

[Copyright © 1997 Rutgers Law Review. Originally published as 50 RUTGERS L. REV. 97-197 (1997). Permission for WWW use at this site generously granted by the author. For **educational use only**. The printed edition remains canonical. For citational use please obtain a back issue from William S. Hein & Co., 1285 Main Street, Buffalo, New York 14209; 716-882-2600 or 800-828-7571.]

PRINCIPLES AND PASSIONS: THE INTERSECTION OF ABORTION AND GUN RIGHTS*

Nicholas J. Johnson**

In this article, Professor Nicholas J. Johnson explores the parallels between the right of armed self-defense and the woman's right to abortion. Professor Johnson demonstrates that the theories and principles advanced to support the abortion right intersect substantially with an individual's right to armed self-defense. Professor Johnson uncovers common ground between the gun and abortion rights—two rights that have come to symbolize society's deepest social and cultural divisions—divisions that prompt many to embrace the abortion right while summarily rejecting the gun right. Unreflective disparagement of the gun right, he argues, threatens the vitality of the abortion choice theories with which gun-rights arguments intersect and suggests that society's most difficult questions are settled not on principle, but by people's passions.

INTRODUCTION

Rights are costly. Wesley Hohfeld's classic account casts rights as a privilege to inflict harm.¹ Nowhere is this critique more apt than the hotly contested "rights"² to abort an unwanted fetus, and to own a gun for private self-defense. These (pg.98) rights are in one sense the ultimate liberties. They have the capacity to absolutely consume very substantial competing interests, making unparalleled demands on our tolerance of the costs that rights impose. Yet, our generation, amidst much controversy, has continued to tolerate both abortion rights and gun rights and their costs.³

This is due substantially to our recognition that these liberties 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.⁴

* Copyright © 1997 Nicholas J. Johnson. All rights reserved.

** Associate Professor of Law, Fordham University School of Law. J.D. Harvard University School of Law. I am grateful for the comments of Jill Fisch, Russ Pearce, Don Kates, Linda McClain, Jim Fleming and Martin Flaherty. Special thanks to C.B. Kates.

¹ See J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1129 (1990). See also Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-32 (1913).

² I use quotations here to acknowledge the controversy over whether the Constitution, properly construed, guarantees these rights. As I will discuss, these views often come from opposite ends of the political spectrum, but ring similar in form and tone.

³ I have suggested elsewhere that our willingness to endorse costly rights is the best test of whether we take rights seriously. See Nicholas J. Johnson, *Plenary Power and Constitutional Outcasts: Federal Power, Critical Race Theory and the Second, Ninth, and Tenth Amendments*, 57 OHIO ST. L.J. 1555, 1588 n.122 (1996).

⁴ While this is harder to show in the abortion context, Nelson Lund offers an array of illustrations that the fear of violent death is a deep passion that "nags at us all with two messages: arm yourself or those you control and disarm those whom you do not control." Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1, 6 (1996). Lund describes the ownership and use of guns by an array of notable opponents of gun possession for self-defense: Former Chief Justice Warren Burger "had been known to answer a knock at his door by appearing with a gun in his hand"; Senator Edward Kennedy's "private bodyguard

While an alliance between NARAL⁵ and the NRA⁶ seems unlikely,⁷ the common theme of preserving a vital option in a life-changing or life-threatening crisis has produced significant (pg.99) parallels between arguments supporting a constitutional right to abortion and arguments supporting a right to possess individual firearms for self-defense. Answering critics and addressing their own dissatisfaction with the conceptual foundation on which the Supreme Court has set the abortion right, commentators have offered alternative and improved theoretical foundations for a fundamental right to abortion. Many of these efforts are grounded on concepts that dovetail eerily and ironically with those of gun-rights commentators and theorists. From direct self-defense analogies to accounts responding to social and political failure, these projects are the primary guideposts that I will employ to trace the intersection between conceptions of abortion and gun rights.

Broadly speaking, the core theme of the two movements is the same: private choice in making life's most critical and pivotal decisions. Moreover, there turns out to be a considerable congruence of rhetoric, political strategy, and regulatory proposals from the groups that oppose individual decision making on these issues.

This is ironic because these two issues are often viewed as occupying opposite positions in the political spectrum. That they are truly so far apart is by no means clear. I can find no poll which has ever surveyed what gun owners think of abortion or what abortion-rights supporters think of gun ownership.⁸ But certainly in gross political terms the "standard position" (pg.100) of the left, reflected for example by the stance of the Clinton Administration, defends the abortion choice but generally condemns private gun ownership.⁹

was charged with carrying illegal weapons" in Washington, D.C.; Columnist Carl Rowan "was prosecuted for using an unregistered pistol to gun down a teenager who trespassed in his backyard swimming pool"; Dr. Joyce Brothers's "husband was one of a privileged few New York City residents to possess a license ... to own a handgun." *Id.* at 4-5.

⁵ The National Abortion Rights Action League.

⁶ The National Rifle Association.

⁷ In the nature of their political allegiances with the major parties, the two groups seem to reflect extreme ends of the political spectrum. *See, e.g.*, Sanford Levinson, *Democratic Politics and Gun Control*, 1 RECONSTRUCTION 137, 138-39 (1992); Dana Milbank, *Gun-Control Issues in Illinois Campaign May Hurt GOP Candidate for Senate*, WALL ST. J., Nov. 4, 1996, at A14.

⁸ Gun ownership polls reveal that approximately 50% of American households contain firearms. *See* John T. Whitehead & Robert H. Langworthy, *Gun Ownership and Willingness to Shoot: A Clarification of Current Controversies*, 6 JUST. Q. 263, 273 (1989) (using information from a 1982 ABC News poll to determine the effects of specific variables on the willingness of a gun owner to shoot). *See generally* GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICAN LIFE 18 (1991) (citing various surveys conducted between 1959 and 1990 which asked gun ownership questions). As might be expected from so large a proportion of households, many have attitudes that are generally deemed "liberal"; but "liberals" who own guns report that they are willing to use them if necessary to repel criminal attack. *See generally* Whitehead & Langworthy, *supra*, at 273 (finding that liberalism does not significantly affect an individual's willingness to shoot). Professor Kleck notes that "[g]un ownership is higher among middle-aged people than in other age groups, presumably reflecting higher income levels and the sheer accumulation of property over time." KLECK, *supra*, at 22. "Gun owners are not, as a group ... more racist, sexist, or violence-prone than nonowners." *Id.* at 47.

⁹ The Clinton Administration has been a staunch supporter of abortion rights. *See* Melinda Henneberger, *House Votes to Override Clinton's Veto of Abortion Bill*, N.Y. TIMES, Sept. 20, 1996, at A22. The President took a significant political risk in vetoing a measure that would have banned a category of late-term, or "partial-birth," abortions. *See id.* In contrast, cataloguing the "grim madness of our times," Department of Health and Human Services Secretary Donna Shalala condemns "the madness of families keeping loaded guns in the bedroom or hallway closet." Henry J. Reske, *Seeking Gun Silence*, A.B.A. J., Sept. 1994, at 86. President Clinton has acknowledged that he is not advocating a ban on handguns because he does not "think the American people are there right now." Jann S. Wenner & William Greider, *The Rolling Stone Interview: President Clinton*, ROLLING STONE, Dec. 9, 1993, at 40, 45.

I do not contend that the conceptual overlap between abortion rights and gun rights is complete. There are abortion-rights theories that do not intersect with gun-rights arguments.¹⁰ Moreover, one large aspect of the gun-rights debate is of minor importance here—arguments about the collective political value of a citizens' militia, its proper configuration and constitutional pedigree are largely outside the intersection. The gun right that intersects abortion-rights theories is the "right" to own and use a gun for individual self-defense.¹¹ Armed resistance against criminal attack is the "model case" that the right addresses.^(pg.101)

My aim in tracking this unlikely congruence of ideas is to uncover conceptual common ground, not to fulminate about hypocrisy. But I also have a political point to make. That point is the crucial importance of unwavering consistency for those who call upon public officials to honor controversial rights and call upon the populace generally to respect a contested sphere of private choice. It is crucial that such advocates respect the range of choices that are fairly within the boundaries of the theories they espouse. It will be ruinous to such advocacy if it seems that its theorists are advocating tolerance merely for a choice they personally value, to the exclusion of other choices that their own theories support.

Former ACLU national board member Alan Dershowitz, who admits that he "hates" guns and wishes to see the Second Amendment repealed, nevertheless warns:

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.¹²

All this said, the intersection between abortion rights and gun rights might not necessarily render the standard position incoherent. Commentators and supporters who embrace formulations of abortion rights that fall within the intersection, and still operate from the standard position, might articulate some principled basis for their disparate treatment of the two rights.¹³ But that work is yet to be done.

Part I begins with a critique of explicit self-defense analogies supporting the abortion right. Part II examines a cluster of theories that ground the abortion right on renditions of autonomy and self-determination that provide equal or stronger justifications for armed self-defense. Part III focuses on one writer's ^(pg.102) attempt to form a textual hook for the abortion right using arguments that offer equal or stronger support for armed self-defense. Part IV employs the communitarian pairing of abortion and gun rights to underscore their intersection and gauge their relative claims as

¹⁰ See, e.g., Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990) (arguing that to force pregnant women to give birth would place them in a servant caste, thus violating their Thirteenth Amendment rights).

¹¹ Compare Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1611 (1979), with Lund, *supra* note 4, at 6 (using the self-defense rationale for both abortion and gun-rights arguments). In contrast to the abortion right, the gun right is controversial partly because of the Supreme Court's failure to address its status. The last Supreme Court decision directly addressing the Second Amendment was *United States v. Miller*, 307 U.S. 174, 178-79 (1939). The Court's conclusion in *Miller* that the Second Amendment protects the possession of militia weapons and its recognition that the militia consists of individuals bearing their own private arms allows widely divergent views of the amendment's scope. See *id.* at 178-79.

¹² Dan Gifford, *The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason*, 62 TENN. L. REV. 759, 789 (1985) (quoting a telephone interview with Alan Dershowitz, Law Professor at Harvard University (May 3-4, 1994)).

¹³ In Part IV, *infra*, I suggest several points that might be part of that work.

fundamental rights. Part V presents an array of congruencies between the positions opposing the two rights. Part VI examines the apparent political gulf between abortion rights and gun rights and lays some of the ground work for future efforts to reconcile this political division with the conceptual intersection of the two rights.

I. EXPLICIT SELF-DEFENSE ANALOGIES SUPPORTING ABORTION RIGHTS

The suggestion that there is a noteworthy intersection between conceptions of abortion rights and gun rights is supported directly by efforts to provide alternative or stronger theoretical foundations for the right to abortion. The theme of private choice in personal crisis has prompted analogies between the newly established abortion right and the traditionally protected choice of self-defense. These analogies are explicit in two early works that Cass Sunstein contends underpin the strongest current justification for the abortion right.¹⁴

1. "Re-writing *Roe v. Wade*"

Donald Regan's attempt to provide a more satisfying justification for *Roe v. Wade*¹⁵ grounds the abortion right explicitly on self-defense principles.¹⁶ Regan first analogizes abortion rights to samaritan law.¹⁷ He offers the self-defense analogy (pg.103) for those who "cannot bring themselves to view removing a fetus from a woman's body as an omission for purposes of the bad-samaritan principle."¹⁸

Regan presents the abortion choice in the context of a spectrum of scenarios where self-defense is permissible: self-defense against a willful criminal attacker, an insane attacker, a convulsive epileptic swinging a cleaver in a small cabin, and self-defense by a boat-wreck survivor against a delirious companion who tries to drown him.¹⁹ Regan anchors this line with a prohibited act of self-preservation—the potential victim who uses another innocent as a shield against a fatal blow.²⁰ According to Regan, abortion choice fits somewhere between self-defense against the epileptic cleaver swinger and the wrongful use of an innocent person as a shield.²¹

Regan concedes that justifying abortion as self-defense is much more difficult than tolerating self-defense against a willful criminal attacker: "How does one answer the suggestion that, provided the mother's life is not at stake, the privilege of self-defense is lost because abortion involves

¹⁴ See Cass R. Sunstein, *Neutrality In Constitutional Law (With Special Reference to Pornography, Abortion and Surrogacy)*, 92 COLUM. L. REV. 1, 31 n.120 (1994). Sunstein focuses mainly on sexual inequality issues and the bad-samaritan analogy. See *id.* at 32. In the first effort that Sunstein discusses, Donald Regan draws a clear line between the self-defense and the bad-samaritan analysis. See Regan, *supra* note 11, at 1611. In the second, Judith Thomson joins the samaritan and self-defense themes. See Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 53 (1971).

¹⁵ 410 U.S. 113 (1972).

¹⁶ See Regan, *supra* note 11.

¹⁷ See *id.* at 1569-70.

¹⁸ *Id.* at 1611. Regan defines the bad-samaritan as one who declines to give aid to another in need. See *id.* at 1574.

¹⁹ See *id.* at 1611-12.

²⁰ See *id.* at 1611.

²¹ See *id.* at 1611-12 (arguing that while the fetus is unlike a violent, insane attacker or a person in convulsions brandishing a cleaver, it is also unlike an uninvolved bystander).

excessive force?"²² Regan responds that the Model Penal Code permits deadly force to avoid "death, serious bodily harm, rape or kidnapping."²³ "The burdens of pregnancy and childbirth can be assimilated either to serious bodily harm or to rape."²⁴ Abortion defends against serious bodily harm because "pregnancy is a protracted impairment of function of [a woman's] body as a whole."²⁵

Sharpening this argument, Regan endorses a dramatic and illuminating expansion of self-defense. He notes that the *Restatement (Second) of Torts* includes an example that "strongly (pg.104) implies that a broken arm is serious bodily harm."²⁶ Abortion does not involve excessive force because "a broken arm and pregnancy involve similar interferences with normal physical activity."²⁷ The objection that the burdens of pregnancy do not justify deadly force because "the force used to repel an attack must always be proportionate to the harm threatened" ignores the fact that our law tends to divide harms into two categories: death or serious bodily harm and less than death or serious bodily harm.²⁸

Whatever some people might like, our law does not take the position that death is in a class by itself. Unquestionably one can kill in self-defense in order to avoid some harms less than death. Surely one can kill to avoid being made a quadriplegic. Surely one can kill to avoid being made a paraplegic. Surely one can kill to avoid being blinded.²⁹

The parallel between Regan's analysis and the argument for armed self-defense is illuminating. The first and obvious point is reflected in Regan's own acknowledgement that abortion is *less* like self-defense against a *willful* attacker and more like using deadly force against the epileptic cleaver swinger.³⁰ By this measure, the case for armed self-defense is stronger than the case for abortion choice. Resistance against willful criminal attack is the "model case" on which the "right" to armed self-defense is grounded. Herbert Wechsler's classic account shows that self-defense derives from "the [then] universal judgment (pg.105) that there is no social interest in preserving the lives of aggressors at the cost of those of their victims."³¹ While there are varying degrees of

²² *Id.* at 1613.

²³ *Id.* at 1613 (citing MODEL PENAL CODE § 3.04(2)(b) (Proposed Official Draft 1962)).

²⁴ *Id.*

²⁵ *Id.* at 1614.

²⁶ *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 65 (1965)). Regan notes that although the broken arm illustration in the *Restatement (Second) of Torts* was not drafted with the intention of defining serious bodily harm, it nevertheless "appears in connection with the basic section on the use of deadly force in self-defense." *Id.*

²⁷ *Id.* at 1615. Regan concedes that he still must answer the argument that pregnancy is not an impairment because "pregnancy is 'normal' while a broken arm is not." *Id.* He responds that to say pregnancy is normal "is not to say that it imposes no costs." *Id.*

²⁸ *See id.*

²⁹ *Id.* (citation omitted). Finally Regan emphasizes that serious bodily injury exists only where there is significant risk of death. *See id.* He points out that serious bodily injury under both the *Model Penal Code* and the *Restatement (Second) of Torts* requires "either substantial risk of death or protracted loss of an important physical function." *Id.* at 1616.

³⁰ *See id.* at 1611-12.

³¹ Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 736 (1937).

controversy over its effectiveness,³² its constitutional pedigree, and its role in civilized society,³³ few dispute that individual self-defense is at the core of the contemporary gun-rights debate.³⁴

The act of self-defense on which Regan's analogy relies—lethal self-defense against the harm of a broken (pg.106) arm³⁵—is much more problematic. When viewed in the gun-rights context, it is likely to generate strong objections. Implicit in many gun control arguments is the notion that one should not resist a criminal attack.³⁶ In common with other anti-gun organizations, Handgun Control, Inc. ("HCI"), advises victims of criminal attack to submit rather than physically resist: "[T]he best defense against injury is to put up no defense—give them what they want, or run."³⁷ Under this view, submission resulting in merely a broken arm for the victim seems preferable to the hazards of armed resistance. Ironically, operating from the standard position, one might embrace both Regan's and HCI's arguments without perceiving the tension between them.

The armed self-defender aims to avoid the precise harms that form Regan's analogical foundation. Regan's burden, on (pg.107) the other hand, is to equate the rigors of pregnancy and child birth to the harms that trigger the right of self-defense. Regan travels much of the same path taken

³² See, e.g., Don B. Kates, Jr., *The Value of Civilian Handgun Possession as Deterrent to Crime or a Defense Against Crime*, 18 AM. J. CRIM. L. 113, 113-14 (1991) (evaluating the proposition that civilian gun ownership reduces crime); Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 150-52 (1995) (examining defensive gun use and victimization); John R. Lott, Jr., & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD. 1, 5 (1997) (discussing the effect of "shall issue" right-to-carry concealed handgun laws); David McDowall & Colin Loftin, *Collective Security and the Demand for Legal Handguns*, 88 AM. J. SOC. 1146, 1158 (1983) (arguing that gun control costs rise in proportion with the collective insecurity of a community); David McDowall et al., *Easing Concealed Firearms Laws: Effects on Homicide in Three States*, 86 J. CRIM. L. & CRIMINOLOGY 193, 194 (1995) (examining the frequency of homicides in the urban areas of three states after enacting "shall issue" concealed weapons laws); David McDowall et al., *General Deterrence Through Civilian Gun Ownership: An Evaluation of the Quasi-Experimental Evidence*, 29 CRIMINOLOGY 541, 541-42 (1991) (studying the effect that media attention has had on defensive gun use and reported crimes); Daniel D. Polsby, *Reflections on Violence, Guns, and the Defensive Use of Lethal Force*, LAW & CONTEMP. PROBS., Winter 1986, at 89, 96-97; Marvin E. Wolfgang, *A Tribute to a View I Have Opposed*, 86 J. CRIM. L. & CRIMINOLOGY 188, 188 (1995) (conceding that arguments put forth by gun-rights commentators are persuasive).

³³ See, e.g., Don B. Kates, Jr., *Bigotry, Symbolism and Ideology in the Battle Over Gun Control*, 1992 PUB. INTEREST L. REV. 31, 31-33 (1992) (discussing the moral and public policy arguments in the gun control debate); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236, 1243-44 (1994) (interpreting the Second Amendment as conferring a private right to bear arms).

³⁴ See, e.g., David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551, 588 (1991) ("The central issue in gun ownership for contemporary America is personal protection.").

³⁵ See Regan, *supra* note 11, at 1614-15.

³⁶ See, e.g., PETE SHIELDS, GUNS DON'T DIE—PEOPLE DO 125 (1981) (writing as Chairman of Handgun Control, Inc.).

³⁷ See SHIELDS, *supra* note 36, at 125. This advice leaves open the question, what if they want me dead, raped or maimed? Shields's advice reflects a particular bias that is problematic and even offensive to many people.

His advice reflects the threat expectations and resistance dynamic of men—arguably, affluent, white men. On the view that one's main exposure will be property crimes, typically committed by young, poor, perpetrators, Shields's advice makes very good sense. Who wants the condemnation and stigma that would follow the shooting of a knife-wielding kid from the ghetto over fifty dollars and some credit cards?

From the perspective of a woman, or a husband or father who thinks seriously about potential threats to women he loves, the calculation changes dramatically. It is certainly debatable whether the Central Park jogger would have been better off having had, and used, a gun in self-defense rather than giving her assailants what they wanted.

The threat calculation is also different for individuals whose differences make them targets, e.g., someone who is the "wrong" color in the wrong place, interracial couples who might be the "wrong" combination many places, openly gay or lesbian individuals or couples in many places in America.

Many people who fall into any of these categories might easily find the blind spot in the HCI threat model elitist, insensitive or flatly offensive. To the degree that the HCI threat model influences legislation and policy, it is dangerous. That it is unreflectively endorsed by public representatives of groups whose threat models it ignores, is baffling.

by those who wish to preserve for individuals the opportunity to use guns for the core self-defense purposes identified by the Model Penal Code,³⁸ but ultimately he must cut deep into territory that one need not explore to sustain the gun right.

Regan acknowledges that the innocence of the fetus creates wrinkles in his self-defense analogy.³⁹ The law imposes a duty to retreat where the attacker is innocent or where the "victim" has provoked the attack.⁴⁰ Regan answers that while a pregnant woman generally has done "something which made her pregnancy more likely," in cases where she has used contraception, she has not "invited" attack by the fetus.⁴¹

The gun right avoids this wrinkle. In the model case, the victim may not invite or provoke the attack. If she does, the self-defense claim generally fails.⁴²

At another stage of the comparison, however, the gun right faces more difficulty. Regan contends that abortion is an essential liberty because it is the only remedy that will save the woman from the harms of pregnancy and child birth.⁴³ That claim is harder to make for the gun-user, who might have a number of alternatives to armed self-defense. This allows two general points.

First, it invites the observation that passive avoidance measures such as locking doors and avoiding "dangerous" places are to the gun argument as abstinence or contraception are to the abortion argument. Avoidance responses, like more police and better locks,⁴⁴ are non-responsive to the problem that the (pg.108) gun right addresses—*viz.*, what happens where avoidance mechanisms have failed. A woman facing an unwanted pregnancy will find exhortations to celibacy or contraception equally non-responsive.

Second, it highlights the objection that self-defense and armed self-defense are different. I deal with this objection in detail in Part IV, drawing upon responses to similar objections of over-inclusiveness in the abortion debate. Also I argue there, as I have elsewhere,⁴⁵ that the objection does not take self-defense against deadly threats seriously. As governmental choices of defense tools show, guns are unparalleled instruments of self-defense.⁴⁶ Moreover, empirical work shows the gun's deterrent/threat value (its capacity to stop aggression without being fired) is unmatched.⁴⁷ The alternative of contact weapons would sacrifice this deterrent value and effectively deny self-defense to physically weaker or outnumbered people who may need it most.⁴⁸

³⁸ See Regan, *supra* note 11, at 1613-14; MODEL PENAL CODE § 3.01-.04 (Official Draft 1962).

³⁹ See Regan, *supra* note 11, at 1612; see also *infra* Part IV.

⁴⁰ See Regan, *supra* note 11, at 1612 (citing RESTATEMENT (SECOND) OF TORTS § 63 cmt. b (1965)).

⁴¹ See *id.*

⁴² See *id.* (acknowledging the failure of the self-defense claim where the "victim" has provoked the violence).

⁴³ See *id.* at 1613 ("The woman cannot be spared the burdens of pregnancy without killing the fetus").

⁴⁴ It is debatable whether calling the police is properly within the category of avoidance strategies. There is a significant difference between passive measures like locks or barred windows, and defensive violence delegated to police. As I will argue in Part V, Section F, there is very little moral distinction between self-defense and the delegation of defensive violence to police. See also Kates, *supra* note 32, at 120 (arguing that if it is immoral to use deadly force in self-defense it is equally immoral to delegate that task to others).

⁴⁵ See Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1, 37-53 (1992).

⁴⁶ See Kleck & Gertz, *supra* note 32, at 151-52.

⁴⁷ See, e.g., *id.*

⁴⁸ For more detailed treatment of this issue, see *infra* Part VI.

Regan's last analogy is between unwanted pregnancy and rape.⁴⁹ He concedes that a significant barrier to the rape analogy is the innocence of the fetus.⁵⁰ To account for this, Regan employs a hypothetical "innocent rapist" and then advocates a right to self-defense against him.⁵¹ In this comparison, (pg.109) Regan again travels through territory and relies upon points that support a right of armed self-defense against a willful criminal attacker.⁵² To make the case for abortion rights in this context, he must move well beyond the "model case" of the willful criminal attacker to the fantastic example of the "innocent rapist" whose circumstances are closer to the unwanted fetus.⁵³

Regan acknowledges that the right of self-defense grows substantially from an asymmetry of claims to physical integrity between the attacker and the victim.⁵⁴ As Regan shows, this asymmetry is most severe where the attacker is a criminal aggressor—the primary concern of those who advocate strong protection for a right of armed self-defense. Attention to this asymmetry underscores the comparative weakness of the abortion argument. The armed victim's duty toward her attacker is significantly diminished by the attacker's aggressive action. As Regan's analogies show—e.g., the innocent rapist—establishing that same asymmetry between the mother and the fetus is much harder.

Regan's analysis has been widely cited.⁵⁵ His self-defense arguments are squarely within the intersection of the abortion and gun rights. This demands reflection by those who find Regan convincing but who also adopt the standard position.(pg.110)

2. *Self-Defense Against the Fetus as Person*

Judith Thomson uses the self-defense analogy to support abortion choice as a matter of moral philosophy.⁵⁶ Thomson intentionally surrenders much of the contested ground in the abortion debate, granting for the sake of argument that the fetus is a person at conception. Through a series of

⁴⁹ See Regan, *supra* note 11, at 1616. Regan acknowledges that there are differences between unwanted pregnancy and rape that make the comparison imprecise, but he contends they are differences in degree rather than kind. See *id.* The statistical risk of death from rape is greater. Arguably the intrinsic horror of rape is greater. However, Regan argues that there is surely an element of horror to an unwanted pregnancy. See *id.* at 1617.

