration of rights in the English Bill of Rights of 1689 provided:

5. That the raising or keeping a Standing Army within the Kingdom unless it be with the Consent of Parliament is against the Law.

6. That the subjects which are Protestants may have Arms for their Defence suitable to their Conditions, and as allowed by Law.²¹⁰

The *Kessler* court further noted that the phrase "for the defense of themselves and the State" in both the Oregon and Indiana constitutional provisions for the right to bear arms appeared in the present-day constitutions of six other states.²¹¹ This language, the *Kessler* court held, implied three separate justifications and purposes for a state constitutional right to bear arms:

- (a) The preference for a militia over a standing army;
- (b) the deterrence of governmental oppression; and^(pg.821)
- (c) the right of personal defense.²¹²

According to the *Kessler* court, the constitutional phraseology "the right to bear arms ... for the defense of ... the State" refers to that historical preference for a citizen militia over a standing army;²¹³ whereas the language "a right to bear arms in defense of themselves ..." refers to the closely related purpose of "the deterrence of government from oppressing unarmed segments of the population,"²¹⁴ as well as "an individual's right to bear arms to protect his person and home."²¹⁵

²⁰⁹ *Id.* at 364, 614 P.2d at 96, *citing* English Bill of Rights, 1689, 1 W. & M., Sess. 2 ch. 2. For background and legislative history of the English Bill of Rights, see *supra* notes 46-75 and accompanying text.

²¹⁰ 289 Or. at 364, 614 P.2d at 96.

²¹¹ *Id.* at 366, 614 P.2d at 97. The six other states are Florida (FLA. CONST. art. I, § 8), Kentucky (KY. CONST. § 1), Pennsylvania (PA. CONST. art. I, § 21), South Dakota (S.D. CONST. art. VI, § 24), Vermont (VT. CONST. ch. 1, art. 16), Wyoming (WYO. CONST. art. I, § 24). See *supra* note 8 for texts of these provisions.

²¹² 289 Or. at 366, 614 P.2d at 97. Compare: "Until after the Boer War, there was no real restriction in this country [England] on the carrying of arms. Indeed the right to carry arms would have been defended as a traditional right of Englishmen ... an ultimate prerogative—the means to resist unjust government by force." Phelan, *Men and Arms*, 110 LAW J. 131 (1969).

²¹³ 289 Or. at 366, 614 P.2d at 97.

²¹⁴ *Id.* at 367, 614 P.2d at 98.

²¹⁵ *Id.*

Furthermore, the unanimous *Kessler* court noted that today five state constitutions explicitly provide for the right of an individual person to bear arms "in defense of his home, person and property."²¹⁶

The *Kessler* court also discussed the type of arms the possession of which by private individuals is thus constitutionally protected in Oregon. The court observed that in the colonial and revolutionary war era there was an identity of arms used by militiamen and by private citizens in defense of home and person.²¹⁷ It reasoned that, therefore, the drafters of constitutional provisions on the right to bear arms intended to include as constitutionally protected arms those hand-carried arms used by settlers for both personal and military defense,²¹⁸ such as ordinary firearms and other hand-carried weapons commonly used for personal defense,²¹⁹ but not cannon or other heavy ordinance which were not privately kept by (pg.822) militiamen or private citizens.²²⁰ Moreover, the *Kessler* court further observed that the Industrial Revolution had brought about unprecedented changes in technology and concomitant changes in weaponry,²²¹ thus, whereas firearms and other hand-carried arms have remained as weapons of personal defense, the more advanced automatic weapons, explosives, and chemicals of modern warfare have never been intended or commonly used for personal possession and protection.²²² Accordingly, today the constitutionally protected arms do not include cannon or other sophisticated modern weapons, but rather include the modern day equivalents of weapons used by colonial militiamen "for defense of the State,"²²³ plus the "hand-carried weapons commonly used by individuals [including police] for personal defense."²²⁴ In adopting this formulation of the individual right to bear arms, together with the stipulation that the legislature could constitutionally prohibit the carrying of any arms by individuals in a concealed manner and the possession of any arms at all by felons,²²⁵ the *Kessler* court in effect adopted a modern equivalent of the common law principle that the right to bear arms extended to "persons of quality ... wearing common weapons."²²⁶