⁵⁰ See *id.* at 1616-17.

⁵¹ See *id.* at 1617. He posits a woman being raped by a man she knows is suffering from an insane delusion that she is his wife who enjoys resisting and being taken by force. The man's only delusion is about the identity of the woman he is attacking. Regan speculates that if such a case arose, "a privilege to use deadly force would be found." *Id.*

But it might be thought that the rape is different; that the injury from rape depends more on the hostility of the attacker. It might therefore be argued that deadly force cannot be used on the innocent rapist, or, by extension, on the fetus.

⁵² See *id.* at 1617-18. For a discussion of a woman's right to use deadly force to repel rape, see Don B. Kates & Nancy J. Engberg, *Deadly Force Self-Defense Against Rape*, 15 U.C. DAVIS L. REV. 873 (1982).

⁵³ See Regan, *supra* note 11, at 1617.

⁵⁴ See *id.* at 1618.

⁵⁵ See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 383 n.61 (1985) (Justice Ginsburg, at the time, was a Judge on the D.C. Circuit Court of Appeals); Sunstein, *supra* note 14, at 31 n.120.

⁵⁶ See Thomson, *supra* note 14, at 52-53. Jane Cohen calls this Thomson's "justly famous essay." Jane Maslow Cohen, *Comparative Shopping in the Marketplace of Rights*, 98 YALE L.J. 1235, 1235 (1989).

analogies she shows that it is a long and uncertain journey from there to strict prohibition of abortion.⁵⁷

You wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours.... To unplug you would be to kill him.... [R]emember.... all persons have a right to life, and violinists are persons.⁵⁸

Thomson argues that one's natural outrage as the victim of this arrangement helps illustrate the distance between a declaration that the fetus is a person and a prohibition on abortion.

Like Regan, Thomson builds her case for abortion rights on themes that more easily support armed self-defense. The view that we may not intervene, even to save the life of the mother⁵⁹ falls to her argument that the mother surely would have (pg.111) a right to abort, where the fetus was threatening her life.⁶⁰

Thomson takes the point further with an analogy that is illuminating in its content and tone. She posits the case of a mother trapped in a very small house with a rapidly growing child.⁶¹ The child is growing at such a rate that it soon will crush the mother against the walls of the house.⁶² Thomson presses the self-defense point in rhetoric that is instructive. Under these circumstances, she insists, "it cannot be concluded that [the woman] can do nothing, *that you cannot attack it to save your life.*"⁶³

There is a notable dissonance between this rhetoric and the emotions that typically accompany parenthood, even in cases where the child is unplanned. Thomson's suggestion of a "right to attack" the life-threatening child does not seem to capture the decision faced by the mother whose life is threatened by a problem pregnancy. Thomson's account connotes indignation about having been assaulted. This certainly resonates in the context of armed self-defense against a criminal attack. But is it accurate to say that women who choose abortion think of themselves as attacking the fetus? The scenario Thomson poses, seems more a "tragic choice"⁶⁴ between conflicting virtues than a violent contest where a victim resists and triumphs over a wrongful aggressor.

⁵⁷ See Thomson, *supra* note 14, at 48. She presumes as the argument against abortion that: Every person has a right to life. So the fetus has a right to life. No doubt the mother has a right to decide what shall happen in and to her body.... But surely a person's right to life is stronger and more stringent than the mother's right to decide what happens in and to her body, and so outweighs it.

Id.

⁵⁸ *Id.* at 48-50.

⁵⁹ On this view the fetus is a person, and taking the life of a person is always murder and always wrong. See *id.* at 50.

⁶⁰ See *id.* at 52.

⁶¹ See *id.*

⁶² See *id.*

⁶³ *Id.* (emphasis added).

⁶⁴ Guido Calibresi coined the term "tragic choice" to connote legal choices allocating great burdens where "basic ideals are in irreconcilable conflict." Guido Calibresi, Bakke as *Pseudo-Tragedy*, 28 CATH. U. L. REV. 427, 428 (1979).

The dissonance grows as Thomson layers the analogy with the further indignation of the woman being crushed to death in her own home.⁶⁵ Knowing that the woman owns the house, she contends, compels a bystander to choose between the woman and the child.⁶⁶ It is not mere impartiality to say that we cannot choose between the two.⁶⁷ (pg.112)

[T]he mother and the unborn child are not like two tenants in a small house which has, by an unfortunate mistake, been rented to both: the mother *owns* the house. The fact that she does adds to the offensiveness of deducing that the mother can do nothing from the supposition that third parties can do nothing. But it does more than this: it casts a bright light on the supposition that third parties can do nothing. Certainly it lets us see that a third party who says "I cannot choose between you" is fooling himself if he thinks this is impartiality. If Jones has found and fastened on a certain coat, which he needs to keep him from freezing, but which Smith also needs to keep from freezing, then it is not impartiality that says "I cannot choose between you" when Smith owns the coat. Women have said again and again "[t]his body is *my* body!" and they have reason to feel angry, reason to feel that it has been like shouting into the wind.⁶⁸

The dissonance is clearer here. Thomson's relation of the woman's anger seems misplaced. While anger easily might be directed toward social and legal structures that complicate an already tragic choice, it is harder to imagine the woman feeling toward the *fetus* the type of anger that Thomson describes. It is much easier to understand this type of anger directed at the criminal aggressor who forces a victim to shoot in self-defense. This illustrates in a different way that the themes Thomson employs support armed self-defense more easily than they do the abortion right.⁶⁹

Thomson's next analogy parallels the case of the fetus who is not a threat to the life of the mother. The equivalent, she suggests, is again our kidnapping victim, who this time learns that she can save the life of the violinist merely by staying connected to him for an hour.⁷⁰ Thomson argues that while it would be indecent for one to refuse the violinist under these (pg.113) circumstances, that does not translate into a right of the violinist to demand assistance.⁷¹ She argues that laws prohibiting abortion require the mother to act as a good samaritan for the benefit of the fetus, in a way that is vastly inconsistent with our general views of when one is compelled to give assistance to save the life of another.⁷² She finishes with a point that is important here: "[T]he groups currently working against liberalization of abortion laws, in fact working toward having it declared unconstitutional

⁶⁵ See Thomson, *supra* note 14, at 52.

⁶⁶ See *id.* at 53.

⁶⁷ See *id.*

⁶⁸ *Id.*

⁶⁹ Thomson also acknowledges that in the case of voluntary pregnancy the self-defense analogy breaks down. See *id.* at 58. Where the woman "voluntarily called [the fetus] into existence, how can she now kill it, even in self-defense?" *Id.* She answers that voluntariness establishes at most that there are some cases in which abortion is unjust killing. See *id.* at 59. It does not establish that all abortion is unjust killing. See *id.*

⁷⁰ See *id.* at 59.

⁷¹ See *id.*

⁷² See *id.* at 63.

for a state to permit abortion, had better start working for the adoption of Good Samaritan laws generally, or earn the charge that they are acting in bad faith."⁷³

Thomson's suggestion that abortion restrictions put a unique burden on women to act as samaritans—made more forcefully as an equal protection argument—is according to Cass Sunstein, one of the strongest theoretical justifications for the abortion right.⁷⁴ Her challenge invites a similar one to commentators who ground the abortion right on self-defense principles but still embrace the standard position. I do not argue that inconsistency on these issues necessarily earns the charge that people are acting in bad faith. As I indicate in Part VI, reconciliation might be possible.

Within the samaritan critique, the armed citizen can raise strong objections that parallel Thomson's points on abortion. Perhaps a splendid samaritan would undertake to assist a small, but widely distributed and unidentified group of putative victims by sacrificing her personal firearm (on the view (pg.114) that her gun might fall into the wrong hands and be used criminally against one of them).⁷⁵ But given the relative duties of the right bearers (the woman toward the fetus and the armed citizen toward other citizens generally), forcing such an obligation by banning defensive firearms would be a greater imposition of samaritan duty than occurs in the abortion context.

Finally, Thomson deals with the objection that her argument misses the point: that it is not merely a view of the fetus as a person that fuels opposition to abortion, but also the responsibility of the parents to the fetus.⁷⁶ Thomson responds that the parents have no such special responsibility until the child is born and they make the affirmative decision to take it home.⁷⁷ She seems to be alone on this view of parental responsibility.

Notwithstanding Thomson's view it is clear that parental responsibility, the causal link between actions of the parents and the plight of the fetus are central to the self-defense analogies that she draws upon. This is apparent from Donald Regan's discussion above, explaining that the self-defender may not use lethal violence where she has "caused" the confrontation in the first place.⁷⁸ (pg.115)

⁷³ *Id.* at 63-64.

⁷⁴ Cass Sunstein suggests a growing consensus among legal theorists that this argument is the best conceptual foundation for the abortion right. *See* Sunstein, *supra* note 14, 31 n.120. *See also* text accompanying notes 119, 120, 149.

On this view, abortion restrictions improperly require women to act as samaritans, because the same thing is not demanded of men. In fact, this is only true of fertile, post-pubescent, pre-menopausal women. It is not then strictly sex discrimination, but a burden that attaches to a particular biological characteristic. *But see* Ginsburg, *supra* note 55, at 382 (arguing that abortion restrictions are not merely conditions relevant to biological characteristics, because gender is a social construction).

⁷⁵ The samaritan argument also might yield the opposite conclusion. The citizen who eschews gun ownership might significantly diminish her ability to protect another who is encountering a violent assault. *Cf.* George P. Fletcher, *Defensive Force as an Act of Rescue*, SOC. PHIL. & POL'Y, Spring 1990, at 174 (analyzing the Talmudic duty of rescuing one's neighbors from catastrophic danger, particularly in the case of rape).

⁷⁶ *See* Thomson, *supra* note 14, at 64.

⁷⁷ *See id.* at 65. Thomson argues that:

[W]e do not have any such "special responsibility" for a person unless we have assumed it, explicitly or implicitly. If a set of parents do not try to prevent pregnancy, do not obtain an abortion, and then at the time of birth of the child do not put it out for adoption, but rather take it home with them, then they have assumed responsibility for it....

Id.

⁷⁸ *See* Regan, *supra* note 11, at 1612. Donald Regan, who uses both the samaritan and self-defense analogies in support of abortion choice, would impose parental responsibility for the fetus earlier. Regan contends that the samaritan analogy sustains the *Roe* trimester approach since "the woman who allows her pregnancy to reach the third trimester without having an abortion ... has waived her right of non-involvement with the fetus." *Id.* at 1643.

For our purposes, the relative responsibility of the right-bearers helps to order the two liberties. As discussed in detail in Part IV, the parents have a greater responsibility for the fetus than does the armed victim for the criminal attacker in the "model case."⁷⁹ In this context, the gun-rights claim is stronger.

II. SOCIAL FAILURE, AUTONOMY, PERSONAL CRISIS, AND SELF-DETERMINATION: PRIVATE CHOICE IN PIVOTAL LIFE DECISIONS

An array of formulations draw upon principles of autonomy, choice in personal crisis, social failure and physical integrity, to advance conceptions of essential liberty that support the abortion right. These themes coalesce roughly in the Supreme Court's latest abortion-rights decision, *Planned Parenthood v. Casey*.⁸⁰ These same themes support equally, and often more powerfully, a right to armed self-defense against criminal attack.⁸¹ Indeed, the *Casey* decision is explicit in the suggestion that the abortion right rests on a foundation of fundamental rights that includes an individual right to arms. Sections A through D discuss the themes that have emerged in the abortion-rights literature and the intersection of these themes with gun-rights arguments. Section E discusses *Casey*.^(pg.116)

A. *Grounding Rights on Social Failures: A Modified Rawlsian Account*

Robin West offers a general conception of rights that might provide a stronger justification for abortion rights.⁸² She calls her formulation a "modified Rawlsian" account: "To whatever degree we fail to create the minimal conditions for a just society, we also have a right, individually and fundamentally, to be shielded from the most dire or simply the most damaging consequences of that failure."⁸³ By West's account, a just society must have more than the qualities described by Rawls.

[A] just society is a society in which being a mother with attached, connected, or simply dependent children, does not unduly burden participatory citizenship. Indeed, I would take this insight further: A just society is one in which "connected relationality"—whether through motherhood, fatherhood, sisterhood, brotherhood, intimacy, friendship, or whatever—not only does not unduly burden participatory citizenship, but is central to our conception of participatory citizenship. Such a world would be more just than the world we presently inhabit. It would also be a very different world; it would require not only a displacement, but a transformation of our prevailing norms of citizenship.

In the meantime, we have a right, I would argue, to be shielded from the harshest consequences of our failure to secure such a world. The abortion right partakes of this second-best, residual, transitional form. We must have the right to opt out of an unjust

⁷⁹ Parental responsibility is central to the communitarian critique of abortion and the communitarian pairing of abortion and gun rights that is discussed in Part IV.

⁸⁰ 505 U.S. 833, 851 (1992).

⁸¹ The same broad theme has fueled arguments that the foundation of the abortion right also supports a constitutional right to assisted suicide. See, e.g., Sanford H. Kadish, *Letting Patients Die: Legal and Moral Reflections*, 80 CAL. L. REV. 857, 888 (1992); Tom Stacy, *Death, Privacy and the Free Exercise of Religion*, 77 CORNELL L. REV. 490, 496 (1992) (suggesting a "deep symmetry" between the right to abortion and the right to die). But see, e.g., Seth F. Kreimer, *Does Pro-Choice Mean Pro Kevorkian? An Essay on Roe, Casey, and The Right to Die*, 44 AM. U. L. REV. 803, 837 (1995).

⁸² See generally Robin L. West, *The Nature of the Right to an Abortion*, 45 HASTINGS L.J. 961 (1994).

⁸³ *Id.* at 964-65.

patriarchal world that visits unequal but unparalleled harms upon women with wanted and celebrated children, and even more serious harms upon women with unwanted pregnancies.⁸⁴

The question for our purposes is whether it is fair to exclude from this account, a woman's choice of armed self-defense against assault, rape or the "grim world of terror abuse and violence" that radical feminists have argued is the reality for many women in the private sphere.⁸⁵ To the extent that women (pg.117) voluntarily participate in the act that leads to an unwanted fetus,⁸⁶ the abortion right responds to a less obvious societal failure. Arguably, the greater failure is where women cannot feel safe from physical assault away from or in their homes.

West's principle extends not just to women. It is a solid foundation for a right to armed self-defense for all citizens in a society where physical assault is a real danger and where collective measures to address the problem are demonstrably inadequate.⁸⁷ Gary Kleck confirms, empirically, what should be obvious: "police primarily respond reactively to crimes *after* they have occurred.... Police officers rarely disrupt violent crimes or burglaries in progress...."⁸⁸ Moreover, police have no legal duty to protect individual citizens.⁸⁹ With collective mechanisms structurally inadequate, armed self-defense responds (pg.118) to a more direct and serious failure than the one West contends sustains the abortion right.

This conclusion is strengthened when we measure West's position against both the traditional theoretical justification for self-defense and Rawlsian arguments for expansion of self-defense in battered women cases.⁹⁰

⁸⁴ *Id.* at 965.

⁸⁵ *See id.* at 963.

⁸⁶ *But see* CATHARINE A. MACKINNON, *Desire and Power*, in *FEMINISM UNMODIFIED* 46-62 (1987) (describing women's role as passive objects in society); CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade*, in *FEMINISM UNMODIFIED* 43, 95 (1987) (suggesting that women feel compelled to encourage male initiative in sexual expression); Linda C. McClain, "Irresponsible" Reproduction, 47 *HASTINGS L.J.* 339, 428-29 (1996) (arguing that most female adolescent sexual activity results from abuse, exploitation, coercion and aggression).

⁸⁷ The conception of rights that West advances rings similar to Blackstone's view of the right to possess arms for self-defense. "The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defense.... when the sanctions of society and laws are found insufficient to restrain the violence of oppression." 1 *WILLIAM BLACKSTONE, COMMENTARIES* *143-44 (citation omitted).

There is, however, a notable difference. West's conception establishes abortion as a transitional right, pending transformation of our patriarchal society. *See* West, *supra* note 82, at 965. Blackstone appears to base his right to armed self-defense on the premise that the societal safety net against physical threats might fail from time to time. *See* BLACKSTONE, *supra*, at *144. West seems to believe that the eradication of patriarchy would be necessarily permanent. *See* West, *supra* note 82, at 965.

⁸⁸ KLECK, *supra* note 8, at 121.

⁸⁹ *See, e.g.,* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989); Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982); Warren v. District of Columbia, 444 A.2d 1, 3 (D.C. 1981); *see also* Kates, *supra* note 32, at 123-24 (citing cases and statutes). *But see* Thurman v. City of Torrington, 595 F. Supp. 1521, 1527-28 (D. Conn. 1984) (holding that plaintiff who alleged that a municipal police department policy of non-intervention in domestic disputes discriminated against women as a class stated a valid cause of action).

⁹⁰ *See, e.g.,* Benjamin C. Zipursky, *Self-Defense, Domination, and the Social Contract*, 57 *U. PITT. L. REV.* 579, 605 (1996). Zipursky's Rawlsian critique argues that political and societal failure can justify self-defense by battered women even absent an imminent threat of death or serious bodily harm. *See id.*

Social/political failure or incompetency (viz., the inability of collective mechanisms to respond to an imminent violent threat) are core rationales for our traditional right of self-defense.⁹¹ The state's inability to stop imminent criminal attacks justifies, and indeed compels, a right to armed self-defense to fill the gap.⁹²

[T]he imminence requirement expresses the limits of governmental competence: when the danger to a protected interest is imminent and unavoidable, the legislature can no longer make reliable judgements about which of the conflicting interests should prevail. Similarly, *when an attack against private individuals is imminent, the police are no longer in a position to intervene and exercise the state's function of securing public safety. The individual right to self-defense kicks in precisely because immediate action is necessary.*⁹³

The gun right rests solidly on this inevitable failure. West grounds the abortion right on a more amorphous deficiency.

Arguing for a broader right of self-defense for battered women, Ben Zipursky would excuse the imminent threat requirement to allow deadly force where the woman has no access in fact to genuine alternatives.⁹⁴ He presents *State v. Norman*⁹⁵ (pg.119) as the typical "no access" case:

Judy Norman experienced decades of serious physical and emotional abuse from her husband. She killed [shot] him while he slept, but he had stated that he would kill her when he awoke. He had tracked her down on every previous occasion on which she had tried to escape. Her efforts to have him institutionalized failed and caused her to be more severely abused. The authorities had permitted him to return home.⁹⁶

Zipursky argues that from a social contract perspective, physical, psychological, sexual and political domination of women is a reason to favor a self-defense rule that does not require imminence.⁹⁷ Zipursky builds this idea on Rawls's "original position,"⁹⁸ expanding the boundaries

⁹¹ See *id.* at 585.

⁹² See *id.* at 585 & n.17 (quoting George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 570 (1996) (discussing allocation of authority where public resources fail and diminished competency where public resources are absent) (citing GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* (1978))).

⁹³ *Id.* (emphasis added).

⁹⁴ See Zipursky, *supra* note 90, at 583.

⁹⁵ 366 S.E.2d 586 (N.C. 1988).

⁹⁶ Zipursky, *supra* note 90, at 583. Zipursky notes the objection that allowing self-defense as an excuse in these cases invites sexist stereotypes of women as pathetic victims, who should not be held responsible for their actions. See *id.* at 580. Feminists have criticized that those same stereotypes fuel the argument that women ought not possess guns for self-defense. See Mary Ziess Stange, *Arms and the Woman: A Feminist Reappraisal*, in *GUNS: WHO SHOULD HAVE THEM* 15, 20 (David B. Kopel ed., Prometheus Books 1995).

⁹⁷ See Zipursky, *supra* note 90, at 596. Zipursky contends that we could properly eliminate the imminence requirement in cases where a woman has no effective access to alternatives—cases in which the assailant would have inflicted grievous bodily harm or death upon the defendant had she not resorted to defensive aggression. See *id.* at 609. The lack of an alternative is shown where the woman has tried to leave in the past but the man has tracked her down, retrieved her, and beat her again. See *id.* at 584. She has tried the police, but they have failed to offer adequate protection, and she has been beaten for seeking protection; she is economically or psychologically dependent upon the man. See *id.*

⁹⁸ See *id.* at 587 ("[W]hat sort of structure would be chosen by a rational person selecting a basic structure for society without knowing his or her wealth, occupation, religion, ideology, race, gender, abilities, disabilities and so on?").

of self-defense in a way that closely tracks West's argument⁹⁹ that the right (pg.120) to choose abortion is essential to redressing the injustices levied on women under patriarchy.¹⁰⁰ Zipursky argues that a system that prohibits the no-access self-defense justification cannot ask for the rational allegiance of women.¹⁰¹

The basic failures that leave a battered woman with no access to real options outside lethal violence are similar to those that West claims sustain the abortion right. But the parent's responsibility for the plight of the fetus makes the battered woman's claim for a compensating self-defense right stronger.

Compared either to the model case of traditional self-defense or Zipursky's expanded formulation, the abortion right rests on a more tenuous connection between societal failure and the fair demand for a responsive right. As against either the imminent criminal attacker or the abusive mate in temporary repose, the fetus is overwhelmingly innocent of responsibility for the crisis. The parents in the abortion context also have several degrees more control over the crisis and contribute to it directly through discretionary acts or even negligence. This does not bar West's claim for the abortion right, but it does show that the abortion claim is comparatively weaker under her theory than is the claim for armed self-defense.

B. "Castle" as a Location of Inviolability, Autonomy, and Reproductive Freedom

Linda McClain uses the trilogy of "castle, sanctuary and body" to develop a conception of inviolability that might help "to secure women's sexual autonomy, to achieve reproductive autonomy and to eliminate violence against women."¹⁰² She presents this trilogy "as familiar location[s] of the law's protection (pg.121) of inviolability."¹⁰³ McClain describes this project as only a first step toward a view of inviolability that will address an array of concerns women have under patriarchy.¹⁰⁴ While McClain warns that she has not completed the connections,¹⁰⁵ it is useful for our purposes to examine one of her operative principles and its traditional parameters.

As David Caplan notes, defending the castle/home by force of arms is a vaunted Anglo-American tradition.¹⁰⁶ The Model Penal Code reflects the castle doctrine by eliminating the duty to retreat when being attacked in one's own dwelling.¹⁰⁷ The castle defense is acknowledged

⁹⁹ Zipursky argues that from the original position, rational decision-makers, calculating the possibility that they might be women when the veil of ignorance is lifted, could easily select a "no-access" self-defense rule that eliminated the requirement of imminence. *See id.* at 594. Those who know they will be men would not. This illustrates how the no-access rule is affected by male domination of women. *See id.* According to Zipursky, the no-access rule thus becomes an essential feature of a just society, so long as there is domination by men over women. *See id.* at 596.

¹⁰⁰ Similarly, Catharine MacKinnon argues that abortion is an essential "transitional right." *See* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1326-27 (1991).

¹⁰¹ *See* Zipursky, *supra* note 90, at 596.

¹⁰² Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 196 (1995).

¹⁰³ *Id.* at 195.

¹⁰⁴ *See id.* at 240.

¹⁰⁵ *See id.*

¹⁰⁶ *See* David I. Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 DET. C.L. REV. 789, 807, 809.

¹⁰⁷ *See* MODEL PENAL CODE § 3.04 (2)(b)(ii)(A).

explicitly in feminist self-defense critiques.¹⁰⁸ In an examination of self-defense by battered women, Richard Rosen notes that "[t]he law almost never requires retreat in the home—the 'castle' exception—because of society's recognition of the sanctity of the home."¹⁰⁹ Rosen gives representative examples of the array of cases in which the idea of castle enhances the self-defense claim.¹¹⁰

McClain acknowledges this connection but seemingly grudgingly.

One dimension of the idea of the home as castle is the right of a man or woman to protect the home and persons within it against intrusion or attack by using force. A disturbing recent example of the misapplication of such a right involved an acquittal of a homeowner for fatally shooting a Japanese exchange student who mistakenly approached the home looking for a party. [The defense lawyer claimed], (pg.122) "[a]mericans have the absolute legal right to answer everyone who comes to their door with a gun." In a subsequent civil trial brought by the student's parents, however, a judge found "no justification whatsoever" for the killing and awarded damages.¹¹¹

The idea of castle may help to further feminist goals. But outside certain limited contexts, it seems an uncomfortable one for feminists. McClain's response to feminist arguments that privacy jurisprudence is an illusion for women reflects this point.¹¹² She acknowledges the criticism that privacy in the home and domestic life has benefited men and imperiled women's bodily integrity and decisional autonomy.¹¹³ Nonetheless, she argues that it is possible to use privacy and inviolability in ways that will protect women's interests.¹¹⁴

One might take from this a claim that women can indeed benefit from the idea of castle—but only if we pursue privacy values or the notion of inviolability in an aggressive but principled way. It is unclear, though, how principled use of the idea of castle to achieve feminist goals would avoid the tradition of armed self-defense firmly located there. Indeed, concerns about bodily integrity and protection against violent threats that partly animate McClain's effort, require serious consideration of tools and strategies of self-defense.

A right of armed self-defense is deeply embedded in the idea of castle on which McClain hopes to build. Moreover, the idea of castle arguably supports armed self-defense more easily than

¹⁰⁸ See, e.g., Thomson, *supra* note 14.

¹⁰⁹ Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371, 390 (1993). Rosen argues that imminence is merely a translator for necessity; that the battered women's cases present such necessity and a justification for deadly self-defense, even absent classic imminence. See *id.* at 380, 404.

¹¹⁰ See *id.* at 389 n.51. See also *Payton v. New York*, 445 U.S. 573, 596 n.44 (1980) (quoting *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603)).

¹¹¹ McClain, *supra* note 102, at 205 n.30 (citations omitted). McClain's commentary also can be read as a more limited criticism, focusing on the use of lethal force to protect property. She would acknowledge that defense of the person is a stronger case. See *id.* at 203.

¹¹² See *id.*

¹¹³ See *id.* at 209.

¹¹⁴ See *id.* at 207-11.

it supports a right of procreative freedom.¹¹⁵ At a minimum, procreative autonomy grounded in the idea of the inviolable castle must share space with the right of armed self-defense.^(pg.123)

C. *Fundamental Rights and the Essence of Liberty*

Susan Estrich and Kathleen Sullivan offer one of the most comprehensive treatments of the theories and principles that might support the abortion right.¹¹⁶ They contend that abortion is within the range of autonomous choices about matters of family that the Court has long considered to be central to privacy.¹¹⁷ Elaborating on the rationale for protecting these choices, they draw upon principles from which we can just as readily draw a right of armed self-defense.

Liberty, they tell us, "requires independence in making the most important decisions in life."¹¹⁸ The abortion decision lies at the heart of protected constitutional choices because "*few* decisions can more importantly alter the course of one's life than the decision to bring a child into the world."¹¹⁹ The gun right thrives under this analysis.

Arguably, *no* decision has more potential to alter the course of one's life than one's response to the threat of death or serious bodily injury.¹²⁰ The choice of armed self-defense deserves equal, if not more, protection than the abortion choice since the right-bearer's very existence, rather than just the ^(pg.124) quality of it, is at stake.

I do not contend that armed resistance to violent threats is always the right choice. No one makes that claim about abortion either. The point is that each offers an option that can dramatically affect the course of a life-changing crisis. In many cases, eliminating the option will have catastrophic effects.¹²¹

Estrich and Sullivan contend that "keeping reproductive choice in private hands is essential to a free society."¹²² "Regimentation of reproduction," they argue, is a "hallmark of the totalitarian

¹¹⁵ For one thing, the abortion right often is exercised outside the home and requires the assistance of a third party who is engaged in a commercial enterprise. For another, traditional and historical connections between the idea of castle and armed self-defense are much more firmly established.

¹¹⁶ See Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 119-55 (1989). Estrich and Sullivan characterize the article as their "best try, using whatever legal and persuasive talents we have" to convince Justice O'Connor to champion the abortion right. *Id.* at 123. Reflecting this broad ambition, the article presents not a single theory, but the full array of arguments in favor of the abortion right. *See id.* at 119-55.

¹¹⁷ *See id.* at 130-31.

¹¹⁸ *Id.* at 127 (citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)).

¹¹⁹ *Id.* (emphasis added).

¹²⁰ Views on this will be tempered by one's image of the circumstances in which the threat emerges and its immediacy. In some cases, the victim has no real choice because the threat is upon her before she can react. Focusing only on those cases, the comparison breaks down, because there is no opportunity to "choose" self-defense or anything else.

There is, however, an entire constellation of threats where the victim has the choice of submitting or fighting back. The empirical findings of Professor Kleck and others indicate that there are millions of successful acts of armed self-defense each year, most of which do not involve discharge of a weapon. *See* KLECK, *supra* note 8, at 106.

¹²¹ Speaking more broadly, the two choices present what we might concede are essentially equal concerns. On issues like these, it is probably impossible to construct a rigid hierarchy by which to rank personal crises. It is enough to say that to abort a fetus or to use a gun in self-defense are both horrible choices that individuals will face in times of deep personal crisis. In both cases, we can say, that not having a choice is worse.

¹²² Estrich & Sullivan, *supra* note 116, at 130.

state, from Plato's republic to Hitler's Germany....¹²³ "Preserving a private sphere for childbearing and child-rearing decisions not only liberates the individual; it desirably constrains the state."¹²⁴

From the earliest commentaries to the present, this precise claim has been made about the Second Amendment. Joseph Story's 1833 commentary hailed the right of the citizens to keep and bear arms as "the palladium of the liberties of a Republic,"¹²⁵ adding that "one of the ordinary modes, by which tyrants accomplish their purpose without resistance, is, by disarming the people, and making it an offense to keep arms."¹²⁶ An armed citizenry not only serves the private function of self-defense. It is a solid constraint on the physical coercion that Estrich and Sullivan's examples show to be a basic tool of totalitarian regimes.¹²⁷ (pg.125)

Sanford Levinson cautions that it might be painfully short sighted to discard the constraint on the state that individual arms provide.¹²⁸ William Van Alstyne emphasizes the Framers' vision of an armed citizenry as a component of the security of a "free state" which he points out is quite distinct from the security of "the State."¹²⁹ In a study of government genocides, Jay Simkin, Aaron Zelman and Alan Rice argue that one hallmark of the totalitarian state is the confiscation of private firearms.¹³⁰ Tracking the patterns of genocides over the past 100 years, they argue that as a practical matter, governments cannot commit genocide except on effectively disarmed populations.¹³¹ Abortion choice as a barrier against totalitarianism (pg.126) is a minor theme for Estrich and Sullivan.

¹²³ *Id.*

¹²⁴ *Id.* (citing Jed Rubenfeld, *The Right To Privacy*, 102 HARV. L. REV. 737, 804-07 (1989)).

¹²⁵ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 746 (Carolina Academic Press 1987) (1883).

¹²⁶ JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (Harper & Bros. 1883). This is one place where arguments about the collective political value of an armed citizenry intersects with abortion-rights arguments.

¹²⁷ Joseph Story's comments suggest that the classically educated Founding Fathers were well acquainted with Aristotle's dictum that basic to tyrants is "mistrust of the people; hence they deprive them of arms." ARISTOTLE, POLITICS 218 (Betty Radice ed., Thomas Alan Sinclair trans., Penguin Books 1962). The Founding Fathers also recognized Aristotle's teaching that confiscation of the Athenians' personal arms had been instrumental to the tyrannies of the Peisistratus and the Thirty. See ARISTOTLE, THE ATHENIAN CONSTITUTION 47, 105 (H. Rackham trans., Harvard University Press 1952).

¹²⁸ See Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 656-57 (1989).

¹²⁹ See Van Alstyne, *supra* note 33, at 1244-45.

¹³⁰ See JAY SIMKIN ET AL., LETHAL LAWS (1995). Don B. Kates, Jr. and Daniel D. Polsby provide a good summary of the book. See Don B. Kates, Jr. & Daniel D. Polsby, *Of Genocide and Disarmament*, 86 J. CRIM. L. & CRIMINOLOGY, 247, 247-56 (1995) (book review).

¹³¹ For instance, had its 1-3 million Cambodian victims been armed, it is far from clear that a Khmer Rouge army numbering less than 100,000 could have murdered them. At least, the Khmer Rouge doubted they could have done so. The Cambodians were already largely disarmed, guns having been prohibited from the time of the French occupation. Nevertheless, as a prelude to the geno-politicide, the Khmer Rouge took the extraordinary precaution of a nationwide house-to-house and hut-to-hut search to assure that the citizenry was indeed helpless. The rationale the Khmer Rouge gave their victims for disarming is eerily familiar with the standard position on gun ownership for self-defense. The Khmer Rouge soldiers would:

knock on the doors and ask the people who answered if they had any weapons. "*We are here now to protect you,*" the soldiers said, "*and no one has a need for a weapon any more.*" People who said that they kept no weapons were forced to stand aside and allow the soldiers to look for themselves.

....

... [This all] took nine or ten days, and once the soldiers had concluded that the villagers were no longer armed they dropped their pretense of friendliness.

Alec Wilkinson, *A Changed Vision of God*, THE NEW YORKER, Jan. 24, 1994, at 54-55 (emphasis added).

Simkin and company employ the theme to make a much stronger case for the government-constraining effect of privately-owned firearms.¹³²

Estrich and Sullivan contend that arguments about judicial versus legislative control of abortion choice miss the point.¹³³ The important distinction, they argue, is between private and public control.¹³⁴ Certain decisions, they explain, are committed to the private sphere. The Framers never intended to commit all moral disagreements to the political arena—quite the contrary:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.¹³⁵

This invocation of a foundation of "fundamental rights" that transcends politics is predictable and appropriate. It also highlights a problem. No single fundamental right is secure unless we respect the ideal of fundamental rights generally. In the context of a broader critique, Justice Scalia illustrates the dramatic tension between this ideal and the common law model of constitutional construction that Estrich has endorsed¹³⁶ and that is vitally important in sustaining the abortion right.^(pg.127)

[T]he record of history refutes the proposition that the evolving Constitution will invariably enlarge individual rights. The most obvious refutation is the modern Court's limitation of the constitutional protections afforded to property.... So also, we value the right to bear arms less than did the Founders (who thought the right of self-defense to be absolutely fundamental), and there will be few tears shed if and when the Second Amendment is held to guarantee nothing more than the state National Guard. But this just shows that the Founders were right when they feared that some (in their view misguided) future generation might wish to abandon liberties that they considered essential, and so sought to protect those liberties in a Bill of Rights. We may *like* the abridgment of property rights and *like* the elimination of the right to bear arms; but let us not pretend that these are not *reductions* of rights.

... Perhaps the most glaring defect of Living Constitutionalism ... is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution.... What is it that the judge must consult to determine when, and in what direction, evolution has occurred? Is it the will of the majority, discerned from newspapers, radio talk shows, public opinion polls, and chats at the country club? Is it the philosophy of Hume, or of John Rawls, or of John Stuart Mill, or of Aristotle? As soon as the discussion goes

¹³² See SIMKIN ET AL., *supra* note 130, *passim*; see also Johnson, *supra* note 45, at nn.37-52.

¹³³ See Estrich & Sullivan, *supra* note 116, at 131.

¹³⁴ See *id.*

¹³⁵ See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

¹³⁶ See Susan Estrich, *Deserving of the Most Serious Scrutiny*, HARV. L. BULL., Oct. 1991, at 24 (reviewing LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* (1991)).

beyond whether the Constitution is static, the evolutionists divide into as many camps as there are individual views of the good, the true and the beautiful.¹³⁷

While Scalia's own approach to constitutional interpretation is subject to criticisms of inconsistency,¹³⁸ his critique usefully highlights the difficulty of Estrich's reliance on the theme of fundamental rights that transcend politics.

Estrich faces serious questions about her commitment to the (pg.128) ideal of fundamental rights when the question moves beyond abortion to the costly and controversial right to bear arms. Where the topic is abortion, she contends that the constitutional design places it, and other "fundamental rights," above the fray of politics and commands judges to protect them. Here, Estrich is sufficiently committed to the broad ideal of fundamental rights that she is able to discern an abortion right that is unenumerated. Yet, when the focus shifts to the right to keep and bear arms, which Scalia contends suffers from the very threats that the fundamental rights ideal is meant to resist, Estrich's aggressive commitment to the ideal of fundamental rights withers.

Estrich has entered the gun-rights debate through an open letter published in several national political magazines and the *American Lawyer*. She and twenty-six other law professors offer a view of the Second Amendment that would eliminate it as a barrier to laws prohibiting private access to firearms for individual self-defense.¹³⁹ "We want Americans to know: that the U.S. Supreme Court ruled over fifty years ago that the only purpose of the Second Amendment's 'right to keep and bear arms' is to assure the effectiveness of state militias."¹⁴⁰ The open letter fails to indicate that this is only one perspective on a deeply disputed question and fails to mention that the scholarly treatments of the Supreme Court's decisions, and of the Second Amendment generally, overwhelmingly contradict the states-rights view.¹⁴¹

Estrich's approach is a fair illustration of the standard position. At a base political level, this is unremarkable.¹⁴² At the (pg.129) level of legal theory it is fair only if one grants that our commitment to individual rights should vary substantially from one right to the next. For Estrich this cannot be the case. She and Sullivan recognize that the idea of fundamental rights is itself a principle that must be protected. "[W]e don't leave freedom of speech or religion or association to the political process, even on good days when the polls suggest they might stand a chance, at least in some states. The

¹³⁷ Antonin Scalia, *Vigilante Justices: The Dying Constitution*, NAT'L REV., Feb. 10, 1997, at 32-33. Justice Scalia does not suggest that the expansion of individual rights is inevitably a good thing. His point is that many who tout rights expansion as a primary virtue of the "living constitution" are wrong. *See id.* at 33-35.

¹³⁸ *See, e.g.*, William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 808 (1995).

¹³⁹ *See* Albert W. Alschuler, *Does the 2nd Amendment Mean We Must Tolerate This?*, AM. LAW., June 1994, at 96.

¹⁴⁰ *Id.*

¹⁴¹ *See infra* Appendix 1 (listing the scholarship on both sides of the Second Amendment question in the last fifteen years). The signers of the open letter are not on the list. Their contention that the Court has interpreted the Second Amendment to merely protect "state militias" is not accurate. The *Miller* decision to which they refer recognizes the militia to be the entire body of people. Justice Thomas's recent concurrence in *Printz v. United States*, 117 S. Ct. 2365, 2385-86 (1997) (Thomas, J., concurring), explains that the Supreme Court has never decisively ruled on the scope of the Second Amendment. *See id.* at 2385 n.1 (Thomas, J., concurring).

¹⁴² Notably, Estrich has argued against expanding the right of self-defense in battered women's cases. *See* Susan Estrich, *Defending Women*, 88 MICH. L. REV. 1430, 1432-33 (1990) (reviewing CYNTHIA GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSES AND THE LAW* (1989)).

very essence of a fundamental right is that it 'depend[s] on the outcome of no elections.'¹⁴³ Commitment to this ideal compels one to respect all fair claims of fundamental rights. If 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.¹⁴⁴ As it stands, Estrich tugs hard on both abortion and gun rights, but in opposite directions.¹⁴⁵ (pg.130)

At least superficially, Estrich's support of the common law model of constitutional interpretation promises to explain her rendition of the standard position. In a review of Professor Tribe's book advocating a common law model of constitutional interpretation, Estrich contends that this approach is attractive in part because it renders the right results.¹⁴⁶ On this view, one might say we have properly outgrown the right to bear arms, and grown into the right to abortion.

This suggests that the living constitution is flexible enough to consume rights as well as create them—precisely Justice Scalia's lament.¹⁴⁷ The problem for Estrich is that there is no reason to believe that the abortion right—or any other for that matter—is immune from being consumed by some new and different view of the good—precisely Alan Dershowitz's warning.¹⁴⁸ Indeed, the abortion right seems more deeply at risk, since it is both unenumerated, and by traditional mores, more suspect than armed self-defense.¹⁴⁹

Estrich and Sullivan contend that restrictive abortion laws violate the Equal Protection Clause, because "every restrictive abortion law, by definition, contains an unwritten clause exempting all men from its strictures."¹⁵⁰ Noting that every restrictive abortion law has been passed by a legislature in which men were the majority, Estrich and Sullivan raise a theme that is also important in the gun-rights debate.

As Justice Jackson wrote, *legislators threaten liberty when they pass laws that exempt themselves or people like them*: "The Framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials

¹⁴³ Estrich & Sullivan, *supra* note 116, at 151 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

¹⁴⁴ See Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 485 (1995). The fact that a right is relatively costly does not justify giving it a narrow, rather than broad construction.

If one does accept the plausibility of any of the arguments on behalf of a strong reading of the Second Amendment, but, nevertheless, rejects them in the name of social prudence and the present-day consequences produced by a finicky adherence to earlier understandings, why do we not apply such consequentialist criteria to each and every part of the Bill of Rights? As Ronald Dworkin has argued, what it means to take rights seriously is that one will honor them even when there is significant social cost in doing so. If protecting freedom of speech, the rights of criminal defendants, or any other part of the Bill of Rights were always ... costless to the society as a whole, it would truly be impossible to understand why they would be as controversial as they are.... "Cost-benefit" analysis, rightly or wrongly, has come to be viewed as a "conservative" weapon to attack liberal rights. Yet one finds that the tables are strikingly turned when the Second Amendment comes into play.

Levinson, *supra* note 128, at 657-58.

¹⁴⁵ This is particularly ironic since one of the best sources we have for discerning the modern Court's view of the Second Amendment is a cluster of rare Supreme Court dicta concentrated in cases discussing family and reproductive rights. See *infra* Part II.E.

¹⁴⁶ See Estrich, *supra* note 136, at 24.

¹⁴⁷ See Scalia, *supra* note 137, at 33.

¹⁴⁸ See Gifford, *supra* note 12, at 789.

¹⁴⁹ See *infra* Part III.

¹⁵⁰ Estrich & Sullivan, *supra* note 116, at 151.

would impose upon a minority must be imposed generally." The Supreme Court has long interpreted the equal protection clause (pg.131) to require even-handedness in legislation, *lest the powerful few too casually trade away for others key liberties that they are careful to reserve for themselves.*¹⁵¹

Many commentators have argued that proposals for American gun control or prohibition raise similar concerns, threatening to create a privileged caste of individuals who enjoy enhanced, armed security that is denied to the general population.¹⁵² Under the view that only government should have guns, entry into this caste would depend upon one's status as an agent of government or an individual with sufficient political influence to extract special concessions.¹⁵³ Don Kates emphasizes the problems with such a structure.¹⁵⁴

Even under New York City's extremely stringent administration, some citizens are able to obtain permits not only to own but even to carry handguns for protection. Several years ago the local affiliate of the National Rifle Association obtained ... a list of those holding such "carry permits." According to official policy, a "carry permit" should have been granted only upon the applicant's showing a "unique need" for self-defense. Yet the list was predominantly made up of individuals noted less for the perilousness of their life styles, than for wealth, social prominence, and political influence. Highly, and ironically, visible on the list were a number of well-known "gun control" advocates.¹⁵⁵ (pg.132)

....

The true significance of such revelations is their adverse effect on voluntary compliance with [gun laws]....

... When people whose lives are spent in mansions, high security buildings, and chauffeured limousines are accorded gun permits which ordinary citizens condemned to live and/or work in high crime areas are denied, those citizens are likely to assume that government places a higher value on the lives of the wealthy or influential than on theirs.

¹⁵¹ *Id.* at 152 (emphasis added) (quoting *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring)).

¹⁵² See Johnson, *supra* note 45, at 43-44; Nicholas J. Johnson, *Shots Across No Man's Land: A Response to Handgun Control, Inc.'s Richard Ahborn*, 22 FORDHAM URB. L.J. 441, 446 (1995); James B. Jacobs, *Exceptions to a General Prohibition on Handgun Possession: Do They Swallow Up the Rule?*, LAW & CONTEMP. PROBS., Winter 1986, at 5, 32-34.

¹⁵³ There is evidence that this is the way concealed carry permits are controlled in some jurisdictions. See, e.g., Leonard Levitt, *Smoking Gun In Pistol Dept. / Top Cop Suspended, Staff Transferred*, N.Y. NEWSDAY, Jan. 23, 1997, at A4; Leonard Levitt, *Pistol-Packing Partners Probed*, N.Y. NEWSDAY, Jan. 27, 1997, at A23.

¹⁵⁴ See Don B. Kates, Jr., *Handgun Banning in Light of the Prohibition Experience*, in FIREARMS AND VIOLENCE 139, 154 (Don B. Kates, Jr. ed. 1984).

¹⁵⁵ The list of New York City licensees referred to was from the 1970s. Among those listed as having concealed carry licenses were such opponents of gun ownership as Nelson Rockefeller, former New York Congressman and Mayor John Lindsay, the publisher of the *New York Times* and the psychiatrist husband of Dr. Joyce Brothers (a psychologist whose often-repeated public claim is that gun ownership is evidence of male sexual dysfunction). He and Nelson Rockefeller are deceased as are a number of other nationally known concealed carry licensees, e.g. Eleanor Roosevelt, Lyman Bloomingdale, Henry Cabot Lodge, Arthur Godfrey, Sammy Davis, Jr., Robert Goulet, Sid Caesar, and a plethora of Rockefellers. The current New York City concealed carry license list continues to include the *New York Times's* Arthur Ochs Sulzberger as well as (referring only to those nationally known): Donald Trump, Lawrence Rockefeller, Leland du Pont, Joan Rivers, Howard Stern, Michael Korda, William F. Buckley, and Bill Cosby. See Kates, *supra* note 154, at 154 n.44. See also *Elite in NYC Are Packing Heat*, BOSTON GLOBE, Jan. 8, 1993, at 3; Don B. Kates, Jr., *The Battle Over Gun Control*, 84 PUB. INTEREST L. REV. 42, 45 (1986).

Needless to say, ordinary citizens are unlikely either to concur in that valuation or to feel many qualms about violating a law which they deem expressive of it.¹⁵⁶

Estrich and Sullivan argue that the danger of subjecting the abortion choice to the political process is heightened by the peculiar character of the debate historically.¹⁵⁷ Restrictive abortion legislation is rooted in now discredited, sexist rationales developed in the second half of the nineteenth century.¹⁵⁸

Robert Cottrol and Raymond Diamond chronicle in great detail the racist roots of gun-control legislation that emerged during the same period.¹⁵⁹ The first proposal for a federal (pg.133) ban on "Saturday Night Specials" was sponsored by a senator from Tennessee who was very candid about the bill's racist impulses.¹⁶⁰ Before it became socially unacceptable, judges acknowledged that particular gun restrictions were "never intended to be applied to the white population and in practice [the restriction in question] has never been so applied."¹⁶¹ The view even found its way into academic journals. In 1909, the law review of the University of Virginia (the predecessor publication of the current University of Virginia Law Review) editorialized in favor of disarming "the son of Ham" through restrictions on handguns.¹⁶²

There is evidence that modern gun control grows from the (pg.134) same sinister root.¹⁶³ Gun control advocate Robert Sherrill admits that "[t]he gun control act of 1968 was passed not to control guns, but to control blacks.... The fear of 'armed niggers' ran deep; the flood tide rose steadily up

¹⁵⁶ Kates, *supra* note 154, at 154-55 (emphasis added) (citation in original, modified).

¹⁵⁷ See Estrich & Sullivan, *supra* note 116, at 152-53.

¹⁵⁸ See *id.* ("[M]odern studies have found that support for laws banning abortion continues to be an outgrowth of the same stereotypical notions that a women's only appropriate roles are those of mother and housewife.")

¹⁵⁹ See Robert J. Cottrol & Raymond T. Diamond, "Never Intended to Be Applied to the White Population": *Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1324-33 (1995) (reviewing the racist motivations for nineteenth century gun restrictions in the South); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 342-49 (1991). See also DAVID KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROL OF OTHER DEMOCRACIES?* 322-40 (1993) (examining the effects of gun rights and restrictions on the safety of African-Americans throughout history); Raymond Kessler, *Gun Control and Political Power*, 5 LAW & POL'Y Q. 381, 391-94 (1983).

¹⁶⁰ See 65 CONG. REC. 3946 (1924).

Here we have laid bare the principal cause for the high murder rate in Memphis—the carrying by colored people of a concealed deadly weapon, most often a pistol....

... It is unspeakable that there is public sentiment among the whites that negroes should not be disturbed in their carrying of concealed weapons.

Id.

¹⁶¹ See, e.g., *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring); *State v. Nieto*, 130 N.E. 663, 669 (Ohio 1920) (Wanamalger, J., dissenting).

¹⁶² See Comment, *Carrying Concealed Weapons*, 15 VA. L. REG. 391, 391-92 (1909).

It is a matter of common knowledge that in this state and in several others, the more especially in the Southern states where the negro population is so large, that this cowardly practice of 'toting' guns has always been one of the most fruitful sources of crime.... Let a negro board a railroad train with a quart of mean whiskey and a pistol in his grip and the chances are that there will be a murder, or at least a row, before he alights.

Id.

¹⁶³ David Kopel contends that the term "Saturday Night Special" may be traced to a combination of "suicide special" and "niggertown Saturday Night." See KOPEL, *supra* note 159, at 336, 367 n.220.

Capitol Hill...."¹⁶⁴ Early last year, one of America's leading academic gun control advocates, Professor Franklin Zimring acknowledged:

I have been studying "Saturday Night Specials" for twenty-five years and have yet to find one. There is no content to the term other than a gun that poor people with dark skins can use to shoot each other.... There is no principled way to define or ban "Saturday Night Specials."¹⁶⁵

Elaborating on the privacy foundation of the abortion right, Estrich and Sullivan argue that "[b]y compelling pregnancy to term and delivery even where they are unwanted, abortion restrictions ... exert far more profound intrusions into bodily integrity than the stomach-pumping the Court [has] invalidated...."¹⁶⁶ Building the point that "[t]he integrity of an individual's person is a cherished value of our society,"¹⁶⁷ Estrich and Sullivan demonstrate the contexts in which that point is uncontroversial: "[t]hese points would be too obvious to require restatement if the state attempted to compel abortions rather than to restrict them."¹⁶⁸ Dismissing the distinction that restrictive abortion laws do not involve physical contact, Estrich and Sullivan argue that the state would infringe its citizens' bodily integrity "whether its agents inflicted knife (pg.135) wounds or its laws forbade surgery or restricted blood transfusions in cases of private knifings."¹⁶⁹

There is a parallel argument for armed self-defense. By preventing victims from effectively resisting deadly attacks, prohibitions on individual firearms would more deeply intrude upon bodily integrity. In that case, the state intrusion is worse than prohibiting a citizen from seeking treatment (surgery or transfusion in the Estrich example). Now, the state is banning tools that might allow the citizen to resist the injury in the first place.