Almost a year after the *Kessler* decision, the Oregon Supreme Court handed down another decision, this time on the subject of carrying a "billy" in an automobile.²²⁷ The court held that the same statute was unconstitutional as applied, because the statute "is written as a total proscription

²¹⁶ *Id.* at 368 n.14, 614 P.2d at 98 n.14. The five state constitutional provisions containing the phrase "in defense of his home, person and property" are: COLO. CONST. art. II, § 13; MISS. CONST. art. III, § 13; MO. CONST. art. I, § 23; MONT. CONST. art. III, § 13; OKLA. CONST. art. II, § 26. See *supra* note 8 for texts of these provisions.

²¹⁷ 289 Or. at 368, 614 P.2d at 98. See also *United States v. Miller*, 307 U.S. 174, 179 (1939) ("[T]he Militia comprised all males physically capable of acting in concert for the common defense And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.").

²¹⁸ 289 Or. at 368, 614 P.2d at 98.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 369, 614 P.2d at 99.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 371, 614 P.2d at 100.

²²⁵ *Id.* at 370, 614 P.2d at 99.

²²⁶ W. HAWKINS, *supra* note 30. See *supra* notes 99-100 and accompanying text. See also VI *Record of Proceedings, Sixth Illinois Constitutional Convention, Bill of Rights Committee Report* § 27 (1970) ("The substance of the right is that a citizen has the right to possess and make reasonable use of arms that law-abiding persons commonly employ for purposes of recreation or the protection of person and property.").

²²⁷ *State v. Blocker*, 291 Or. 255, 630 P.2d 824 (1981).

of the mere possession of certain weapons, and that mere possession, insofar as a billy is concerned, is constitutionally protected."²²⁸ (pg.823)

CONCLUSION

The collective right theory of the right to bear arms was born in the 1905 decision of the Kansas Supreme Court in *Salina v. Blaksley*.²²⁹ In that case, the court held that solely a collective right was guaranteed by section 4 of the Kansas constitution's bill of rights, which provided: "[t]he people have the right to bear arms for their defense and security."²³⁰ The Kansas Supreme Court declared: "[t]he provision in section 4 of the bill of rights, that 'the people have the right to bear arms for their defense and security,' refers to the people as a collective body."²³¹ Seventy-five years later, under somewhat similar state constitutional provisions for a right of the people to bear arms, the Indiana *Schubert v. DeBard*²³² decision and the Oregon *State v. Kessler*²³³ decision squarely rejected the exclusively collective right theory in favor of an individual right interpretation.²³⁴ Such interpretation was fully in accord with the common law and historical background of the right to keep and bear arms.²³⁵ Accordingly, these recent individual right interpretations can be expected to signal a judicial trend in favor of the right of the individual citizen to keep and carry arms, especially in those states that have constitutional provisions for the right to bear arms. Moreover, the articulation in *Kessler* of "the deterrence of government from oppressing unarmed segments of the population,"²³⁶ as one of the basic purposes of the right of the people to bear arms under the Oregon constitution, cogently indicates a similar basic purpose and an individual right interpretation for "the right of the people to *keep* and bear arms"²³⁷ under the second amendment of the United States Constitution.

²²⁸ *Id.* at 257, 630 P.2d at 826.

²²⁹ 72 Kan. 230, 83 P. 619 (1905).

²³⁰ *Id.*, 83 P. at 620.

²³¹ *Id.* at 231, 83 P. at 620.

²³² 398 N.E.2d 1339.

²³³ 289 Or. 359, 614 P.2d 94.

²³⁴ *See supra* text accompanying notes 139-226.

²³⁵ *See supra* text accompanying notes 14-138.

²³⁶ 289 Or. at 367, 614 P.2d at 98.

²³⁷ U.S. CONST. amend. II (emphasis added).