One objection to this comparison is that abortion is more efficient than armed self-defense. Abortion will, in virtually every instance, end the physical intrusion on the woman. In contrast, a victim's gun will not always end or avoid the physical intrusion by the criminal.¹⁷⁰ Indeed, the armed victim might end up worse off because of her gun.¹⁷¹

The cases to which Estrich and Sullivan analogize eliminate this objection (both the surgery and the transfusions present similar inefficiencies between act and benefit). But the objection does invite a useful point of information. While the gun is not a perfectly efficient tool, empirical work shows that the gun is a highly effective instrument of self-defense. Gary Kleck shows that large

¹⁶⁴ ROBERT SHERRILL, *THE SATURDAY NIGHT SPECIAL AND OTHER GUNS WITH WHICH AMERICANS WON THE WEST, PROTECTED BOOTLEG FRANCHISES, SLEW WILDLIFE, ROBBED COUNTLESS BANKS, SHOT HUSBANDS PURPOSELY AND BY MISTAKE AND KILLED PRESIDENTS—TOGETHER WITH THE DEBATE OVER CONTINUING SAME* 280-97 (1975).

¹⁶⁵ See Letter from Don B. Kates to Nicholas Johnson (Mar. 27, 1997) (copied verbatim during Zimring's presentation at the Feb. 1996 Journal of Criminal Law and Criminology symposium at which Kates was a discussant on the panel with Zimring) (on file with author).

¹⁶⁶ Estrich & Sullivan, *supra* note 116, at 126.

¹⁶⁷ *Id.* at 126 (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)).

¹⁶⁸ *Id.* at 127.

¹⁶⁹ *Id.*

¹⁷⁰ See Kates, *supra* note 32, at 147-48; Kleck & Gertz, *supra* note 32, at 152.

¹⁷¹ National data indicates that victims who use guns in self-defense are injured only half as often as those who submit, and only one third as often as those who resist with other weapons. See Don B. Kates, et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513, 538 (1995).

numbers of people successfully use guns for self-defense.¹⁷² Considering among other things, the avoided costs of crime, John Lott argues that more liberal laws granting licenses to carry concealed weapons produce a considerable net social and economic benefit.¹⁷³ While empirical claims are often met with skepticism in this debate, gun-control advocate Marvin Wolfgang's assessment of Kleck is telling.

I am as strong a gun-control advocate as can be found (pg.136) among the criminologists in this country. If I were Mustapha Mond of *Brave New World*, I would eliminate all guns from the civilian population and maybe even from the police. I hate guns—ugly, nasty instruments designed to kill people.

My reading of the articles in this Symposium has been enlightening even though I have been reading research on guns and violence for over a quarter of a century, ever since the Eisenhower Commission on the Causes and Prevention of Violence....

... As a gun-control advocate, I am pleased to add [the policy claims from a study of gun markets] to my advocacy.

What troubles me is the article by Gary Kleck and Marc Gertz. The reason I am troubled is that they have provided an almost clear-cut case of methodologically sound research in support of something I have theoretically opposed for years, namely, the use of a gun in defense against a criminal perpetrator. Maybe Franklin Zimring and Philip Cook can help me find fault with the Kleck and Gertz research, but for now, I have to admit my admiration for the care and caution expressed in this article and this research.

Can it be true that about two million instances occur each year in which a gun was used as a defensive measure against crime? It is hard to believe. Yet, it is hard to challenge the data collected. We do not have contrary evidence. The National Crime Victim Survey does not directly contravene this latest survey, nor do the Mauser and Hart studies....

....

The Kleck and Gertz study impresses me for the caution the authors exercise and the elaborate nuances they examine methodologically. I do not like their conclusions that having a gun can be useful, but I cannot fault their methodology. They have tried earnestly to meet all objections in advance and have done exceedingly well.¹⁷⁴

The contention that your gun is forty times more likely to injure a member of your household than to be used in self-defense is a catchy political slogan, but there is good evidence that factually it is just wrong, and at a minimum, highly debatable.¹⁷⁵ The slogan is drawn from Doctors Arthur (pg.137) Kellermann and Donald Reay's *New England Journal of Medicine* study.¹⁷⁶ Even under the most generous view, the study does not support the story of forty children or spouses accidentally shooting one another as the cost of a single thwarted criminal attack. Most of the household

¹⁷² See KLECK, *supra* note 8, at 124.

¹⁷³ See Lott & Mustard, *supra* note 32, at 59-62.

¹⁷⁴ Wolfgang, *supra* note 32, at 188-92.

¹⁷⁵ Compare the statistics compiled by the National Safety Council, showing the number of people killed in gun accidents each year in the range of 1,400, see Kates et al., *supra* note 171, at 556-61, 567-70, tbl.2, with Kleck's estimates of defensive gun uses. See KLECK, *supra* note 8, at 104-08.

¹⁷⁶ See Arthur L. Kellermann & Donald T. Reay, *An Analysis of Firearm-Related Deaths in the Home*, 314 NEW ENG. J. MED. 1557, 1560 (1996).

shootings in the Kellermann study are suicides.¹⁷⁷ Moreover, Kellermann does not even consider the great majority of defensive gun uses where no one is killed.

Kellermann and a colleague reviewed six years' worth of gunshot deaths in Seattle. About half occurred in the home where the weapon was kept. The researchers found that "for every case of self-protection homicide involving a firearm kept in the home, there were 1.3 accidental deaths, 4.6 criminal homicides and 37 suicides involving firearms"—an overall ratio of almost 43 to 1....

....

Kellermann's critics argue that using death as the sole criterion for measuring the risks of gun ownership is inappropriate: The huge majority of defensive firearms uses—99 percent, critics say—involve no more than wounding, missing the target or brandishing the gun. Kellermann, they say, passes off his work as a risk-benefit analysis even though it measures risks alone.... In his 1986 study, Kellermann seems to admit the problem: "*Studies such as ours do not include cases in which intruders are wounded or frightened away by the use or display of a firearm....*"¹⁷⁸ (pg.138)

The empirical debate is important to clarify because narrow or contestable empirical claims are sometimes employed to glibly dismiss gun-rights arguments. But there is a deeper point. Our interpretation of fundamental rights should not rise or fall on questions of statistical efficiency. That a right becomes too costly to tolerate means we should amend the Constitution to eliminate it. Short of that, a commitment to the ideal of fundamental rights demands that we defend the right, indeed exalt it.

D. *Self Determination and Equality: Controlling One's Full Life's Course*

Justice Ruth Bader Ginsburg has suggested that the opinion in *Roe* "presented an incomplete justification" for the Court's decision.¹⁷⁹ Criticism of *Roe*, she argues, might have been less severe had the Court linked the abortion right more solidly to principles that prohibit discrimination against women.¹⁸⁰

Traditionally, Ginsburg says, the abortion analysis considers the conflict between the mother and fetus, and state versus private control of a woman's body.¹⁸¹ If we incorporate equal protection concerns, she argues, then "[a]lso in the balance is a woman's autonomous charge of her full life's

¹⁷⁷ See *id.* at 1559 tbl.3.

¹⁷⁸ Gordon Witkin, *Should You Own A Gun, The Answer May Depend on Which of the Two Seminal Researchers You Believe. They Have Reached Sharply Different Conclusions*, U.S. NEWS & WORLD REP., Aug. 15, 1994, at 24, 30 (emphasis added). Witkin interviews Kellermann and Kleck and provides a very accessible summary of their research and findings as well as their criticism of the other's work. Kellermann's objection to Kleck is that his results rest on "an ambiguous definition of self-defense." *Id.* at 28. Kleck's subsequent survey, praised by Marvin Wolfgang, see *supra* note 32, answers these objections through deeply detailed questioning about each surveyed event. See Kleck & Gertz, *supra* note 32.

¹⁷⁹ Ginsburg, *supra* note 55, at 382.

¹⁸⁰ See *id.* at 382. Ginsburg also argues that had the Court focused purely on the restrictive Texas statute at issue, and not adopted the trimester test, the legislative trend toward less restrictive abortion regulations might have continued. See *id.*

¹⁸¹ See *id.* at 383. The equal protection argument, she notes, should not be undermined by the difference. See *id.* at 382. Society, not nature, attaches greater stigma to the mother of the unwanted child, and commands women to take major responsibility for child care. See *id.* at 382-83.

course.¹⁸² Incorporating (pg.139) this value, she contends, would make it easier to strike the balance in favor of the woman.¹⁸³

The right of armed self-defense relies on a similar but more basic theme. It emphasizes the individual's fundamental interest in preserving her own existence, and avoids the numerous complications of Ginsburg's proposition that autonomy means the right to control the quality and direction of one's life even to the severe detriment of innocents. Indeed, self-preservation is a prerequisite to efforts to manage the quality and direction of one's life.¹⁸⁴ Feminist commentator Jane Cohen emphasizes that physical security is the foundation of liberty of thought, speech and movement.¹⁸⁵ Ben Zipursky summarizes:

What is at stake ... is not only physical security, but, as Jane Cohen has pointed out, liberty of thought, speech, movement, and sexuality. Physical domination is an instrument for the elimination of these forms of liberty, and for the elimination of psychological independence and well-being. And one particularly important enhancement of the physical domination is the elimination of the dominated woman's access to outside help.¹⁸⁶

Feminist critiques of the self-defense claims of battered women present individual self-defense as essential to a woman's control of her full life's course.¹⁸⁷ Mary Ziess Stange (pg.140) is mystified by fellow feminists who, "in regard to gun regulation, [willingly] tolerate precisely the kind of government intrusion into individual behavior that they abhor, on sound feminist grounds, when it comes to such issues as sexual orientation or reproductive rights."¹⁸⁸ These observations reflect the basic Maslovian hierarchy of human concerns. Before one can take "autonomous charge of one's full life course," to "self actualize" in Maslow's terms,¹⁸⁹ one must first deal with more fundamental concerns—centrally, physical security.¹⁹⁰

¹⁸² *id.* at 383. Professor Karst views a "woman's autonomous charge of her full life's course" as "her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal citizen." *Id.* In a world where the burdens of unwanted children bore equally on men and women, should the father be given broader rights to affect the abortion decision? Would not the choice under those circumstances affect his control of his "full life's course?"

¹⁸³ *See id.* at 384-85.

¹⁸⁴ There are of course police. But their role and capabilities are limited. They have no duty to guard individual citizens and that is not their assignment. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195-96 (1989); *South v. Maryland*, 59 U.S. (18 How.) 396, 402-03 (1855); *Bowers v. DeVito*, 686 F.2d 616, 618-19 (7th Cir. 1982). Second, the role of police is reactive, not protective. *See KLECK, supra* note 8, at 121; *Johnson, supra* note 152, at 143-47.

¹⁸⁵ *See generally* Jane Maslow Cohen, *Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?*, 57 U. PITT. L. REV. 757 (1996) (postulating that murders committed by women who are the victims of repeated physical abuse may be morally justified).

¹⁸⁶ Zipursky, *supra* note 90, at 591 (discussing Jane Maslow Cohen, *Regimes of Private Tyranny: What Do They Mean to Morality and for the Criminal Law?*, 57 U. Pitt. L. Rev. 757 (1996)).

¹⁸⁷ *See, e.g.,* Hope Toffel, *Crazy Women, Unarmed Men, and Evil Children*, 70 S. CAL. L. REV. 337, 374 (1996) (advocating a shift from the model of learned helplessness to survival strategies in domestic violence cases).

¹⁸⁸ Stange, *supra* note 96, at 20. Stange points out that the argument that women should not trust themselves to use guns competently is a throwback to sexist stereotypes. *See id.*

¹⁸⁹ *See* Charles Handy, *The New Equation*, HOSP. & HEALTH NETWORKS, Aug. 5, 1995, at 34, 36 (elaborating on Maslow's hierarchy of needs).

¹⁹⁰ In an earlier article, I discussed the near universal value of self-preservation and personal security against physical threats. *See Johnson, supra* note 45, at 57 n.181.

E. *Liberty as Autonomy, Bodily Integrity, Choice, and Self Determination: Coalescence in Casey*

The values and ideas elevated by the projects already discussed in this section coalesce roughly in the plurality decision in *Planned Parenthood v. Casey*.¹⁹¹ In *Casey*, the Court articulated, more specifically than in *Roe*, why reproductive choices, including abortion, are constitutionally protected. The Court explained that the right to abortion rests on a "[rule (whether or not mistaken) of personal autonomy and bodily integrity...."¹⁹² "The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.... Her suffering is too intimate and personal for the state to insist, without more, upon its own vision of the woman's role...."¹⁹³

These matters, involving the most intimate and personal (pg.141) choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. *At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.*¹⁹⁴

These values can be reduced further. More basic than "[defining] one's own concept of existence"¹⁹⁵ is *preserving* one's existence. It is repugnant for the state to dictate one's concept of existence. It is more repugnant for the state to bar individuals from possessing arguably the most effective tools for resisting wrongful threats to that existence. This is especially disturbing considering the state has no obligation to protect anyone in particular,¹⁹⁶ and practically speaking, is not equipped to provide such individual protection.¹⁹⁷ Moreover, it is deeply offensive to offer police as an exclusive and unproblematic security option for those who have experienced neglect, overt hostility, and abuse from police (e.g., minorities and battered women).¹⁹⁸ Finally, it is clear from Donald Regan's and Judith Thomson's self-defense analogies, that the physical burdens of

¹⁹¹ 505 U.S. 833 (1992).

¹⁹² *Id.* at 857.

¹⁹³ *Id.* at 852.

¹⁹⁴ *Id.* at 851 (emphasis added). This is the foundation of the analysis but the Court cautions:

These considerations begin our analysis of the woman's interest in terminating her pregnancy but cannot end it, for this reason: though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophic exercise. Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted.

Id. at 852.

¹⁹⁵ *Id.* at 851.

¹⁹⁶ See Fletcher, *supra* note 75, at 585-86.

¹⁹⁷ See KLECK, *supra* note 8, at 142.

¹⁹⁸ See Johnson, *supra* note 45, at 21 n.61, 57 n.181.

pregnancy and childbirth pale in comparison to the (pg.142) physical harm the victim confronts in the model case of armed self-defense.¹⁹⁹

The standard position highly values choice and autonomy in the metaphysical exercise through which one forms her unique concept of existence, so much so that it easily tolerates the elimination of a fetus in pursuit of these values. When the question shifts to choices that might be vital to simply preserving one's existence, the standard position condemns and would deny private choice in favor of a homogenized, structurally inadequate public response provided by local governments with varying degrees of commitment. A state-imposed "one choice fits all" approach is deemed repugnant when the question is the meaning of life and the accompanying right to abortion. Yet the standard position finds "one choice fits all" perfectly acceptable when the question is the preservation of life and armed self-defense.

This is doubly ironic when we consider that the conceptions of autonomy and choice that coalesce in *Casey* rest on a foundation that, in the view of at least some Justices, explicitly includes an individual right to keep and bear arms.

The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights. We have held that the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States. It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of *the first eight Amendments to the Constitution*.

....

Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. As the second Justice Harlan recognized:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided (pg.143) in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures; and so on.²⁰⁰

David Kopel argues that it is "impossible" to read Harlan's words as anything other than a recognition that the Second Amendment protects the right of individual Americans to possess firearms.²⁰¹ "Obviously, the Due Process Clause of the Fourteenth Amendment protects a right of

¹⁹⁹ See *infra* Part I.

²⁰⁰ *Casey*, 505 U.S. at 847-48 (emphases added) (alteration in original) (citations omitted) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)); see also Scalia, *supra* note 137, at 33-35.

²⁰¹ See David B. Kopel & Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 MD. L. REV. 438, 540 (1997). Kopel and Little point out another case in which the Court suggests that decisions relating to family autonomy rest on a liberty foundation that explicitly includes the right to bear arms. See *id.* at 541. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1976), the Court employed Harlan's dissent—including the reference to a right to keep and bear arms—in striking down a zoning regulation that restricted cohabitation by extended families in single family homes. See *id.* at 502.

individuals *against* governments; it does not protect government, nor is it some (pg.144) kind of collective right."²⁰² The most recent book-length history of the Fourteenth Amendment reaches the same conclusion: "[a]mong the rights that Republicans in the Thirty-ninth Congress relied on as absolute rights of the citizens of the United States were the right[s] to freedom of speech ... due process ... and the right to bear arms."²⁰³

III. TEXTUAL SUPPORT FOR ABORTION RIGHTS CRAFTED FROM THE PLANKS OF SELF-DEFENSE

The constitutional foundation of the abortion right has been criticized by jurists and constitutional theorists.²⁰⁴ Proceeding generally from an originalist or textualist position, critics have characterized the abortion right as a product merely of Justices' political preferences.²⁰⁵

Sheldon Gelman answers these criticisms with an argument that develops a textual foothold for the right to procreative autonomy.²⁰⁶ Gelman argues that the abortion right is better supported on a more traditional view of the Fourteenth Amendment's (pg.145) "life, liberty and property."²⁰⁷ He argues that a fuller conception of "life" can transform interests that qualify only marginally as aspects of "liberty" into "life" interests that gain greater constitutional protection.²⁰⁸ Gelman concedes that liberty, traditionally understood, is ill-suited to do the work that *Roe* and its progeny

The Court also mentioned the Second Amendment in *Lewis v. United States*, 445 U.S. 55, 65-66 n.8 (1980) (finding that restrictions on gun possession by a convicted felon were constitutional because the Second Amendment does not protect firearms that have no reasonable relationship to the preservation or efficiency of a well regulated militia), and in *United States v. Verdugo-Urquidez*, 409 U.S. 259, 265 (1990) (noting that the "people," as used in the First, Second, Fourth, Ninth and Tenth Amendments, is a "term of art" referring to "a class of persons who are part of a national community").

Lewis and *Verdugo-Urquidez* highlight the puzzle of *United States v. Miller*, 307 U.S. 174 (1939). *Miller* focuses on the militia, but recognizes that the militia is the entire citizenry bearing their own private arms, arms to which (under one view) they have a pre-existing right. See 307 U.S. at 179; see also L.A. Powe, Jr., *Guns, Words and Constitutional Interpretation*, 38 WM. & MARY L. REV. 1311, 1329 (1997) (suggesting that the remand in *Miller* for further evidentiary proceedings might contemplate either evidence on the status of the sawed-off shotgun as a militia weapon or disposition of the reinstated indictment, leaving the case hopelessly ambiguous).

²⁰² Kopel & Little, *supra* note 201, at 540.

²⁰³ MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 104 (1986). Curtis chronicles debates extolling the right to arms and equating it to the rights of free expression, religious liberty, due process, jury trials and the right against unreasonable searches. See *id. passim*.

²⁰⁴ See, e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA 112 (1990) (declaring that "the right to abort, whatever one thinks of it, is not to be found in the constitution"); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 943 (1973) (contending that *Roe* "lacks even colorable support in the constitutional text, history or any other appropriate source of constitutional doctrine"). Justice Scalia would deny the abortion right on the ground that "[the Constitution says absolutely nothing about [abortion]." *Casey*, 505 U.S. at 980 (Scalia, J., concurring in part and dissenting in part).

²⁰⁵ See generally BORK, *supra* note 204, at 113-26 (contending that *Roe v. Wade* was the product of judicial preference as the right to abortion cannot be found anywhere in the Constitution); Ely, *supra* note 204, at 943-49 (comparing *Lochner* with *Roe* to reach the conclusion that both were the product of judicial policy-making rather than sound constitutional interpretation).

²⁰⁶ See Sheldon Gelman, *"Life" and Liberty: Their Original Meaning, Historical Antecedents and Current Significance in the Debate Over Abortion Rights*, 78 MINN. L. REV. 585 (1994).

²⁰⁷ See *id.* at 591-92.

²⁰⁸ See *id.* at 692. With "life" as a textual foothold, abortion restrictions warrant strict scrutiny. See *id.*

require.²⁰⁹ The Court's unreflective presentation of the abortion right as a "liberty" interest, he says, invites the criticism that the abortion right has no solid constitutional footing.²¹⁰

Life, Gelman argues, as understood by the framers and the legal and political philosophers who influenced them, is a broad concept that encompasses quality of life concerns—ultimately the right to a "full life."²¹¹ This right to make decisions about the direction and quality of one's life, Gelman argues, is a solid textual hook that deflates originalist and textualist criticisms of the abortion right.²¹²

Gelman builds his point principally through a discussion of Locke, Hobbes, Blackstone, and state constitutional traditions.²¹³ He shows how the broad formulations of "life" apparent in these sources were fully integrated into the Constitution and other public documents, only to be supplanted by the strawman of "liberty" at the end of the 19th century.²¹⁴ Gelman's exercise is notable because he draws upon sources (often precisely the same passages) and employs themes that gun-rights commentators have used to support an individual right to arms for self-defense.²¹⁵ (pg.146)

Gelman begins with Locke, arguing that the "modern construction of 'life, liberty and property' mirrors Locke's construction, using the same three elements to produce an inverted structure."²¹⁶ According to Gelman, Locke viewed "liberty" as merely a logo, a conceptual vessel, that can hold rights derived from other sources.²¹⁷ "Life," on the other hand, encompassed a variety of substantive interests related to "quality of life".²¹⁸

²⁰⁹ See *id.* at 690.

²¹⁰ See *id.* at 591; see generally BORK, *supra* note 204, at 111-16.

²¹¹ Gelman, *supra* note 206, at 588.

²¹² See *id.* at 588-89.

²¹³ See *id.* at 612-64.

²¹⁴ See *id.* at 664-65.

²¹⁵ See generally STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 27-35 (1984) (Locke, Sidney, Harrington, Burgh, Beccaria, Rousseau, Montesquieu, etc.); Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87, 89-103 (1992) (Locke, Sidney, Blackstone, Montesquieu); Nelson Lund, *The Second Amendment, Political Liberty and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 118-19 (1987) (Hobbes, Locke); Robert Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 601-05 (1981); Robert Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125, 126-33 (1986) (the Florentine-Atlantic School through Trenchard and Burgh).

²¹⁶ Gelman, *supra* note 206, at 633.

²¹⁷ See *id.* at 635 (demonstrating Locke's use of "liberty" as a summary term or logo for civil rights that are derived from other ideas, for example "life"). Gelman observes that the Framers used "liberty" as the same sort of summary term. See *id.* at 635-36. The mistake, says Gelman, is that "300 years later, American courts began to *derive* natural rights from liberty, the reverse of Locke's procedure, and virtually no one noticed the difference." *Id.* at 636. Without reference to phrases such as life, limb, health, property and goods, we cannot properly fill the empty shell of liberty with rights. See *id.* at 636.

²¹⁸ See *id.* at 622.

In language that Gelman calls "pivotal," Locke declares that everyone is bound to "preserve himself."²¹⁹ From this core conception of self-preservation, Gelman advances that Locke derived "liberty," as well as all other natural rights, from the (pg.147) concept of "life."²²⁰

Like Hobbes, then, Locke began with an expansive concept of "life." In the quoted passage, Locke derived all other rights—liberty, health, limb, and goods—by exploiting ambiguities in the words "life" and "preservation." He began, as Hobbes had, with "life" as self preservation.... Yet, that meaning expands over the course of the paragraph into a broader right of "life."

The duty to preserve one's own life became the duty to preserve everyone's life.... "Preserving" life thus means "not impair[ing]" life. Not impairing life, in turn, entails protecting a person's liberty, health, limb, and goods. The duty of refraining from suicide, with which Locke began the paragraph, turns into everyone's entitlement to a full life, by the end of the paragraph.²²¹

Since Gelman's starting point is a Lockean right of self-preservation,²²² it seems much more difficult to generate a right (pg.148) to terminate a pregnancy that is no threat to the life of the mother, than to generate a right of self-defense.²²³ This becomes clearer when we consider the other obstacles Gelman faces.

²¹⁹ See *id.* (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 119-20 (Dutton 1975) (1690)). In this pivotal passage of *The Second Treatise*, Locke wrote:

[t]he state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions.... Every one ... is bound to preserve himself, and not to quit his station wilfully, so by the like reason, when his own preservation comes not in competition, ought he as much as he can to preserve the rest of mankind, and not unless it be to do justice on an offender, take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb or goods of another.

Id.

²²⁰ See Gelman, *supra* note 206, at 623.

²²¹ *Id.* at 622-23 (parenthetical omitted). It is just as easy to read the language differently, concluding that the liberty, health, and goods of another ought to be protected because they "tend[] to the Preservation of the Life." *Id.* at 623. That reading, focusing on these items as essential to the preservation of life, contradicts Gelman's conclusion that preservation of life is a Lockean doorway to everyone's entitlement to a full life. See *id.*

Gelman acknowledges this but concludes that this reading is too strict because it "fails to explain the panoply of natural rights Locke posited in the *Second Treatise*." *Id.*

His own reading says Gelman, does account for these rights. However, Gelman admits that his reading "fails to explain ... how those rights follow from the duty of 'not quitting one's station,' ... that was Locke's starting point." *Id.* Gelman's answer is merely that "[e]vidently, 'life' has come to mean not just existence, but a full or good or unimpeded 'life'." *Id.*

Of course Locke's life-rights might very well be a closed list that does not admit the abortion right. More than that, Locke's admonition, that one might only impair "life" where necessary to bring an offender to justice, is an obstacle to Gelman's jump from the right to a full life, to the right of parents to violently terminate a pregnancy.

²²² Interestingly, Gelman takes his own narrow view of Locke's core concept of self-preservation. Locke wrote that "[e]very one is bound to preserve himself and not to quit his Station wilfully." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 120 (Dutton 1975) (1690). It is reasonable to view the first clause as an endorsement of individual self-defense, particularly, given that Locke, in the same paragraph, discusses the impairment of life of another where required to "do [j]ustice to an offender." *Id.* Gelman, however, ignores this possibility and consistently presents Locke's core message as merely a duty "not to commit suicide." See Gelman, *supra* note 206, at 622.

²²³ I have made this argument elsewhere. See Johnson, *supra* note 45, at 80 n.250.

In the second part of the "pivotal"²²⁴ passage, Locke declares that one cannot take a life unless it is to do justice to an offender.²²⁵ A right of self-defense flows smoothly from this language and is aided by Locke's other explicit references to self-defense.

It cannot be supposed that [the populace] should intend, had they a power so to do, to give any one or more an absolute arbitrary power over their persons and estates [T]his were to put themselves into a worse condition than the state of nature, wherein they had a liberty to defend their right against injuries of others, and were upon equal terms of force to maintain it.... Whereas by supposing they have given up themselves to the absolute arbitrary power and will of a legislator, they have disarmed themselves, and armed him to make a prey of them when he pleases....²²⁶

Proceeding on this view, we are left merely to discuss the types of tools one is entitled to use in meeting these potential threats.

The abortion right faces more difficulty. Gelman must either deny that the fetus represents any life-value at all or somehow establish that the fetus is an "offender against whom justice is being done." Query which burden is greater? Virtually everyone in the debate appears to concede that denying the fetus some level of life-value is increasingly difficult as it moves toward viability.²²⁷ Judith Thomson comes closest to establishing (pg.149) the fetus as an offender.²²⁸ But even her claim depends on the remarkable contention that the parents have no responsibility for the child until they decide to take it home.²²⁹

By Gelman's own formulation, self-defense is closer to the core of Lockean "life" than is the abortion right.²³⁰ To extract the abortion right we must extrapolate from Locke's fullest, though less frequent and less powerful formulations of "life," which "treat health, limb and body"²³¹ as aspects of life.²³²

The Lockean concepts on which Gelman builds figure prominently in scholarship supporting the individual rights view of the Second Amendment.²³³ Arguing that self-defense is at the core of

²²⁴ See Gelman, *supra* note 206, at 622.

²²⁵ See LOCKE, *supra* note 222, at 120.

²²⁶ *Id.* at 186-87.

²²⁷ See *Partial-Birth Abortion: Joint Hearing Before the Senate Judiciary Comm. and the House Judiciary Subcomm. on the Constitution*, 105th. Cong. (1997), available in 1997 WL 8219816 (statement of Kate Michelman, President, National Abortion and Reproductive Rights Action League) [hereinafter Michelman].

²²⁸ See generally Thomson, *supra* note 14.

²²⁹ See *id.* at 65.

²³⁰ See Gelman, *supra* note 206, at 632. Compare the use of Locke in sources cited *supra* note 215.

²³¹ Gelman moves from Locke's phrase "indolency of body" to his own shorthand "body." See Gelman, *supra* note 206, at 632. Arguably the abortion right is more readily drawn from Gelman's shorthand than from Locke's original (used only once) "indolency of body." See *id.*

²³² See *id.* Gelman also acknowledges Locke's distinction between "natural liberty" and the liberty of persons in political society, or "civil liberty." See *id.* at 628. This distinction, however, does not diminish the "natural liberty" life-rights on which Gelman focuses. "[L]aws enacted by a duly constituted legislature do not abridge civil liberty, provided the laws comport with natural right.... According to Locke, enacted laws may be invalid for substantive or procedural reasons. Substantively, the laws must comport with natural right...." *Id.* at 628, 630.

²³³ See, e.g., sources cited *supra* note 215; Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285, 290-313 (1983).

the Second Amendment, Don Kates contends that the Framers' view of self-protection was not only stronger, but also more inclusive than the concept described by modern thinkers.²³⁴ (pg.150)

Radiating out directly from this core belief in self-defense as the most self-evident of rights came the multiple chains of reasoning by which contemporary thinkers sought to resolve a multitude of diverse questions. For instance, seventeenth and eighteenth century treatises on international law were addicted to *long disquisitions on individual self-protection from which they attempted to deduce a law of nations*. More important for present purposes, *John Locke adduced from the right of individual self-protection his justification of the right(s) of individuals to resist tyrannical officials and, if necessary, to band together with other good citizens in overthrowing tyranny.*²³⁵

Kates contends that the Framers' belief in armed citizens was practical as well as philosophical; that they had seemingly boundless faith in the pragmatic impact of widespread arms possession. According to Locke's followers Trenchard and Moyle, arming the people is:

the surest way to preserve [their liberties] both at home and abroad, the People being secured thereby as well against the Domestick Affronts of any of their own [fellow] Citizens, as against the Foreign Invasions of ambitious and unruly Neighbours.²³⁶

Like Gelman, Kates invokes Locke's elevation of self-preservation.²³⁷ He draws from it not just support for an individual right to firearms, but also an argument that individual self-defense was used to sustain an array of once controversial collective rights.²³⁸ Ironically, these collective rights are less contested in our modern conversation than the individual right from which they grew.²³⁹ (pg.151)

Gelman contends that Hobbes also conceived of "life" expansively. At the heart of this expansive conception of life is Hobbes's contention that natural law prevents one from doing that which takes away the means of preserving his life.²⁴⁰ Gelman contends that on at least one phrasing of "life", Hobbes moves beyond mere self-preservation to include "things ... without which [one]

²³⁴ See Kates, *supra* note 215, at 89-90. "Indicative of the intellectual gulf between that era and our own is that when Montesquieu asked, 'Who does not see that self-defence is a duty superior to every precept?' he was posing the question rhetorically rather than meaningfully." *Id.* at 89.

²³⁵ *Id.* at 90 (emphasis added) (citations omitted).

²³⁶ *Id.* at 96 (alterations in original) (quoting JOHN TRENCHARD & WALTER MOYLE, AN ARGUMENT SHEWING, THAT A STANDING ARMY IS INCONSISTENT WITH A FREE GOVERNMENT, AND ABSOLUTELY DESTRUCTIVE TO THE CONSTITUTION OF THE ENGLISH MONARCHY 7 (1697)).

²³⁷ See *id.* at 103.

²³⁸ See *id.* at 101-02 (arguing that the rights to resist enslavement and to be free from searches and seizures were originally derived from the more fundamental right to armed self-defense).

²³⁹ See *id.* The states' rights view at least pays lip service to the idea of individual states maintaining independent military units. Nelson Lund contends that, given the exclusive siting of formal military power in the federal government, the states' rights view is structurally incoherent. See Lund, *supra* note 4, at 26-29; see also Don B. Kates & Glenn Harlan Reynolds, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737, 1765 (1995).

²⁴⁰ See Gelman, *supra* note 206, at 618-21. Hobbes wrote that a subject enjoys a liberty to disobey sovereign commands "to kill, wound, or mayme himselfe; or not to resist those that assault him; or to abstain from the use of food, ayre, medicine, or any other thing, without which he cannot live...." THOMAS HOBBS, *LEVIATHAN* 184 (E.P. Dutton 1950) (1651).

cannot live ... well."²⁴¹ Gelman focuses on Hobbes's right to resist a sovereign command denying food, medicine or other things without which one cannot live.²⁴² From this he derives an expansive Hobbesian view of life that includes quality of life issues.²⁴³

Gelman is cautious about this extrapolation. He recognizes that a right to resist sovereign commands diminishing the quality of one's life, "would change Hobbes's theory [of the absolute sovereign] beyond recognition."²⁴⁴ His answer is that the difference between quality of life concerns (where Hobbes denies a right to resist) and self-preservation (where Hobbes grants a right to resist the sovereign) has little practical significance in *Leviathan*, because the sovereign has no duty to respect the right of disobedience and because other subjects are (pg.152) bound to support the sovereign against the rebelling subject.²⁴⁵ All that is really important, Gelman argues, is that Hobbes in fact used life expansively to embrace quality of life issues.²⁴⁶

Accepting Gelman's reconciliation, we have a basis for ordering the abortion and gun rights.²⁴⁷ Hobbes's right to disobey commands that would deprive one of life, positions self-defense above quality of life concerns that include the abortion right.²⁴⁸ While the right to disobey commands prohibiting self-defense might be futile within Hobbes's social contract,²⁴⁹ it is Hobbes's very recognition of the right that indicates the higher status of self-defense.

Focusing on the same language that Gelman says is critical, gun-rights commentators have made a similar argument,²⁵⁰ stressing Hobbes's position that:

The Second, the summe of the Right of Nature; which is, *By all means we can, to defend our selves.*(pg.153)

....

²⁴¹ Gelman, *supra* note 206, at 618. In this second account Hobbes argued for the citizen's right to disobey sovereign commands that barred resistance against physical assaults. *See id.* at 618-19; HOBBS, *supra* note 240, at 164. Compare Hobbes's argument to the theme that underpins the regulatory agenda of anti-gun groups: "[T]he best defense against injury is to put up no defense—give them what they want, or run." SHIELDS, *supra* note 36, at 125.

²⁴² *See* Gelman, *supra* note 206, at 618.

²⁴³ *See id.* at 620; HOBBS, *supra* note 240, at 164.

²⁴⁴ Gelman, *supra* note 206, at 618-19.

²⁴⁵ *See id.* at 619-20.

²⁴⁶ *See id.* at 618.

²⁴⁷ Gelman notes that this "quality of life dilemma"—that Hobbes's social contract does not authorize disobedience on quality of life questions—assumes considerable importance in modern constitutional theory. *See id.* at 620-21.

²⁴⁸ Hobbes's formulation presents the right to resist lethal threats as an irreducible interest: if the lethal threat succeeds, all other interests, including concerns about quality of life, vanish.

²⁴⁹ This is because the sovereign has no duty to respect the right and other subjects are bound to assist the sovereign in policing. *See* Gelman, *supra* note 206, at 619-20.

²⁵⁰ *See, e.g.,* Lund, *supra* note 215, at 118-19 (finding a theoretical basis for a fundamental right to self-defense in the writings of Hobbes).

The Right of Nature, which Writers commonly call *Jus Naturale*, is the liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own life....

....

A Law of Nature, (*Lex Naturalis*,) is a Precept, or generall Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or *taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved.*

HOBBS, *supra* note 240, at 106-07 (final emphasis added).

A Covenant not to defend my selfe from force, by force, is always voyd. For (as I have shewed before) no man can transferre, or lay down his Right to save himselfe from Death....²⁵¹

Hobbes's suggestion that one has the right to use any tool to save himself from death is a natural rejoinder to the contention that a commitment to self-defense does not mean self-defense with guns.

Hobbes's declaration, with minimal extrapolation, tells a woman fearing attack from a stalker to ignore a governmental bar on armed self-defense. A rural black in church-burning country, an urban Jew in the midst of a pogrom, or a Korean merchant targeted by riot rage, might all take similar instructions from Hobbes. As Gelman shows, it takes more effort and several more analytical steps to move from Hobbes to the abortion right.

Gelman also draws support for the abortion right from Blackstone.²⁵² His section on Blackstone describes the jurist's *Commentaries on the Laws of England* as the most influential and widely-read law book in America during the late eighteenth century.²⁵³ He argues that anyone familiar with Blackstone would use "life" to delineate widely accepted notions of natural right.²⁵⁴ Building from Blackstone's conception of "personal security," Gelman derives an interpretation of life that encompasses "health," "limb," and "body."²⁵⁵ On this broad view of life, he argues, we can rest the right to abortion.²⁵⁶ (pg.154)

Along this path, the right to arms for self-defense comes much sooner. Among Blackstone's auxiliary rights, those essential to preserving primary rights (including personal security), is the right to individual arms.

The fifth and last auxiliary right of the subject ... is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute, and it is 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.²⁵⁷

Blackstone's explicit endorsement of an individual right to arms and his influence on the thinking of the Framers is a significant theme in scholarship urging an individual rights view of the Second Amendment.²⁵⁸ Nelson Lund argues that the Framers:

²⁵¹ HOBBS, *supra* note 240, at 107, 116.

²⁵² See Gelman, *supra* note 206, at 648-51.

²⁵³ See *id.* at 648 n.343. Gelman explains that while certain Americans, notably Thomas Jefferson, criticized the conservative royalist, "the disagreement never touched the enumeration of absolute rights in the *Commentaries*." *Id.*

²⁵⁴ See *id.* at 651.

²⁵⁵ See *id.* at 650 (noting that "the 'principle aim of society,' according to Blackstone, is 'to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature.' These rights Blackstone called 'personal security,' 'personal liberty' and 'property.'" (citations omitted)).

²⁵⁶ See *id.* at 695. Examining the implications of broad "life-rights" on other constitutional questions, Gelman suggests that "life" encompasses reputation, contrary to the Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976) (holding that reputation alone does not implicate "liberty" interests that would warrant due process protection). See Gelman, *supra* note 206, at 695 (contending that "Blackstone counted reputation among the things secured by the right of personal security.").

²⁵⁷ 1 BLACKSTONE, *supra* note 87, at *143-44 (citation omitted).

²⁵⁸ See, e.g., Robert J. Cottrol, *Introduction*, in *GUN CONTROL AND THE CONSTITUTION* xiii (1994); JOYCE LEE MALCOLM, *TO KEEP AND BEAR ARMS* 142-43 (1994); HALBROOK, *supra* note 215, at 45, 53; Kates, *supra* note 215, at 93-94; Robert T. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 *YALE L.J.* 995, 1011 (1995).

may well have been misinformed about many aspects of English life and history that might have a bearing on one or another provision of the American Constitution. If anything about English history matters in interpreting the Second Amendment, it is the fact—a fact made virtually indubitable by all that was said about it by those who were responsible for its adoption—that Americans accepted the basic theory set out by Blackstone: that a free citizen's right to arms is founded in the natural right of self-preservation and that an armed populace is an extremely important safeguard against tyranny. If one knew only two things—what Blackstone said and that Blackstone was considered the authoritative expositor (pg.155) of the English constitution—one would know virtually all the English law that is helpful in interpreting the Second Amendment.²⁵⁹

Some Second Amendment scholars take a page directly from Gelman, arguing that Blackstone informs not just our understanding of the Constitution and Bill of Rights, but also our understanding of the Fourteenth Amendment.²⁶⁰ Robert Cottrol argues that Blackstone's confirmation of an individual right to arms influenced the Framers' view that, among other things, the Fourteenth Amendment was guaranteeing to freedmen the same right to firearms for self-defense that already was enjoyed by white citizens.²⁶¹ Compared to the explicit support for an individual right to arms that Cottrol, Raymond Diamond, Akhil Amar, Steven Halbrook, and others have drawn from the debates surrounding the Fourteenth Amendment, Gelman's extrapolation pales.²⁶²

Consider Blackstone's explicit criticism of abortion. Toward the end of his presentation, Gelman acknowledges Blackstone's precise views. "Blackstone considered abortions after 'quickening' to be illegal, arguing that legally protected life begins at the point of quickening, when a fetus 'is able to stir in the (pg.156) mother's womb,' and noting that abortion after quickening, though illegal, constitutes an offense less serious than murder or manslaughter."²⁶³

Gelman contends that the restrictive position recounted by Blackstone does not significantly injure his argument.²⁶⁴ The important thing, says Gelman, is that generally Blackstone took a broad

²⁵⁹ Lund, *supra* note 4, at 14.

²⁶⁰ See, e.g., COTTRÖL, *supra* note 258, at xiv.

²⁶¹ See *id.*

²⁶² See, e.g., Cottrol & Diamond, *The Second Amendment*, *supra* note 159, at 346 (explaining that attempts to disarm freedmen played an important role in convincing the 39th Congress that traditional conceptions of federalism and individual rights needed to change, leading to the incorporation controversy); Stephen Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms: Visions of the Framers of the Fourteenth Amendment"*, 5 SETON HALL CONST. L.J. 341, 431-34 (1995) (providing a detailed account of debates confirming congressional intent to incorporate the individual rights view of the Second Amendment into the Fourteenth Amendment); Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1237 (1992) (documenting through floor speeches that the framers of the Fourteenth Amendment intended to protect generally the freedoms in the Bill of Rights, including the right to keep and bear arms); Sayoko Blodgett-Ford, Note, *Do Battered Women Have a Right to Bear Arms*, 11 YALE L. & POL'Y REV. 509, 516 (1993) (arguing that the stated intention of many of those ratifying the Fourteenth Amendment was to extend a right to keep and bear arms, even if the Second Amendment does not).

²⁶³ See Gelman, *supra* note 206, at 691 n.578 (citation omitted).

²⁶⁴ See *id.* at 691. Gelman's use of Francis Hutchinson presents a similar problem. Gelman contends that Hutchinson "exercised an influence on revolutionary American that rivaled Locke's." Gelman, *supra* note 206, at 643. Hutchinson's position on "life" closely resembles Locke's. Both ranked "life" first among rights, implicitly or explicitly; both rejected the idea of "life" as mere biological existence; and both protected bodily integrity as an aspect of "life." See *id.* at 645.

Hutchinson's condemnation of abortion was explicit. Gelman acknowledges in a footnote that Hutchinson "thought abortions immoral." See *id.* at 691 n.578. "Mankind ... ha[s] ... a right to prevent any perversions of the natural instinct [of human

view of "life."²⁶⁵ Indeed, the knowledge that Blackstone's explicit position on abortion stems from a constricted and invidious view of women in society tempts us to dismiss the position. However, Blackstone's explicit statements on abortion and arms for self-defense do present an illuminating comparison. It is difficult to advance the abortion right on this foundation and yet reject an individual right to arms.

At the end of the nineteenth century, Gelman claims, a new truncated concept, "liberty," supplanted the traditional, expansive idea of "life."²⁶⁶ Approaching this transition, one of the (pg.157) last markers of the expansive conception of "life" is Joseph Story. Gelman argues that Story's *Commentaries* reflected the sentiment of the times that "[t]he limbs are equally protected with the life."²⁶⁷

Unlike Blackstone, Story did not criticize abortion. This makes Story a less complicated source for Gelman. However Story's silence on abortion, in contrast to his explicit statements supporting an individual right to keep and bear arms, aids our comparison. Story's explanation of the Second Amendment is a staple of the individual rights view, and is often joined with the views of another late nineteenth century commentator, Thomas Cooley.²⁶⁸ Together, they put the individual rights view in the strongest terms. In a passage cited approvingly by the Supreme Court in *United States v. Miller*, Cooley wrote "[t]he alternative to a standing army is 'a well-regulated militia;' but this cannot exist unless the people are (pg.158) trained to bearing arms."²⁶⁹ Cooley further stated:

The Right is General—It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an

reproduction] from its wise purposes, or any defeating of its end. Such are all monstrous lusts, and arts of abortion." *Id.* (quoting 2 FRANCES HUTCHINSON, A SYSTEM OF MORAL PHILOSOPHY 107 (Augustus M. Kelley 1968) (1755)).

²⁶⁵ See *id.* at 661.

²⁶⁶ See *id.* at 665. Second Amendment scholars contend that within this same time period the anti-individual rights conception of the Second Amendment first appeared. See, e.g., COTTRILL, *supra* note 258, at xxv (arguing that "[i]t would take the social changes brought about by urbanization in twentieth-century America to bring about increased regulation and new attitudes concerning arms and the Second Amendment").

Highlighting the Supreme Court's missteps, Gelman comments that "[t]oday, the right of 'life' approaches meaninglessness." Gelman, *supra* note 206, at 664. His comment tells more than he intends. Gelman criticizes the Court for failing to appreciate the Constitution's broad protection of health, limb and body from which he would draw quality of life rights that would support procreative choice. See *id.* at 588, 691. Similarly, commitment to a basic right to self-protection also has suffered. The majority of lower federal court cases on the right to arms for individual self-defense hold that no such right exists. See Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U.L. REV. 57, 58, 76 (1995). William Van Alstyne comments on the virtual absence of thoughtful or useful jurisprudence on the Second Amendment. See Van Alstyne, *supra* note 33, at 1239.

Practically speaking, these lower federal court cases are problematic. Respect for federalism and the absence of federal police power, indicate that the federal government would have minimal power to provide physical security for citizens who it is suggested have no individual right to armed self-defense.

²⁶⁷ Gelman, *supra* note 206, at 665 (quoting JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 697 (Melville M. Bigelow ed., 1891)).

²⁶⁸ See David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559, 614, 615 n.272 (1986) (citing Story's statement that the right to keep and bear arms offers a moral check against arbitrary power of rulers because this right enables the people to resist and triumph over them and, citing Cooley's view that the right of people to bear arms is necessary for protection of self-government against usurpation); Levinson, *supra* note 128, at 649 nn.61 & 64 (same); Van Alstyne, *supra* note 33, at 1247 n.40 (citing Cooley's statement that the Second Amendment means that people shall have the right to keep and bear arms, and that they need no permission to do so).

²⁶⁹ 307 U.S. 174, 182 n.3 (1939) (citing THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 499 (Victor H. Lane ed., 7th ed., Little, Brown 1903) (1896)).

interpretation not warranted by the intent... [I]f the right were limited to those enrolled, [by the government in the militia] the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose.²⁷⁰

If the focus is late nineteenth-century sources, the right of armed self-defense enjoys far more explicit support than the abortion right.

The result is the same when we evaluate Gelman's extrapolation from early state constitutions. Gelman argues that early state constitutions often included clauses modeled after the Magna Carta, reflecting a broad conception of life-rights.²⁷¹ While this appears accurate, it is also true that the prevailing practice in those states was to restrict or prohibit abortion.²⁷² Justice Scalia explains that the "longstanding traditions of American society have permitted [abortion] to be legally proscribed."²⁷³ Gelman contends that Scalia's critique is itself illegitimate, since there is no textual support for using tradition as a gauge for measuring constitutional rights.²⁷⁴ While Scalia may make too much of tradition, Gelman is too quick to (pg.159) dismiss it. Tradition figures prominently in renditions of Philip Bobbitt's famous categories of relevant constitutional sources, and is helpful in ordering the two rights.²⁷⁵

From the common foundation of early state constitutional support (and integrating, rather than dismissing, connected political history) the individual right to arms draws strong explicit support. Steven Halbrook's study of state constitutional support for an individual right to arms compiles hundreds of supportive references from state constitutions and declarations of rights and surrounding debates.²⁷⁶ Even in this century, the individual right to arms has been explicitly reaffirmed in the state constitutions (as recently as 1982).²⁷⁷

In the broader context of our political history, there are so many statements from the Framers and their contemporaries supporting an individual right to arms that it is impractical to offer a complete list.²⁷⁸ The list of commentators who have evaluated this body of information and

²⁷⁰ THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN AMERICA* 282 (Alexis C. Angell ed., 2d ed. 1891).

²⁷¹ See Gelman, *supra* note 206, at 660. In a similar exercise, Joyce Malcolm chronicles the explicit support for the right to bear arms in the English political and legal history from which Gelman more generally draws a broad view of life. See MALCOLM, *supra* note 258, *passim*.

²⁷² See *Planned Parenthood v. Casey*, 505 U.S. 833, 984 (1992) (Scalia, J., concurring in part and dissenting in part).

²⁷³ *Id.* at 980.

²⁷⁴ See Gelman, *supra* note 206, at 602 n.97.

²⁷⁵ See PHILIP BOBBITT, *CONSTITUTIONAL FATE* 3-119 (1982); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 11-22 (1991); see also Symposium, *Philip Bobbitt's Constitutional Interpretation*, 72 *TEX. L. REV.* 1703 (1994).

²⁷⁶ See, e.g., STEPHEN P. HALBROOK, *A RIGHT TO BEAR ARMS* (1989).

²⁷⁷ A 1982 amendment to the New Hampshire Constitution declares, "[a]ll persons have the right to keep and bear arms in defense of themselves, their families, their property and the state." *Id.* at 121; N.H. CONST. pt. I, art. 2-a. This phenomenon is not restricted to rural states. The Connecticut Constitution provides that "[e]very citizen has a right to bear arms in defense of himself and the state." CONN. CONST. art. I, § 15. The Delaware Constitution provides that "[a] person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use." DEL. CONST. art. I, § 20.

²⁷⁸ See, e.g., HALBROOK, *supra* note 215, at 7-35 (citing numerous historical references to support the individual right to arms); Hardy, *supra* note 266, at 561 (analyzing six periods in the development of the right to bear arms in English and American law); *THE ORIGIN OF THE SECOND AMENDMENT* (David E. Young ed., 1991) (collecting documents relating to the right to arms from

concluded that the Constitution does indeed protect an individual right to arms is itself long enough to be unwieldy.²⁷⁹ (pg.160)

Professor Powe puts this material in context.²⁸⁰ Powe dismantles both Gary Wills's historical critique (Wills contends that the Second Amendment was merely a ruse—uncovered for the first time by him—that we can confidently ignore)²⁸¹ and the "single other serious historical project" arguing that the Second Amendment does not guarantee an individual right.²⁸² Summarizing the historical record, Powe concludes:

Although I find myself surprised by my own words, the historical claim for the individual rights view of the Second Amendment seems at least as strong as the historical claim for a strongly individualist First Amendment. Words and guns [and French assistance] enabled a successful revolution, and it is not surprising that the founding generation thought highly of both.... [But] [t]here are far more references from authoritative sources of an individual right to bear arms than there are for a right of the press going beyond prior restraints.

....
Thus, like all other constitutional law scholars who have taken the time to analyze the Second Amendment, I join with them reluctantly singing the Monkees refrain: "I'm a believer."²⁸³

IV. THE ULTIMATE LIBERTIES AND THE HEIGHT OF IRRESPONSIBILITY: A COMMUNITARIAN PAIRING

Gun and abortion rights are in many ways the ultimate liberties, each entailing in its most extreme rendition the total sacrifice of a competing life-interest. They have been targeted (pg.161) as the worst examples of a political culture that exalts individual rights but ignores community and individual responsibilities.

The "New Communitarians" are principal advocates of the view that our worst social problems stem from a legal and political structure that exalts rights, but not responsibilities.²⁸⁴ Communitarians have identified both the abortion right and the gun right as emblems of a regime of rights that fails to impose responsibilities.²⁸⁵

the opening of the Constitutional Convention to the ratification of the Second Amendment).

²⁷⁹ The list of scholarship and commentary since 1980 appears at Appendix 1.

²⁸⁰ See Powe, *supra* note 201. Powe is a constitutional scholar at the University of Texas. He compares the First and Second Amendments by using standard interpretive tools to pursue questions about constitutional interpretation and preferences for certain rights. See *id.*

²⁸¹ See *id.* at 1359-64. Powe argues, among other things, that even if Wills were right about Madison's intentions—which Powe disputes—Wills plainly understands that *the people* adopted the Second Amendment. The understanding of the people who adopted the Amendment, and not what Wills calls Madison's "shrewd ploy," is the controlling understanding of the Amendment. Wills's suggestion that the understanding of the deceiver should control is, as a general matter, deeply problematic. See *id.* at 1363-64.

²⁸² See *id.* at 1356-59.

²⁸³ *Id.* at 1364-65, 1401 (citations omitted).

²⁸⁴ See *The Responsive Communitarian Platform: Rights and Responsibilities*, in RIGHTS AND THE COMMON GOOD 11 (Amitai Etzioni ed., 1995).

²⁸⁵ See Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989, 1065-66 (1994).

Communitarian Mary Ann Glendon invokes American abortion law as an example of the extremes of "rights talk" and to illustrate key features of the communitarian irresponsibility critique.²⁸⁶ Glendon, an advocate of the most restrictive abortion laws, condemns *Roe* for denying "every human being, for the first nine months of his or her life ... the most fundamental human right of all—the right to life."²⁸⁷ (pg.162)

Linda McClain's critique of the communitarian project, and of Mary Ann Glendon in particular, shows that communitarians are very willing to secure "responsibility" through the coercive power of the state rather than the purported communitarian tools of persuasion and exhortation through the moral voice of the community.²⁸⁸

Communitarian criticisms of "irresponsible" exercises of rights also target individual rights interpretations of the Second Amendment.²⁸⁹ Like the communitarian approach to abortion rights, the agenda for combating the costs that guns impose on American society goes far beyond "education and moral suasion."²⁹⁰ The communitarian platform summarizes the group's stance on individual firearms this way:

There is little sense in gun registration. What we need to significantly enhance public safety is *domestic disarmament* of the kind that exists in practically all democracies.²⁹¹ The National Rifle Association's suggestion that criminals, not guns, kill people, ignores the fact that thousands are killed each year, many of them children, from accidental discharge of guns,²⁹² and that people—whether criminal, insane, or temporarily carried away by impulse—kill and are much more likely to do so when armed than when disarmed.²⁹³

²⁸⁶ See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 53 (1987). Glendon contrasts America's extreme and isolating version of individual liberty, in which a pregnant woman has no responsibilities to others, with western European laws striking a balance between women's liberty and their responsibilities as members of society who are carrying unborn life. *See id.* at 59.

Glendon suggests that American society and American women might be better off with the former French law that permitted and funded a first trimester abortion if a woman states, after a waiting period and counseling in favor of childbirth, that she is in "distress," *see id.* at 15, or the West German provisions restricting abortion to cases where pregnancy would pose a serious danger to a woman's physical or mental health. *See id.* at 31.

In a separate project, Glendon casts the American woman under *Roe* as a "lone rights-bearer," an isolated individual with the "right to be let alone". MARY ANN GLENDON, *RIGHTS TALK* 59 (1991). Alternatively, the West German approach envisions a woman as situated within, and partially constituted by, her relationships with others. *See GLENDON, ABORTION AND DIVORCE, supra*, at 37. As a result, her statutory right to free development of her personality must be balanced against the fetus's right to life. *See id.*

²⁸⁷ *A New American Compact: Caring about Women, Caring of the Unborn*, N.Y. TIMES, July 14, 1992, at A23.

²⁸⁸ *See McClain, supra* note 285, at 1051.

²⁸⁹ *See id.* at 1065.

²⁹⁰ *See id.*

²⁹¹ *See Kopel & Little, supra* note 201, at 441 & n.13 (explaining that the communitarian platform calls for sweeping disarmament that exists only in Japan) (citing DAVID B. KOPEL, *THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROLS OF OTHER DEMOCRACIES?* 20-23 (1992)).

²⁹² Gun accidents rarely involve pre-adolescent children. Nationwide in 1991, there were a total of 142 fatal gun accidents involving children under age 13; approximately 60 of these involved handguns. *See Gary Kleck, Guns and Violence: An Interpretative Review of the Field*, 1 SOC. PATHOLOGY 12, 29-30 (1995).

²⁹³ As Don Kates and Gary Kleck demonstrate, the portrayal of the ordinary citizen as a primary criminal threat is false. The endlessly repeated argument for banning firearms is that "[M]ost murders are committed by *previously law abiding* citizens where the killer and the victim are related or acquainted"; "*previously law abiding* citizens [are] committing impulsive gun-murders while engaged in arguments with family members or acquaintances." "That gun in the closet to protect against burglars will most likely be used to shoot a spouse in a moment of rage.... *The problem is you and me—law-abiding folks.*"

(pg.163) The Second Amendment, behind which the NRA hides, is subject to a variety of interpretations, but the Supreme Court has repeatedly ruled, for over a hundred years, that it does not prevent laws that bar guns. *We join with those who read the Second Amendment the way it was written, as a communitarian clause, calling for community militias, not individual gun slingers.*²⁹⁴

The communitarian disarmament plan is a mixture of coercion and marketing.

Perhaps the best way to proceed, if nationwide domestic (pg.164) disarmament cannot be achieved immediately, is to introduce it in some major part of the country, say, the Northeast. That will allow everyone to see the falsity of the NRA's beloved statement that criminals kill people, not guns.... The rapid fall in violent crime sure to follow will make [even] more states demand that domestic disarmament be extended to their [region].²⁹⁵

These suggestions have elicited a detailed response from David Kopel and Chris Little.²⁹⁶ Tracking McClain's critique of the communitarian preference for European-style abortion laws,²⁹⁷ Kopel argues that Domestic Disarmament springs from a "European sensibility towards an armed populace."²⁹⁸ Kopel questions whether the Communitarians' reliance on state coercion to achieve domestic disarmament raises more problems for communitarians than it solves.

... But every local and national study of homicide shows that murderers are far from being "ordinary citizens" or "law-abiding folks." Rather, they are extreme aberrants, their life histories being characterized by felony records, psychopathology, alcohol and/or drug dependence and often irrational violence against those around them....

... The data set out in [that Chapter] show that—unlike ordinary gun owners—roughly 90% of adult murderers have prior adult crime records, with an average adult criminal career of six or more years, including four major adult felony arrests.

DON B. KATES, JR., *Introduction*, to THE GREAT AMERICAN GUN DEBATE 11 (1997).

While information is less uniformly available for juveniles, Kates and Kleck employ data from a forthcoming Boston study to show the same trend for juveniles murders; which are committed by a "relatively small number of very scary kids." See David M. Kennedy et al., *Youth Violence in Boston: Gun Markets Serious Youth Offenders, and a Youth Reduction Strategy*, LAW & CONTEMP. PROBS., Winter 1996, at 147.

²⁹⁴ Kopel & Little, *supra* note 201, at 445 & n.40 (citations added) (quoting THE COMMUNITARIAN NETWORK, THE CASE FOR DOMESTIC DISARMAMENT 1 (1992)). Kopel and Little point out that the number of accidental deaths from firearms is often exaggerated; in 1993 the number of accidental deaths was 1,600. See *id.* The number of accidental firearm deaths of children (ages 0-14) was 220. See NATIONAL SAFETY COUNCIL, ACCIDENT FACTS (1994).

In his book, Etzioni puts the number of fatal gun accidents annually at 14,000. AMITAI ETZIONI, THE SPIRIT OF COMMUNITY 179 (1993). Since 1990 the actual number has been on the order of 1400-1500 annually, a decrease since the late 1970s. See Kates et al., *supra* note 171, at 568-69 & tbl.2.

²⁹⁵ THE COMMUNITARIAN NETWORK, THE CASE FOR DOMESTIC DISARMAMENT 8 (1992) [hereinafter DOMESTIC DISARMAMENT] (on file with author).

²⁹⁶ See Kopel & Little, *supra* note 201, at 445.

²⁹⁷ See McClain, *supra* note 285, at 1003, 1006.

²⁹⁸ See Kopel & Little, *supra* note 201, at 451. Kopel and Little also note that the communitarian position reflects a "low grade war" over gun control detailed by Barry Bruce-Briggs. See *id.* Bruce-Briggs argued:

[T]hose who take bourgeois Europe as a model of a civilized society: a society just, equitable, and democratic; but well ordered, with the lines of responsibility and authority clearly drawn, and with decisions made rationally and correctly by intelligent men for the entire nation. To such people, hunting is atavistic, personal violence is shameful, and uncontrolled gun ownership is a blot upon civilization.

Barry Bruce-Briggs, *The Great American Gun War*, PUB. INTEREST, Fall 1976, at 61.

Echoing McClain's concerns about communitarian support for coercion in the abortion area, Kopel presents an array of problems with coerced disarmament.²⁹⁹ He suggests that the (pg.165) communitarian position on gun ownership reflects a superficial and elitist treatment of an issue that communitarians have not considered in a serious way.³⁰⁰

The communitarian platform on abortion and gun rights highlights a common thread. The two rights represent extremes in the balance between individual liberty and disputed conceptions of duty. Each is a severe and often damaging exercise of individual freedom. Each requires powerful justifications, if for no other reason than the costs imposed on other very significant interests. Consequently, the two are uniquely paired by communitarians as rights that ought to be extinguished through education, moral suasion and finally force.

There are many problems with the communitarian critique of abortion and gun rights,³⁰¹ not the least of which is that (pg.166) renditions of the two rights advance solid communitarian values.³⁰²

²⁹⁹ Among other problems, Kopel and Little discuss the potential for widespread non compliance with confiscation efforts by gun culture types in law enforcement and the military, noncompliance by and criminalization of potentially millions of America's approximately 50 million gun owners, the danger of overwhelming the criminal justice system with large numbers of new gun criminals, armed resistance by gun owners, and a crisis of government legitimacy that tends to follow prohibitionist solutions. See Kopel & Little, *supra* note 201, at 456-72.

³⁰⁰ Kopel and Little argue:

Although the communitarian agenda for selective censorship, drug testing, and the like may not comport with strict construction of the Constitution, there is a recognition that freedom of speech and privacy are tremendously important, and that First and Fourth Amendment rights should be infringed only when there is a compelling reason to do so. Etzioni formulates a four-part test for when rights may be infringed: (1) clear and present danger, (2) no alternative way to proceed, (3) "adjustments" should be as limited as possible, and (4) infringing policies should minimize harmful effects.

....

Etzioni's snide accommodation of gun collectors—by allowing them to keep their guns if they employ his "favorite" technique of pouring "cement in the barrel"—is likewise explainable only as a product of condescending ignorance.

Id. at 472-73.

³⁰¹ Robin West's critique is apt here. On abortion, the communitarian proposal falls short because the community has failed to provide essential resources that West contends are vital to women facing unplanned pregnancies. See West, *supra* note 82, at 966-67. On guns, the critique fails, because, as Fletcher's account of self-defense shows, the community is not competent to provide personal security for individuals. See generally Fletcher, *supra* note 75, at 174-75.

Moreover, the kind of suasion and social pressure communitarians would rely upon before using coercion, has been abused traditionally in ways that raise fair claims, indeed demands, for the very rights that communitarians would dismantle. Robin West, Catharine MacKinnon and others argue that the abortion right is an essential liberty in a society whose norms and values are corrupted by patriarchy. See MACKINNON, *Privacy v. Equality*, *supra* note 86, at 94-96; West, *supra* note 82, at 94-96. Abuse of "community" power also is at the root of countless episodes of racist violence that have prompted Professors Cottrol, Diamond and others to reevaluate and endorse individual gun ownership by good people of color. See Cottrol & Diamond, *The Second Amendment*, *supra* note 159, at 354-55, 361.

Communitarians acknowledge these concerns glancingly. See McClain, *supra* note 285, at 1035, 1036-38. The only reason the community they imagine would not be abused in the way it has been historically—and for many of us still is—is that communitarians proclaim that it should not be. See *id.* at 1029-30. This is cold comfort to those who have been abused under earlier balances between community and individual rights of the type communitarians pine for. See *id.* *passim*.

³⁰² Kopel and Little point out that a communitarian stance does not inevitably produce a prohibitionist position on firearms possession. Indeed, it seems somewhat odd. They emphasize David Williams's contention that a true citizen's militia (with citizens bearing their own private arms) is the height of republican virtue. See Kopel & Little, *supra* note 201, at 477-87 (referencing David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991)). Kopel and Little offer communitarian principles that seem to support a virtuous armed community and conclude

Were it not for Etzioni and the Communitarian Network's antipathy towards firearms, Reynolds's militia proposal might be considered mainstream communitarianism....

....

However, the communitarian emphasis on responsibility (pg.167) does give us a framework for ordering the two rights.³⁰³ An exercise of either right extinguishes some level of life-interest and under some constructions fully extinguishes the most highly protected interest in our constitutional structure.³⁰⁴ It is instructive to evaluate these respective life-interests and the nominal duties that right-bearers owe them.

Focusing on the relative duties of the right-bearers toward the sacrificed life-interest, the case for armed self-defense against a criminal attacker appears stronger than the case for terminating the innocent fetus, who we can more easily say is owed a duty by the parents.³⁰⁵ Granted, some have argued the woman's sexual inequality pushes her toward the status of an innocent who had no real ability to avoid conceiving.³⁰⁶ But even those critiques cast the woman's innocence relative to (pg.168) the male partner, and a male-dominated society. The comparison is not between the mother and the fetus.³⁰⁷

... [C]onsidering how to revive the militia is the most appropriate policy, both for those who consider themselves faithful adherents to the Constitution and for those who genuinely embrace communitarian values.

Kopel & Little, *supra* note 201, at 496, 499.

Communitarian Andrew Payton Thomas embraces the armed citizenry as a solid communitarian value. Arguing that the original Federal Militia Act elevated communitarian ideals, Thomas contends

A new statutory requirement that heads of household with noncriminal backgrounds keep a serviceable firearm in their households and that all private firearms therefore be registered with the government would likely provide one of the most efficacious means of deterring offenders. This law would clearly have to be wedded to mandatory training requirements, as well as properly strict penalties, as are now on the books in several states, for adults who failed to store them so that they were inaccessible to children. Also, conscientious objectors to the requirement would be exempt. Aside from reinforcing the historically vital conception of the community as ultimately responsible for crime control, such a law could have an immediate deterrent effect.

ANDREW PAYTON THOMAS, *CRIME AND THE SACKING OF AMERICA* 281-82 (1994).

Planned Parenthood and other pro-choice groups have stressed communitarian values in their goal of making every child a wanted child. See Candace Crandall, *The Fetus Beat Us*, *HUM. LIFE REV.*, Mar. 1, 1996, at 100.

³⁰³ See McClain, *supra* note 285, at 992.

³⁰⁴ See, e.g., Sunstein, *supra* note 14, at 29-30. To be sure, there are competing conceptions of the life-interest that is impaired by the exercise of these rights. The life-interest of the fetus during a large phase of gestation is viewed by many to be less significant than the life-interest of an extant adult. See Roger Wertheimer, *Understanding the Abortion Argument*, 1 *PHIL. & PUB. AFF.* 67, 80-82 (1971). Similarly, the life-interest of a criminal aggressor or invader is generally subordinated to the interest of the victim defending his own life against aggression. However, in both debates this balancing is contested. See Thomson, *supra* note 14, at 45-50 (articulating the argument that human life begins at conception); Allan R. Brockway, *But the Bible Doesn't Mention Pistols!*, *ENGAGE/SOC. ACTION* May 1977, at 36, 40 ("Criminals are members of the larger community no less than are others. As such they are our neighbors or as Jesus put it, our brothers ..."). See also Kates, *supra* note 215, at 91-93.

³⁰⁵ It is easy to construct this duty on the common-law view that we place responsibility on the party whose action caused the problem.

³⁰⁶ See, e.g., MACKINNON, *Privacy v. Equality*, *supra* note 86, at 95; MACKINNON, *Desire and Power*, *supra* note 86, at 46-62; McClain, *supra* note 86, at 428-29.

³⁰⁷ Cass Sunstein says that the samaritan/equal protection argument allows us to avoid that balance altogether. He does one of the best jobs of contending with the responsibility of the parents for the plight of the fetus. Sunstein identifies two possible challenges to his equal protection argument. See Sunstein, *supra* note 14, at 40. The first of these challenges is, "that pregnancy results from a voluntary activity that creates a special duty." See *id.* To this challenge, he responds:

Even if this argument is accepted on its own terms, it would not work in cases in which pregnancy has resulted from involuntary intercourse, such as rape and incest....

....

More broadly, the fact that intercourse is voluntary hardly means that pregnancy is. Voluntary intercourse does not mean, as a matter of simple fact, voluntary pregnancy, any more than the decision to walk at night in a certain neighborhood means voluntary mugging.... The question is instead the (always and inevitably normative) one of assumption of risk: whether the decision to engage in intercourse, when voluntary, should be taken to allow the state to impose on women a duty of bodily cooptation in cases of pregnancy.

Compared to the innocent fetus, the criminal aggressor in the gun-rights context is plainly more culpable. Even for someone like Bernhard Goetz, who apparently exceeds the boundaries of self-defense, it is difficult to say that his victim approaches the status of the innocent fetus.

It might be objected that this is the wrong balance to strike; that a true measure of relative duties must consider the broader societal costs of guns—e.g. suicides, accidental, negligent, and criminal homicides. That exercise would be complicated by work such as John Lott's and Gary Kleck's arguing that individual firearms and armed self-defenders produce a net benefit.³⁰⁸ (pg.169)

The objection breaks down further when we consider applying it symmetrically. Would we impose a similar burden on the mother of the unwanted fetus? Should her right be balanced against the cumulative costs (e.g., the total number of fetuses terminated each year, the psychological costs to those who agonize that their society condones something they consider to be murder,³⁰⁹ or even criminal violence by anti-abortion protesters³¹⁰) generated by the abortion controversy?³¹¹

In both cases the link between the individual right-bearer and the cumulative costs generated by the right is tenuous.³¹² Moreover, actually attempting to integrate cumulative costs into the duty critique shows that there is a deeper problem with the objection. (pg.170)

Take the case of accidents to family members caused by negligent storage or use of a gun in the home. Assume that the duty of the gun-owner to the injured innocent is equal to the mother's duty to the fetus. The comparison is confounded when we try to incorporate cumulative costs. How does one weigh 1.5 million aborted fetuses per year³¹³ against 1,600³¹⁴ accidental gun deaths per year. Our inability to agree on the "life-value" of the fetus confounds the comparison, incorporating

Id. at 40-41 (citing Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 57-59, 65 (1971)).

One might object that all this still misses the point. As between the parents and the fetus who is closest to the traditional "responsible party" (one in the best relative position to avoid the harm) on whom our common law often places the burden of mistakes?

³⁰⁸ See Kleck & Gertz, *supra* note 32, at 179-80; Kleck, *supra* note 292, at 12-47; Gary Kleck & E. Britt Paterson, *The Impact of Gun Control and Gun Ownership Levels on Violence Rates*, 9 J. QUANT. CRIMINOLOGY 249-87 (1993); Lott & Mustard, *supra* note 32, at 64-65. See also JAMES D. WRIGHT & PETER ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 141-61, 238 (1986); Daniel D. Polsby, *Firearms Costs, Firearms Benefits and the Limits of Knowledge*, 86 J. CRIM. L. & CRIMINOLOGY 207 (1995).

³⁰⁹ See *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1991) (acknowledging that abortion holds consequences for not only prenatal life, but society as well, namely that society "must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life").

³¹⁰ Women's expected outrage at the suggestion that their rights should be impaired in order to curb criminal violence of abortion protesters is similar to the outrage of good citizens whose ownership of defensive firearms generally is the primary thing impaired by legislative attempts to curb gun violence by criminals who ignore gun and other laws.

³¹¹ This comparison highlights the fact that both abortion and defensive gun use have externalities—positive and negative. Both are deeply personal decisions, but not exclusively so. Gun control advocates highlight an externality of gun ownership that parallels the psychological cost to abortion opponents, who worry that their society condones what they consider to be murder. See David Hemenway et al., *Firearms and Community Feelings of Safety*, 86 J. CRIM. L. & CRIMINOLOGY 121, 126-27 (1995) (exploring "whether increased gun ownership raises or lowers the *perceived* safety of others in the community by looking at subjective beliefs").

³¹² How does the developing life-interest of the fetus compare to the diminished life-interest of a criminal aggressor? Does the mother owe it a lesser duty than a victim owes to the criminal attacker? How much does the criminal aggressor's action reduce his own right to life? When is life-interest sufficiently reduced to justify deadly force in self-defense? Our general moral disagreements about abortion and deadly self-defense bar agreement on these questions.

³¹³ See Sunstein, *supra* note 14, at 38 n.141 and accompanying text (listing various sources providing pre-*Roe* and post-*Roe* abortion rates, including illegal abortions).

³¹⁴ See Kopel & Little, *supra* note 201, at 476 n.40.

cumulative costs stalls the analysis on the life-value question that makes these rights controversial to begin with.

V. THE POLICY DEBATE: PARALLEL THEMES AND ONE STARK CONTRAST

The peculiar nature of abortion and gun rights produces an array of parallel themes in tone and rhetoric surrounding the respective policy debates. From the broad similarity between absolutist agendas in the political arena, to the rhetorical devices employed by opponents and proponents of the rights, these congruencies trace another part of the abortion/gun-rights intersection. At the base of these common themes is one stark contrast between the groups that oppose the two rights. That contrast, presented last, helps us to order the claims against them.

A. *A Conflict of Absolutes*

The two rights present both a political and conceptual conflict of absolutes. Politically, abortion and gun rights each confront organized, credible threats to their very existence.³¹⁵ (pg.171) While there are mild comparisons in the speech area, particularly with efforts to curb pornography,³¹⁶ no other widely enjoyed liberties face comparable opposition.

In the abortion debate most would acknowledge that the deepest conflict is between those who wish to preserve abortion as a woman's choice and those who seek to ban it (with perhaps minor exceptions).³¹⁷ The claim that the gun-rights debate presents the same clash of absolutes is often dismissed. The disarmament goal can be inferred from the structure of gun control laws, but that generally convinces only those who need no convincing.³¹⁸ However, even gun control advocates acknowledge that this fear is validated by explicit statements from public officials and gun control advocates.³¹⁹ Randy Barnett and Don Kates describe in detail the long list of confirmations from leaders of the anti-gun movement and public officials that, for many, *gun control* equals *disarmament* sufficient to prevent armed self-defense.³²⁰ This is almost literally the effect of the

³¹⁵ See, e.g., DENNIS A. HENIGAN ET AL., GUNS AND THE CONSTITUTION (1995).

Kopel and Little's critique of communitarian disarmament advocacy points out numerous earlier calls for total disarmament by gun control advocates. See Kopel & Little, *supra* note 201, at 445-50; Jack M. Beerman, *The Supreme Court's Narrow View on Civil Rights*, 1993 SUP. CT. REV. 199, 199 ("[s]ome of the most serious threats to a woman's ability to choose abortion have not come from government regulation, but from private, national, organized efforts to prevent abortions").

³¹⁶ These are confounded by difficulties in defining it.

³¹⁷ There might be a vast middle ground of public opinion supporting choice with certain "reasonable limitations" but between the groups who lead the political battles, there is no apparent room for compromise.

³¹⁸ See Johnson, *supra* note 152, at 442-43 (The "bad gun formula," our dominant regulatory model, contains no discernable principle that protects any category of firearms); see also *The Second Amendment and the Need for Congressional Protection: Testimony Before The Subcomm. on Crime of the House Comm. on the Judiciary* 104th Cong. (April 5, 1995), available in, 1995 WL 151923 (testimony of Prof. Robert J. Cottrol, Prof. Raymond T. Diamond and Assoc. Prof. Nicholas J. Johnson).

³¹⁹ See Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53 (1992). Based on the positions of the two major national gun control groups, gun-control advocate McClurg acknowledges "the extreme views of many gun control supporters make the slippery slope argument understandable." *Id.* at 89.

³²⁰ Randy Barnett & Don B. Kates, Jr., *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139, 1259 (1997) (critiquing Andrew Herz's *Gun Crazy*, they conclude that "*Gun Crazy's* claim that '[v]irtually no one in the gun control movement calls for confiscation,' reflects either ignorance or deceit"). See also Kates et al., *supra* note 171, at 515-17 (pointing out scores of statements and official positions endorsing total ban on handguns and all firearms).

current restrictions on gun ownership in (pg.172) Washington D.C.³²¹ Under this legislation, lauded by gun control groups as a model for the nation, handguns are banned and long-guns may not be kept assembled or loaded even for self-defense.³²² The communitarian movement goes further with an unequivocal call for the disarmament of American citizens.³²³

In both the *gun* and abortion contexts, the perceived threat of eradication prompts similar reactions to regulatory proposals. Often "compromise" is perceived as right-bearers' ceding rights incrementally in exchange for nothing more than a short rest before the next battle. This fear of a political slippery slope turns nearly all proposals for regulation into pitched battles.

Two cases on point are the abortion-rights community's reaction to the proposed ban on late term abortions, and the gun-rights community's opposition to the assault weapons ban in the 1994 Crime Bill. Those unfamiliar with these debates might wonder why anyone would object to these limitations. But, with every new regulation perceived, and often claimed,³²⁴ as a victory for the cause of eradicating the right, the objections are easier to understand.³²⁵ (pg.173)

Both constituencies also face the strategic disadvantage of combatting powerful, graphic images with abstractions like "liberty" and "autonomy." One of the most powerful images in the late term abortion debate is a pamphlet containing a chilling illustration of the procedure taken from a medical journal article. It shows a fetus being dispatched by a scalpel thrust to the base of the skull.³²⁶ In the gun-rights debate, the image is not just the bloody aftermath of a shooting. The guns themselves (at least certain types) seem to repel some people.³²⁷ That the image of a gun and irrelevant accoutrements like pistol grips³²⁸ have such power suggests that there is something to the observation that

³²¹ See D.C. CODE ANN. § 22-3204(a) (1992).

³²² See *id* § 6-2372; see also Stephen P. Halbrook, *Second Class Citizenship and the Second Amendment in the District of Columbia*, 5 GEO. MASON U. CIV. RTS. L.J. 105, 105 (1995).

³²³ See DOMESTIC DISARMAMENT, *supra* note 295, at 5.

³²⁴ See, e.g., Kates et al., *supra* note 171, at 515-19.

³²⁵ Senator Dianne Feinstein (D-CA), discussing the passage of the assault weapons ban that she authored, candidly admitted that the only reason she does not seek a ban and confiscation of all guns is that it is not yet politically feasible. "If it were up to me, I would tell Mr. and Mrs. America to turn them in." Interview by Lesley Stahl with United States Senator Dianne Feinstein, on *60 Minutes* (CBS television broadcast, Feb. 24, 1995), *quoted in Hand Them All In*, LAS VEGAS REV.-J., Oct. 13, 1997, available in 1997 WL 4555338. David Kopel contends that the assault weapons legislation in the 1994 Crime Bill was prompted more by strategic and policies considerations than substantive legal concerns. See DAVID B. KOPEL, "Assault Weapons," in GUNS: WHO SHOULD HAVE THEM 190-92 (1995). "[Josh] Sugarman authored the November 1988 strategy memo suggesting that the press and the public had lost interest in handgun control. He counseled the anti-gun lobby to switch to the 'assault weapon' issue, which the lobby did with spectacular success in 1989." KOPEL, *supra* note 159, at 435 n.31.

"Assault weapons" are rarely used in crime and are less lethal than most hunting rifles. See KLECK, *supra* note 8, at 71; KOPEL, *supra*, at 179-81; Kates & Polsby, *supra* note 130, at 253.

³²⁶ Cf. Michelman, *supra* note 227 (explaining that the focus on the abortion procedure improperly shifts one's attention from the central issue of choice).

³²⁷ The Estrich open letter attempts to capitalize on this, by using a photograph of an ugly gun (the Tech-9), and the caption, "Does the Second Amendment mean we must tolerate *this*?" See Alschular, *supra* note 139. The precise objection is unclear. The Tech-9 is a 9mm, semi-automatic, "pistol." It takes a detachable magazine. It is black. It is much too large to conceal. It is not terribly accurate. It is by many accounts ugly. The Open Letter does not explain whether the objection is to semi-automatic weapons, detachable magazines, pistol grips, handguns or guns generally. See *id*.

³²⁸ See Johnson, *supra* note 152, at 445 (describing the irrational distinctions—i.e., muzzle guards, pistol grips and bayonet lugs—between protected and bad banned guns in the 1994 Crime Bill).

the impetus to banning firearms comes less from a belief that it will reduce crime than from a cultural and moral opposition to them. At bottom it replicates the view of many who opposed legalization of homosexual and other practices deemed "deviant" on moral grounds even while agreeing that laws will not eradicate such practices. In this view prohibition is desirable even though ineffective, because it brands the banned conduct (gun ownership, homosexual love, or whatever) as loathsome and immoral.³²⁹

One might make the same observation about opposition to (pg.174) abortion. As discussed in Section D below, it is generally acknowledged that making abortions illegal will make them more dangerous for women and surely will stigmatize them further. But it will not stop them.

Abortion and gun rights also present a conceptual conflict of absolutes. Both rights elevate the life-interest of the right-bearer to the extreme detriment of competing life-interests.³³⁰ The character and severity of this conflict makes the two rights virtually unique in the panoply of constitutional liberties and presents them as rights that invite similar treatment, invoke similar principles and generate similar results in the balance that they strike between conflicting interests.³³¹

B. *Opposition Folding Choice Into Utility*

Conversations about gun and abortion rights contain parallel conflicts between the value of individual choice and contentions about the average utility of the right. In the gun debate, the conflict grows from the assertion that the gun owner is more (pg.175) likely to harm herself or someone she cares about than to successfully defend herself from a violent attack.³³² This contention is refuted by empirical studies.³³³ In the abortion debate, the argument is that abortion is virtually never the right

³²⁹ KATES, *supra* note 293, at 95.

³³⁰ Efforts to show that the opponents and advocates can reach a compromise have received a decidedly mixed reaction. Reviews of Professor Tribe's ambitious attempt to map out common ground for pro-choice and anti-abortion factions suggest that Tribe may have taken on an impossible assignment. *See, e.g.*, Stephen L. Carter, *Abortion, Absolutism, and Compromise*, 100 YALE L.J. 2747, 2749-50 (1991) (reviewing LAURENCE H. TRIBE, *A CLASH OF ABSOLUTES* (1990)); Michael W. McConnell, *How Not to Promote Serious Deliberation About Abortion*, 58 U. CHI. L. REV. 1181 (1991) (same); Annette E. Clark, *Abortion and the Pied Piper of Compromise*, 68 N.Y.U. L. REV. 265, 274 (1993).

³³¹ In theory, we might resist the contention that the fetus represents a "life-interest." From the view that the fetus is not a constitutionally-protected, extant life, one might say that it presents no protected life-interest at all. But even the staunchest supporters of the abortion right, while rejecting that the fetus is a person, acknowledge that it presents some level of conflicting life-interest. *See* Michelman, *supra* note 227. Robin West describes the dilemma that the abortion right poses for "relational feminists." While supportive of the right, they find it highly problematic because "the decision to terminate fetal life" is at odds with their view of a woman's distinctive moral sensibility. *See* West, *supra* note 82, at 962. Donald Regan frames every abortion choice as a balancing of life-interests that precisely reflect the gun-rights balance: "Unwanted pregnancy is serious bodily harm justifying the use of deadly force in self-defense." *See* Regan, *supra* note 11, at 1615.

³³² *See* Witkin, *supra* note 178, at 5-7.

³³³ *See* Lott & Mustard, *supra* note 32, at 5. John Lott's recent findings contradict the contention that arming oneself is the greater danger. *See id.* at 64-65. Lott criticizes a commonly cited study that argues concealed weapons increase individual risks. *See id.* at 5 (criticizing David McDowall et al., *Easing Concealed Firearm Laws: Effects on Homicide in Three States*, 86 J. CRIM. L. & CRIMINOLOGY 193 (1995)). Lott points out:

The paper by McDowall et al., which evaluates right-to-carry provisions, was widely cited in the popular press. Yet, their study suffers from many major methodological flaws: for instance, without explanation, they pick only three cities in Florida and one city each in Mississippi and Oregon (despite the provisions involving statewide laws), and they use neither the same sample period nor the same method of picking geographical areas for each of those cities.

Id. at 5.

Lott's study evaluates all U.S. counties from 1977-1992. *See id.* at 9 (contending that county-wide, rather than state-wide,

choice and that a woman ultimately will be worse off for having chosen abortion. The argument typically focuses on the asserted immorality of abortion and projects remorse-driven spiritual or psychological damage.³³⁴ In both contexts, this homogenization disparages personal choice and ignores the vast variation between individual circumstances on the highly debatable view that the choice is nearly always a bad one.³³⁵ (pg.176)

In practice, the decision to use a gun in self-defense or to have an abortion may or may not turn out to be a good one. The result is not a function of who has the most powerful or graphic anecdotes or barrage of statistics. Rather, the result depends on the individual circumstances of the right-bearer—her skill level, income, risk appetite, education, age, judgement, experience, physical condition, state of mind, and geographical location. In both cases, advocates emphasize that *choice* is vital.³³⁶ Both rights are core options that can dramatically affect the outcome of pivotal life-crises. The intensely personal nature of the respective choices explains much of the resistance to regulatory encroachments that would close off options that will be important in particular cases.³³⁷

C. Regulation Reflecting State Ambivalence About the Respective Rights

In the case of both rights, the line between protected liberty and reprehensible behavior is thin. One certainly can find disagreement about the proper boundary between self-defense and prosecutable homicide.³³⁸ There is similar conflict over the proper policy impact of distinctions between the blastocyst, the early term fetus, the late term fetus and the newborn infant who remains dependent on outside help for survival. This ambivalence is reflected in a common regulatory response to the two liberties which presumes that the exercise of each might well be a very bad decision. Waiting periods, common in both domains, seem to express the hope that upon reflection (pg.177) the right-bearer will choose a different path.³³⁹

data increases accuracy); see also Kleck, *supra* note 8 at 269-305; *supra* text accompanying notes 173-80.

³³⁴ An episode of Pat Robertson's *700 Club* furnishes an example. It devoted several minutes to the story of "Michelle," whose several abortions, she said, lead to spiritual decline, drug use, and years of remorse. See *The 700 Club*, (CBN television broadcast, Jan. 12, 1997).

³³⁵ As President, Ronald Reagan directed Surgeon General C. Everett Koop to report on the negative psychological effects of abortion. Koop (who was openly opposed to abortion) concluded that he could not file a report that could withstand scientific scrutiny and that the psychological effects resulting from abortion are minuscule from a public health perspective. See *Medical and Psychological Impact of Abortion, Hearing Before Human Resources and Intergovernmental Affairs Subcomm. of the House Comm. on Gov't Operations*, 101st Cong. (1989) (including Report and testimony of former Surgeon General, C. Everett Koop); H.R. REP. No. 101-392 (1989) (House of Representatives Committee on Government Operations report presenting findings of hearing before the Human Resources and Intergovernmental Affairs Subcommittee and making recommendations for congressional action). *But see* DAVID C. REARDON, *ABORTED WOMEN: SILENT NO MORE* (1987) (recounting stories of members of Women Exploited by Abortion).

³³⁶ See, e.g., Stange, *supra* note 96, at 4 (criticizing the dominant feminist position on self-defense).

³³⁷ See, e.g., *id.* at 39 (discussing the choice of several women, whether to arm themselves against a rapist); Michelman, *supra* note 227 (arguing that restrictions on abortion hinder a woman's constitutional right of choice).

³³⁸ See, e.g., McClain, *supra* note 86, at 203 n.30 (discussing the accidental shooting death of a Japanese exchange student).

³³⁹ In the abortion context, there is Mary Ann Glendon's advocacy of a French style model that would require a waiting period and counseling. See McClain, *supra* note 285, at 1078. The Brady Law waiting period for purchasing hand-guns is an example in the gun-rights context. See 18 U.S.C. § 922 (1994).

It is difficult to say which right-bearer is more substantially impaired by this delay. At first glance, we might say that the pregnant woman has a larger and longer window of opportunity; that the a period of repose is not a substantial burden. In contrast, we might imagine the stalking victim losing her life to a 15 day waiting period for gun purchases like that in California. See CAL.

D. *Law Breaking as a Primary Argument Against Regulation*

Both debates feature the argument that unenforceable prohibitions, resulting in only partial compliance, will cause greater problems than they solve.³⁴⁰ This type of unintended results objection appears in many debates but has special significance here. The unintended consequences of regulation generate, for gun and abortion-rights supporters, powerful symbols with which to confront their opposition.³⁴¹ The coat hanger in the abortion context and the NRA's chilling 911 tapes of defenseless victims being murdered while waiting for police, are reminders that eradication of the respective rights will not eliminate the human pain associated with these controversies.

In the gun debate, the argument that criminals will not obey gun prohibition laws is a common rejoinder to the contention that strict gun control will make good people safer.³⁴² Extreme (pg.178) gun laws, it is argued, will leave honest and compliant citizens unarmed and worse off by generating greater dependency on government and granting law-breakers more and better targets by lowering the risk of effective resistance by victims.³⁴³

In the abortion debate, powerful images of back-alley abortions diminish the argument that restricting abortion would be a purely protective measure. These images emphasize that abortion restrictions will impair disproportionately the health and safety of poor women, whose only abortion option might be an unsafe, illegal one.³⁴⁴

The argument in the two contexts is also different in a way that aids our comparison. The abortion debate focuses on law-breaking by the former right-bearer and the abortion provider. In the gun debate, the former right-bearer is the putative victim of criminals who will break gun laws the same way that they break other laws. On this measure, the gun-rights argument is stronger. Moreover, the woman who chooses the illegal, unsafe abortion does in fact make a conscious choice to accept the attendant risks. While this is likely to be a very unpleasant choice, it is still a degree more control than can be exercised by the crime victim, who in the model case is thrust into danger completely involuntarily.

E. *Personal Crisis and Political Failure*

Both choices involve deeply personal crises attributable in part to a failure of political and social mechanisms. In the abortion context, Catharine MacKinnon, Robin West and others have highlighted the incongruity of a political scheme that "compels" women to have children they are

PENAL CODE §12071(b)(3)(A) (West Supp. 1997). However, if we focus on those women or girls most at risk, it is easy to imagine the abortion choice being equally impaired. For a young, poor girl, who barely gathers enough money and courage to travel to a place where abortions are available, an unexpected waiting period might be devastating.

³⁴⁰ This is of course controversial. Opponents would say that the benefits of abortion prohibitions are the millions of fetuses saved. In the gun prohibition context, one might hope for the elimination of gun accidents, heat of passion slayings, and black market prices high enough to reduce minors' unsupervised access to guns.

³⁴¹ See *supra* text accompanying notes 326-29.

³⁴² See, e.g., KOPEL, *supra* note 159, at 415; WRIGHT & ROSSI, *supra* note 308, at 227; Kleck, *supra* note 292, at 19-20.

³⁴³ See sources cited *supra* note 308.

³⁴⁴ See Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, The Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 455-56 (1992) (noting the greater ability of affluent women to travel to jurisdictions where abortion is available).

ill-prepared to care for, and then denies them effective assistance once the child is born. If the abortion right is eliminated without addressing the needs of young, poor and single mothers, we should view it as (pg.179) a political failure.³⁴⁵ In the context of this failure severe restrictions on abortion seem incongruous.

A similar theme arises in the debate about an individual right to arms. Collective mechanisms do provide some marginal protection. We know, however, that the state has no duty to provide individual physical security³⁴⁶—a deficiency similar to the state's failure to assist the pregnant woman. Further, we know that the state's capacity to protect citizens from criminal attacks, both in practice and in theory, is minimal.³⁴⁷ For many, the assertion that police will be more effective if (pg.180) good people eschew self-defense rings hollow. Many have argued that beyond the mere assertion, there is little to support the view that severe gun laws, even if generally obeyed by good people, will change the behavior of criminals or the effectiveness of the police.³⁴⁸

F. *One Stark Contrast*

There is finally, a stark and informative contrast between the anti-abortion and anti-gun positions. It suggests that comparatively, the anti-gun argument is on weaker ground.

The result that anti-abortion advocates contemplate is the pregnant woman having her baby. This is a result plainly different from, and in their view morally better than, eliminating the fetus. However one may disagree with it, the position is at least morally coherent—a restriction on freedom to achieve a different, arguably, morally better result.

In contrast, anti-gun activists do not promote allowing criminals to run wild, raping and killing defenseless victims. Rather, they urge delegation. Those facing criminal attack should call armed police for protection. If any shooting needs to be done, police will do it. (We do not call police for their mediation skills). No one seriously contends that police have a better moral compass, or better judgement than the average citizen. It might even be a mistake to assume that they meet the

³⁴⁵ See McClain, *supra* note 86, at 398-403 (highlighting the dilemma faced by women who are denied funding for abortions and then subsequently denied public assistance).

³⁴⁶ See *supra* note 89.

³⁴⁷ See Johnson, *supra* note 45; Johnson, *supra* note 152. This failure provides a response to a question that plagues the gun-rights debate. If guns, what guns? If government is incompetent in this area, the gun control argument goes, it is because individuals have failed to make the sacrifice of liberty that is essential for government to perform its security function. See, e.g., Garry Wills, *John Lennon's War*, CHI. SUN TIMES, Dec. 12, 1980, at 56. Under this view, individual access to firearms reflects a basic failure of our society to insist upon essential terms in the social contract. Those who demand their state of nature right to violent self defense are breaching the agreement to the detriment of us all. (Put aside for the moment the criticism that the social contract is a fiction, and the powerful Rawlsian arguments that absent the basic components of a just society, the social contract includes a right to protect oneself from the most damaging aspects of societal failure).

But arguably, we have enforced the social contract in this regard. In the domain of threats that government is competent to meet (e.g., large scale military threats), enforcement is apparent. We do not give individual citizens access to highly destructive weapons—nukes, stinger missiles, and bazookas. We have drawn the line at tools effective and necessary for individual self-defense. These tools—rifles, shotguns, and handguns—might be effective militarily only where citizens used them cooperatively. And the impulse prompting cooperative self-defense is likely to be the very thing we would want a citizen's militia to oppose.

Domestic disarmament would be a mistake because it would introduce obligations into the social contract that government cannot meet—i.e. requiring government to provide individual security from common criminal threats—forcing citizens to stake their lives on the fiction of individual security through public mechanisms. See Fletcher, *supra* note 75, at 569-70 (analyzing the importance of self-defense against imminent threats and governmental incompetence in this area).

³⁴⁸ David Kopel highlights evidence that disarmament will make criminals more brazen. See KOPEL, *supra* note 159, at 414-19.

average. They very often are younger and less educated than many members of the general population to whom anti-gun advocates would deny a right to armed self-defense.³⁴⁹

If it is immoral to contemplate and use deadly force in self-defense it is equally immoral to call others to do so.³⁵⁰ Indeed, there is a deeper moral problem. As Jeffery Snyder asks "[h]ow can you rightfully ask another human being to risk his life to protect yours, when you will assume no responsibility for yourself?"³⁵¹ Moreover, to the degree that police are prone (pg.181) to use violence more quickly—a reaction bred by the fear distilled from repeated confrontations with the toughest and ugliest elements of our society³⁵²—than would the average citizen, it is morally reprehensible to delegate the defense function.

VI. RECONCILIATION?

The impulse for Robin West's alternative account of the abortion right helps us understand how one might adopt the standard position even while embracing abortion-rights theories that fall within the intersection. As West shows, many aspects of the abortion-rights theories that intersect with gun-rights themes are very problematic for abortion-rights supporters.³⁵³ West explains that many feminist supporters of the abortion right come reluctantly, "with some measure of inconsistency, or in some way by compromising their overriding conception of rights."³⁵⁴

The abortion right is symbolic of women's struggles for political (pg.182) equality and social autonomy.³⁵⁵ It may be this symbolism and allegiance to particular feminist goals rather than commitment to the principles on which one can ground the right, that most influences support for it. West argues that the principles on which the abortion right is grounded "simply do not 'fit well' [with] the various conceptions of rights held by [many] pro-choice legal theorists."³⁵⁶

Its grounding in the right of privacy is problematic for pro-choice radical feminists, who have worked to reveal the private sphere as a "grim world of terror, abuse and violence" for many

³⁴⁹ The requirements for New York's finest are one year of college or military service.

³⁵⁰ See Kates, *supra* note 32, at 120.

³⁵¹ Jeffery Snyder, *A Nation of Cowards*, 113 PUB. INTEREST L. REV. 40, 43 (1993). It is unsatisfactory simply to assert, as the Communitarians and Gary Wills do, that the moral person eschews individual self-defense in favor of receiving community defense from the police who represent us all. See Kopel & Little, *supra* note 201, at 446 (decrying the community of individual gun slingers); Wills, *supra* note 347. First, police generally respond only after the fact. As George Fletcher explains, when a threat is imminent, the community cannot respond to the victim's need for solid physical protection. See Fletcher, *supra* note 75, at 570. Second, the Mark Fuhrman's of the world do not represent, and should not be counted on to protect, people of color—especially people of color in relationships with white people; nor can the department that employed him for decades despite his admitted racism. Many whites would equally deny that Mark Fuhrman represents them or their community. The LAPD did not represent Nicole Brown Simpson or deserve her trust and deference when it did nothing to stop her being repeatedly brutalized by a man who was rich and famous. I use Mark Fuhrman because he is current. I have chronicled elsewhere numerous stomach-turning instances of police misconduct and racism. See Johnson, *supra* note 45, at 57 n.181.

³⁵² See William Barhill, *Focus: Early Warnings; Identifying Violence-Prone Police Officers*, WASH. POST, Aug. 11, 1992, at B5 ("The prolonged, unremitted stress associated with law enforcement often results in a build-up of undischarged anger ... waiting for a chance to explode").

³⁵³ See West, *supra* note 82, at 963-64.

³⁵⁴ *Id.* at 964.

³⁵⁵ See *id.* at 965-66.

³⁵⁶ *Id.* at 963.

women.³⁵⁷ Abortion rights are problematic for pro-choice communitarians who applaud collective, normative processes and the values that emerge from them, and who denigrate the isolated or anti-social individual.³⁵⁸ The abortion right is antithetical to the communitarian or republican ideal of collective democratic choice.³⁵⁹ The right also is problematic for the pro-choice, relational/cultural or difference feminists:³⁶⁰ "The decision to terminate fetal life, whatever prompts it, is hardly emblematic of the act of care or relationality celebrated as at the heart of women's distinctive moral sensibility."³⁶¹

Armed self-defense arguably comes up worse on these accounts. It is emblematic of a stereotypically male form of problem solving, one many feminists and communitarians would argue has caused much senseless human suffering.³⁶² Betty (pg.183) Friedan, for example, calls "the trend of women buying guns 'a horrifying, obscene perversion of feminism.'"³⁶³

Abortion rights are also problematic for pro-choice liberals, West argues, because they do not fit traditional liberal justifications for rights.³⁶⁴ West explains that "[u]nlike the cerebral, cultural, and intellectual activities of the mind celebrated by Mill and his followers as central to self-development, autonomy, and self-identity, the activity protected by this right—abortion—is profoundly of the body: physical, messy, quite painful, bloody and ending in a death."³⁶⁵ We can say the same thing with equal or more force about armed self-defense.

"[T]he abortion right is equally problematic [for] pro-choice egalitarian, green, vegetarian, ecological, spiritual, pacifist, and otherwise gentle feminists, for whom the perspective and experience of the sentient fetus, who (post-viability) does feel (pg.184) pain, can never be subordinated

³⁵⁷ *Id.*

³⁵⁸ *See id.*

³⁵⁹ As we have seen from Kopel and Little's critique of the communitarian proposal for domestic disarmament, individual ownership of firearms for self-defense is characterized by communitarians as equally isolated, pre-social or anti-social. *See* Kopel & Little, *supra* note 201, at 450-54.

³⁶⁰ *See* West, *supra* note 82, at 963. Relational feminists celebrate differences in women as a virtue. Linda McClain has argued that relational feminism jeopardizes abortion rights. *See* Linda C. McClain, "Atomistic Man" Revisited: *Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1887-88, 1242 (1992).

³⁶¹ West, *supra* note 82, at 963.

³⁶² West highlights a common theme. The decision to abort, like the decision to use deadly force in self-defense, stems from an intense personal crisis. Collective and other methods of problem solving and avoidance have failed. It is an act of desperation, one step away from arguably the least attractive possibility facing the right-bearer. But as West points out, each act is inconsistent with the distinctive moral sensibility that relational feminists have claimed for women. *See* West, *supra* note 82, at 963; *see also* Wendy Brown, *Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's The Embarrassing Second Amendment*, 99 YALE L.J. 661, 663, 665 (1989) (urging that sexism and a perverse fascination with violence underpin the Second Amendment). Douglas Laycock argues that Brown's critique is loaded with cultural bigotry. *See* Douglas Laycock, *Vicious Stereotypes in Polite Society*, 8 CONST. COMMENTARY 395, 398 (1991); *see also* Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 37 (1995) (noting her own gendered perspective, and commenting on her surprise that one would take offense, rather than empathize with Brown's story).

³⁶³ Ann Japenga, *Would I Be Safer With a Gun?*, HEALTH, March 1, 1994, at 54 (interviewing Betty Friedan). *But see* Laura Ingrahm, *Why Feminists Should Be Trigger Happy*, WALL ST. J., May 13, 1996, at A18 ("By disdain[ing] gun ownership, feminists simply add one more brick to their elitist, Northeastern, Democratic facade"). Query whether Friedan would argue that "[g]uns are killing us not protecting us," *id.* (quoting Betty Friedan), in cases like *Judy Norman's*. *See* *State v. Norman*, 366 S.E.2d 586 (N.C. 1988). *See also* Tom W. Smith & Robert J. Smith, *Changes in Firearms Ownership Among Women, 1980-1994*, 86 J. CRIM. L. & CRIMINOLOGY 133, 133 (1995) (arguing that pro-gun groups and the media have exaggerated the rate of gun ownership among women).

³⁶⁴ *See* West, *supra* note 82, at 963-964.

³⁶⁵ *Id.* (citation omitted).

to a position of total irrelevance."³⁶⁶ Like the Millsian liberals, these gentle feminists might acknowledge, in theory, some cases where lethal violence would be justifiable and appropriate. But the same concerns that make abortion problematic for them, also should prompt their objection to the practical details of a right to armed self-defense (i.e., practice with and carrying of firearms and a moral resolve to use one in self-defense).

West's account goes very far as an explanation of the political gulf between abortion-rights and gun-rights constituencies. While the "logical [relations]"³⁶⁷ might run parallel, the "human relations"³⁶⁸ could not diverge more.³⁶⁹ But this does not resolve the most important contradiction revealed by the intersection. That many abortion-rights supporters come to that position in spite of the theories and principles on which the right can be grounded is, in the "non-political" realm of legal theory, a problem not a solution.³⁷⁰ At the level of legal theory, adherents to the standard position have work to do.^(pg.185)

I treat here, briefly, several points that might be part of that work. First, one might deny the gun rights/abortion rights intersection on the grounds that the intersection is with self-defense, not gun rights; that equating self-defense and gun rights is imprecise and over-inclusive. It is clear from Gelman's use of Blackstone³⁷¹ and Hobbes³⁷² and arguably McClain's invocation of the privileges of castle,³⁷³ that this criticism is not always the case. But granting the objection allows a useful comparison.

An illuminating response to the objection of over-inclusiveness comes directly from abortion-rights literature. Cass Sunstein highlights the consensus that the strongest argument for the abortion right is an equal protection argument grounded in samaritan critiques like Judith Thomson's.³⁷⁴ Abortion restrictions force women to lend aid to the fetus, at substantial personal costs, while not demanding the same of men.³⁷⁵

³⁶⁶ West, *supra* note 82, at 964 (citing Ruth Colker, *Feminist Litigation: An Oxymoron?—A Study of the Briefs Filed in William L. Webster v. Reproductive Health Services*, 13 HARV. WOMEN'S L.J. 137 (1990)).

³⁶⁷ See Wertheimer, *supra* note 304, at 67.

³⁶⁸ See *id.*

³⁶⁹ Donald Regan touches on a more central impulse for political support of abortion rights that suggests that his self-defense and samaritan arguments are at the periphery of the abortion argument. Arguing for heightened scrutiny of abortion laws, Regan notes:

[W]omen (and perhaps pregnant women especially) have suffered from a history of discrimination in our society. They have suffered not just from occasional laws counter to their interests, but from an extensive pattern of discriminatory laws and social practices. This makes them suspicious and resentful (and justifiably suspicious and resentful) of any particular inequality, however it is supposed to be justified.

...

... *There are limits to how far logic and analysis can carry us... [T]here comes a point at which the judgement of persons imbued with and sensitive to our traditions is worth more than hypotheticals and distinctions.*

Regan, *supra* note 11, at 1632, 1636 (emphasis added).

³⁷⁰ See West, *supra* note 82, at 963-64. West acknowledges that this is itself problematic because it suggests something unprincipled about the way all of these people come to their support of abortion rights. See *id.*

³⁷¹ See Gelman, *supra* note 206, at 648-51.

³⁷² See *id.* at 659-60.

³⁷³ See McClain, *supra* note 285, at 1048 n.236.

³⁷⁴ See Sunstein, *supra* note 14, at 31 n.120.

³⁷⁵ See *id.* at 40.

Sunstein acknowledges that one of the most serious objections to samaritan/self-defense analogies³⁷⁶ is the mother's duty to the fetus.³⁷⁷ His first response is that in cases of rape or incest, the duty/responsibility criticism surely fails.³⁷⁸ This is, of course, insufficient to sustain a general abortion right, because only a small fraction of unwanted pregnancies result from rape or incest.³⁷⁹ A general abortion right is over-inclusive. Sunstein responds that the evidentiary difficulty of distinguishing (pg.186) these cases from voluntary or negligent pregnancies requires us to extend the right generally to all unwanted pregnancies.³⁸⁰

The objection to equating self-defense with gun rights presents the same type of problem. In some self-defense cases, the gun is not an essential tool. It is in others. Employing Sunstein's approach, the difficulty of segregating the gun and no gun cases is much more severe. In the abortion case, there is in fact time for the state to make a determination of rape or incest, albeit a difficult one. In contrast, the self-defense crisis is acute. It is literally impossible to pre-determine and segregate those cases where the gun right is essential to self-defense. The imminence of the threat renders government incompetent to make this decision. The administrative and evidentiary difficulties that Sunstein raises in the abortion context pale in comparison.³⁸¹ Under the Sunstein approach—that the general right is necessary to protect particular, more compelling cases—the gun right is the stronger case.³⁸²

We also might dismiss the objection that self-defense does not encompass gun rights because the objection does not take self-defense seriously. I have argued in detail elsewhere why firearms are uniquely efficient tools of self-defense.³⁸³ They equalize differences in strength, size and speed better than any other tool.³⁸⁴ Their utility is illustrated by the fact that they are without exception the defense tool of choice by government (pg.187) at all levels. Nelson Lund argues that the importance of firearms for self-defense is abundantly clear to the police, "who scrupulously preserve their own right to carry firearms on and off duty (and often after they retire as well) even while some of them

³⁷⁶ Sunstein does not characterize the claim as "samaritan/self-defense." This is my own characterization of Thomson's blending of the two concepts.

³⁷⁷ Judith Thomson simply dismisses this objection on the view that parents assume no duty until they voluntarily take the child home. *See* Thomson, *supra* note 14, at 65. Regan treats this issue perfunctorily. *See* Regan, *supra* note 11, at 1612 (arguing that there is no liberty constraining duty where the woman has attempted to avoid pregnancy).

³⁷⁸ *See* Sunstein, *supra* note 14, at 40.

³⁷⁹ *See* J. Allison Strickland, *Rape in Post-Webster Antiabortion Legislation: A Practical Analysis*, 26 COLUM. J.L. & SOC. PROBS. 163, 169 & nn.26-27 (citing surveys that show pregnancies resulting from rape or incest range from 1-3% of all pregnancies).

³⁸⁰ *See* Sunstein, *supra* note 14, at 40-41. Other theories of abortion rights face similar problems of over-inclusiveness. Not every woman operates under the disadvantages that Robin West posits as the justifications for a transitional right to abortion. *See* West, *supra* note 82, at 963. Unless patriarchy ends in a single flash, the justifications for the abortion right will fall away at different times for different women. *See id.* at 965. Nonetheless, under West's approach, the abortion right would continue for all women until the complete fall of patriarchy. *See id.* at 966.

³⁸¹ *See* Sunstein, *supra* note 14, at 40.

³⁸² *See id.*

³⁸³ *See* Johnson, *supra* note 45, at 11.

³⁸⁴ *See id.* at 49. Assume you or someone you love is being threatened by a six foot four, two hundred-fifty pound, knife-wielding, psychopath. What tool do you want? Who among us would have denied Nicole Brown Simpson a revolver in her purse? Attempts to separate self-defense from gun rights do not take these questions seriously.

advocate disarming those whom the police cannot protect."³⁸⁵ Asked what he would want for his own wife if she were assaulted, Dr. Arthur Kellermann (author of the study driving the slogan that a gun is forty times more likely to injure a loved one)³⁸⁶ responded: "If that were my wife, would I want her to have a [.38] special in her hand? ... Yeah."³⁸⁷

The peculiar utility of firearms is implicit in feminist critiques of self-defense by battered women and rape targets. Jane Cohen describes the gruesome details leading up to Judy Norman's shooting of her abusive husband.³⁸⁸ For a woman like Judy Norman, who has no real access to alternatives to self-defense against a mate turned monster, denying the gun option is not just inconvenient, it is a death sentence. Telling the Judy Normans of the world that they have a right of self-defense (or an expanded one as some urge) but not a right to own a gun is a nearly empty gesture that essentially moots both traditional and progressive feminist theories of self-defense.³⁸⁹

In a discussion of armed self-defense against rape, Don Kates and Nancy Engberg show that in many cases armed self-defense may be a woman's only realistic alternative to rape.³⁹⁰ "[T]he superior physical strength and combat skills (pg.188) of most men over most women enables even the unarmed rapist to carry out his expressed intent to kill or grievously injure his victim if she does not comply."³⁹¹ They acknowledge contentions that "women are less capable of self-defense and less knowledgeable about firearms,"³⁹² but argue that the stronger criminological studies show that women have no peculiar disabilities that impair armed self-defense. Moreover, there is evidence that the "non-lethal weapons recommended for use against rapists are ... ineffective and likely to provoke greater violence."³⁹³

Finally, empirical work on armed self-defense demonstrates that the gun has a non-lethal deterrent or threat value (e.g., cases where firing and missing or merely brandishing the gun drives off aggressors who had anticipated a soft target) that is unparalleled.³⁹⁴ Criticisms of armed self-defense often ignore this dramatic deterrent value.³⁹⁵ Responding to Sanford Levinson's endorsement of an individual right to arms, Wendy Brown's reference to and apparent preference for

³⁸⁵ Lund, *supra* note 4, at 62-63.

Commenting on the irony of the arrest of a housing project self-defense patrol during the Atlanta child murders, Lund argues, "it is hard to doubt that something is seriously wrong when citizens are reduced to protecting their children by holding prayer vigils and lighting little candles." *Id.* at 62 n.146.

³⁸⁶ See Witkin, *supra* note 178.

³⁸⁷ See Japenga, *supra* note 363.

³⁸⁸ See Cohen, *supra* note 185, at 786-91.

³⁸⁹ A student commentator employs the Norman case in her argument that a meaningful constitutional right to bear arms is vital in light of evidence showing the effectiveness of defensive handgun use and the fact that police, friends and neighbors often cannot or will not protect a battered woman. See Blodgett-Ford, *supra* note 262, at 531 n.127.

³⁹⁰ Kates & Engberg, *supra* note 52, at 879.

³⁹¹ *Id.* at 882; see also *id.* at 891 (citing the reversal of a conviction where the charge implied that the self-defense standard for a woman defending herself against a man was the same as for an altercation between two men).

³⁹² *Id.* at 879 n.18 (citing C. NEWTON & F. ZIMRING, FIREARMS AND VIOLENCE IN AMERICAN LIFE 64 (1970)).

³⁹³ *Id.* at 879 n.19. See also James B. Jacobs, *The Regulation of Personal Chemical Weapons: Some Anomalies in American Weapons Law*, 15 U. DAYTON L. REV. 141, 144 (1989).

³⁹⁴ See KLECK, *supra* note 8, at 111, 146.

³⁹⁵ This is one of the flaws in the often referenced New England Journal of Medicine study contending that a firearm in the home puts a family at greater risk—i.e., failure to consider the extremely large number of defensive gun uses where the weapon is not fired, along with the failure to distinguish justifiable homicides by battered women. See Witkin, *supra* note 178. See also Kates et al., *supra* note 171, at 539-41; Blodgett-Ford, *supra* note 262, at 534-38.

her hard won martial arts skills in confronting rape or other criminal attack misses this point entirely.³⁹⁶ As between revealing a holstered gun or shouting "I know karate," one suspects that even Brown, upon reflection, would choose the gun to face an approaching potential criminal attacker or a group of them.

One might grant all this but still react that on balance firearms (pg.189) seem to cause more trouble than they are worth. This position requires serious consideration of the empirical work to the contrary.³⁹⁷ On at least the broad question of the net utility of armed self-defense, it is becoming very hard to sustain the standard position on the glib contention that one is worse off having a gun.³⁹⁸ And there is still the argument that extinguishing gun rights would submerge choice in personal crisis into a homogenized formulation of utility—certainly something supporters would object to in the abortion context.³⁹⁹

We might be left to explain the standard position in terms of pure ideology or passion that renders the intersection irrelevant.⁴⁰⁰ The reason is suggested by another critique of Gary Kleck's *Point Blank*. Reviewing Kleck, social scientist, Lawrence Ross, commends Kleck's meticulous clarification of the misinformation with which the gun debate is obfuscated, (e.g., Kleck's demonstration that "fewer than 1% of all guns, and fewer than 2% even of handguns [are] used in a violent crime [and that] more people are killed in swimming pool accidents than in firearms accidents").⁴⁰¹ Ross does not take issue with Kleck's finding that handguns are more often used by good people to repel crimes than by felons in committing them. However, Ross contends that:

despite the masses of data and the cleverness of his analysis and argument, Kleck's policy position does not satisfy me.... [Kleck] seems to easily to embrace a society based on an internal as well as an external balance of terror. The social order is seen to rest adequately on masses of potential victims using the threat of gun violence to deter masses of potential armed criminals.... [This] spectacle is one that ought (pg.190) to *disgust* rather than cheer the civilized observer.⁴⁰²

The reasons that people view either the abortion or the gun right with "disgust" are well beyond what I have tried to evaluate here. If it is predominately a visceral, passionate *disgust* at the idea of armed self-defense that fuels the standard position, then what are we to make of the articulated principles wherein the two rights intersect?

On things as deeply controversial as the freedom to choose abortion, or a firearm for self-defense, perhaps it is wrong to believe that articulated principles can trump human passions. This suspicion is strengthened in the abortion context by Justice Blackmun's observation in *Casey*:

³⁹⁶ Brown, *supra* note 362, at 666.

³⁹⁷ See *supra* note 308.

³⁹⁸ See *supra* note 178.

³⁹⁹ See *supra* Part II.E.

⁴⁰⁰ For one commentator a push for "domestic disarmament" represents an engine for creation of "a true progressive movement culture" that would galvanize voters to do battle with "multinational capitalism." Eric Alterman, *Who Speaks for Me? Political Progressive Activism*, 19 MOTHER JONES 58, 64 (1994).

⁴⁰¹ Lawrence Ross, Book Review, 98 AM. J. SOC. 661, 661 (1992) (reviewing GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA (1991)).

⁴⁰² *Id.* at 662 (emphasis added). Noting that the shooting of James Brady prompted stricter gun control measures, Ross posits the value of "more incidents, more heinous ones with more tragic or more important victims [to prompt us] to develop the necessary determination" to go beyond narrow gun controls toward citizen disarmament. *Id.*

"I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice ... will be made."⁴⁰³

If politics, ideology, and passion⁴⁰⁴ explain everything, (pg.191) then the intersection between abortion and gun-rights theories is irrelevant. But if this is so, then the discrete theories are irrelevant as well, and the rights that they support are no more secure than the seats of freshman members of Congress.⁴⁰⁵

CONCLUSION

Consider two problems: an unwanted fetus kicking in the womb and a criminal kicking through the back door. What set of principles makes the abortion response to the first problem a vital, fundamental right, but transforms armed response to the second into "grim madness?"⁴⁰⁶

The passions that influence positions on abortion and gun rights seem to grow from different impulses. But when we look to articulated principles and theories of rights the two liberties share a great deal. If we ignore these common themes—embracing a principle in support of one right, while abandoning it in the context of the other—we invite the charge that our principles are merely rationalizations for our passions.(pg.192)

APPENDIX 1

A. *Articles/Books Supporting the Individual Rights View of the Second Amendment:*

LEONARD M. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988);

⁴⁰³ Planned Parenthood v. Casey, 505 U.S. 833, 943 (1991) (Blackmun, J., concurring). David Kopel's discussion reflects this in the gun-rights context. See Kopel & Little, *supra* note 201, at 455-56 (contrasting the relative damage and utility of guns and alcohol and showing that "our" tolerance of alcohol stems from its status as the establishment drug of choice).

⁴⁰⁴ I think I understand the power of passion on these issues. Recently I had an experience that makes me question the capacity of debate to change people's minds on these issues. I was watching a PBS program describing the havoc caused by land mines left from military conflicts around the globe. It showed a training exercise in which soldiers handled and learned to set mines. American military officials explained that they used land mines responsibly and that mines served vital tactical purposes. See *Nova: Terror in the Minefield* (PBS television broadcast, Jan. 9, 1996).

It made me sick. I was repelled just viewing the device. It seemed to be all that is evil distilled into a single small package. You would have a better chance convincing me that the Devil is really just misunderstood, than convincing me that there are any redeeming qualities to land mines. It is not that my mind is closed. It is just that here, my hard-wired visceral reactions against danger, are completely dominant. Is it wholly different from reason or logic? No argument that I can imagine can convince me to abandon my revulsion against these devices in favor of some statistical, tactical military, supply and demand, ease of manufacture argument that banning them would be unrealistic or counter-productive. I think many people have a similar reaction to images used in the gun and abortion debates. Certainly we can find many serious people expressing their hatred of guns. See, e.g., *supra* text accompanying notes 12, 145, 402. Others express the same sentiment about the abortion.

⁴⁰⁵ Proponents of Critical Legal Studies might argue that this is precisely the case. See Morton J. Horowitz, *Rights*, 23 HARV. C.R.-C.L. REV. 393, 399 (1988).

⁴⁰⁶ Donna Shalala, presumably reflecting the views of the Clinton Administration, has branded the decision of families to keep a loaded gun for personal security "grim madness." See *supra* note 10. According to Handgun Control Inc., Chairperson Sarah Brady, "The only reason for guns in civilian hands is for sporting purposes." Tom Jackson, *Keeping the Battle Alive*, TAMPA TRIB., Oct. 21, 1993, at Baylife 1 (interviewing Sarah Brady). The Clinton Administration's stand on abortion as an essential and fundamental choice for women is also clear. See *supra* note 9.

William Marina, *Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective*, in FIREARMS AND VIOLENCE (Don B. Kates, Jr. ed., 1984);

Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992);

Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1990);

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

Bernard J. Bordenet, *The Right to Possess Arms: the Intent of the Framers of the Second Amendment*, 21 U. WEST L.A. L. REV. 1 (1990);

Scott Bursor, *Toward a Functional Framework for Interpreting the Second Amendment*, 74 TEX. L. REV. 1125 (1996);

Robert J. Cottrol & Raymond T. Diamond, *Never Intended to be Applied to the White Population: Firearms Regulation and Racial Disparity, The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI-KENT L. REV. 1307 (1995);

Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995 (1994);

Brannon Denning, *Can the Simple Cite Be Trusted: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961 (1996);

Anthony Dennis, *Clearing the Smoke from the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57 (1995);

Robert Dowlut, *Bearing Arms in State Bills of Rights, Judicial Interpretation, and Public Housing*, 5 ST. THOMAS L. REV. 203 (1992).^(pg.193)

Robert Dowlut, *The Current Relevancy of Keeping and Bearing Arms*, 15 U. BALT. L.F. 32 (1984);

Robert Dowlut, *Federal and State Constitutional Guarantees to Arms*, 15 U. DAYTON L. REV. 59 (1989);

T. Markus Funk, *Gun Control and Economic Discrimination: The Melting-Point Case-in-Point*, 85 J. CRIM. L. & CRIMINOLOGY 764 (1995);

T. Markus Funk, *Is the True Meaning of the Second Amendment Really Such A Riddle?* 39 HOW. L.J. 411 (1995);

F. Smith Fussner, Book Review, 3 CONST. COMMENTARY 582 (1986);

Stephen P. Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 U. DAYTON L. REV. 91 (1989);

Stephen P. Halbrook, *Rationing Firearms Purchases and the Right to Keep Arms: Reflections on the Bill of Rights of Virginia, West Virginia, and the United States*, 96 W. VA. L. REV. 1 (1993);

Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991);

Stephen P. Halbrook, *What the Framers Intended: A Linguistic Interpretation of the Second Amendment*, LAW & CONTEMP. PROBS., Winter 1986, at 153;

David T. Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559 (1986);

David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL. 1 (1987);

Nicholas J. Johnson, *Plenary Power and Constitutional Outcasts: Federal Power, Critical Race Theory and the Second, Ninth and Tenth Amendments*, 57 OHIO ST. L.J. 1555 (1997);

Nicholas J. Johnson, *Shots Across No Man's Land: A Response to Handgun Control, Inc.'s Richard Aborn*, 22 FORDHAM URBAN L.J. 441 (1995);

Don B. Kates, *Gun Control: Separating Reality from Symbolism*, 20 J. CONTEMP. L. 353 (1994);

Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 203 (1983);^(pg.194)

Don B. Kates, Jr., *The Second Amendment: A Dialogue*, LAW & CONTEMP. PROBS., Winter 1986, at 143;

Don B. Kates, Jr., *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMMENTARY 87 (1992);

David B. Kopel, *It Isn't About Duck Hunting: The British Origins of the Right to Arms*, 93 MICH. L. REV. 1333 (1995);

David B. Kopel & Christopher Little, *Communitarians, Neo-Republicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 MD. L. REV. 438 (1997);

Inge Anna Larish, *Why Annie Can't Get a Gun: A Feminist Appraisal of the Second Amendment*, 1996 U. ILL. L. REV. 467;

Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989);

Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1 (1996);

Nelson Lund, *The Second Amendment, Political Liberty and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987);

Joyce Lee Malcolm, Book Review, 54 GEO. WASH. U. L. REV. 582 (1986);

Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HASTINGS CONST. L.Q. 285 (1983);

Pasquale V. Martire, *In Defense of the Second Amendment: Constitutional and Historical Perspectives*, 21 LINCOLN L. REV. 23 (1993);

Thomas McAfee & Michael J. Quinlan, *Bringing Forward The Right to Keep and Bear Arms: Do Text, History or Precedent Stand in the Way?*, 7 N.C. L. REV. 781 (1997);

Thomas M. Moncure, Jr., *Who is the Militia—The Virginia Ratification Convention and the Right to Bear Arms*, 19 LINCOLN L. REV. 1 (1990);

Thomas M. Moncure, Jr., *The Second Amendment Ain't About Hunting*, 34 HOW. L.J. 589 (1991);

Eric C. Morgan, *Assault Rifle Legislation: Unwise and Unconstitutional*, 17 AM. J. CRIM. L. 143 (1990);^(pg.195)

Robert A. O'Hare, Jr. & Jorge Pedreira, Note, *An Uncertain Right: The Second Amendment and the Assault Weapon Legislation Controversy*, 66 ST. JOHN'S L. REV. 179 (1992);

L.A. Powe, Jr., *Guns, Words and Interpretation*, 38 WM. & MARY L. REV. 1311 (1997);

Michael J. Quinlan, *Is There a Neutral Justification for Refusing to Implement the Second Amendment or is the Supreme Court Just "Gun Shy"*, 22 CAP. U. L. REV. 641 (1995);

Jeremy Rabkin, *Constitutional Firepower: New Light on the Meaning of the Second Amendment*, 86 J. CRIM. L. & CRIMINOLOGY 231 (1995);

Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461-512 (1995);

Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution*, 61 TENN. L. REV. 647 (1994);

Glenn H. Reynolds & Don B. Kates, Jr., *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. 1737 (1995);

Robert Shalhope, *The Armed Citizen in the Early Republic*, LAW & CONTEMP. PROBS., Winter 1986, at 125;

Gregory Lee Shelton, *In Search of the Lost Amendment: Challenging Federal Firearms Regulation Through Utilization of the State's Right Interpretation of the Second Amendment*, FLA. ST. U. L. REV. 105 (1995);

Kevin D. Szezepanski, *Searching for the Plain Meaning of the Second Amendment*, 44 BUFF. L. REV. 197 (1996);

Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. CIV. RTS. L.J. 67 (1991);

William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236-55 (1994);

David Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1006 (1994);

Jay R. Wagner, Comment, *Gun Control Legislation and the Intent of the Second Amendment: To What Extent is There an Individual Right to Keep and Bear Arms?*, 37 VILL. L. REV. 1407 (1992);

William A. Walker, Book Review, 88 MICH. L. REV. 1409 (1990).^(pg.196)

B. Articles/Books That Briefly Mention the Individual Rights View of the Second Amendment:

MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986).

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

Gerard V. Bradley, *The Bill of Rights and Originalism*, 1992 U. ILL. L. REV. 417;

Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992);

Don B. Kates, Jr. et al., *Guns and Public Health: Epidemic of Violence or Pandemic of Propaganda?*, 62 TENN. L. REV. 513 (1995);

Stephanie A. Levin, *Grass Roots Voices: Local Action and National Military Policy*, 40 BUFF. L. REV. 321 (1992);

James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287 (1991);

Elaine Scarry, *War and the Social Contract: The Right to Bear Arms*, 139 U. PA. L. REV. 1257 (1991);

John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967 (1993).^(pg.197)

C. Articles/Books Which Reject the Individual Rights View of the Second Amendment:

Richard M. Aborn, *The Battle Over the Brady Bill and the Future of Gun Control Advocacy*, 22 FORDHAM URB. L.J. 417 (1995);

Daniel Abrams, *Ending the Other Arms Race: An Argument for a Ban on Assault Weapons*, 10 YALE L. & POL'Y REV. 488 (1992);

George Anastaplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631 (1992);

Carl Bogus, *Race, Riots, and Guns*, 66 SO. CAL. L. REV. 1365 (1993);

Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the 20th Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5 (1989);

Samuel Fields, *Guns, Crime and the Negligent Gun Owner*, 10 N. KY. L. REV. 141 (1982);

Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U. L. REV. 107 (1991);

Andrew D. Herz, *Gun Crazy: Constitutional False Consciousness and Dereliction of Dialogic Responsibility*, 75 B.U. L. REV. 57 (1995);

Michael T. O'Donnell, Note, *The Second Amendment: A Study of Recent Judicial Trends*, 25 U. RICH. L. REV. 501 (1991);

Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 HAMLINE L. REV. 383 (1983);

Mark Udulutch, Note, *The Constitutional Implications of Gun Control and Several Realistic Gun Control Proposals*, 17 AM. J. CRIM. L. 19 (1989).