

1. Tell us a little about the history of concealed weapon regulation in the United States. What sort of laws regulated the concealed carrying of handguns and other deadly weapons at the beginning of the nation?

At the foundation of our nation, there were no laws that prohibited citizens carrying concealed deadly weapons. Indeed, some of the case law that we inherited from England, such as *Sir John Knight's case* in Hawkins' *Treatises of the Pleas of the Crown*, held that carrying weapons in a way as to cause fear in others was a violation of the common law. There is an implication in early decisions such as the North Carolina Supreme Court decision *State v. Huntly* (1843) that open carry of a firearm might, under some conditions, be a violation of the common law, but concealed carry could not be, because the weapon that can't be seen, can't cause fear.

Vermont remains in this *laissez faire* category, at least partly because the Vermont Supreme Court struck down a local ordinance in *State v. Rosenthal* (1903) for conflicting with the Vermont Constitution's right to keep and bear arms provision.

2. So, when the carrying of concealed weapons was regulated, how was it regulated?

There are two different lines of development of concealed weapon regulation in the United States, one for blacks, and one that applied to all races – and these two lines of development merged together after the Civil War. The laws that resulted from this merger are quite similar to California's current concealed weapon license law.

Blacks in the United States have always been subject to much stricter regulation of firearms ownership and carrying than whites. From almost the beginning of the Republic, there were laws that required free blacks to have a license to own or carry a gun openly. After Turner's Rebellion in 1831, states like Virginia that had restrictively licensed free blacks to own guns abolished the licensing procedure – completely prohibiting free blacks from owning guns.

Along with these race-specific laws, eight Southern states banned the *concealed* carrying of deadly weapons before the Civil War. Some of these laws applied only to knives and daggers, but most included handguns as well. While these laws completely banned the concealed carrying of deadly weapons, there were usually exemptions for "travellers" – a term that was never defined statutorially. California's first concealed weapon statute, adopted in 1863 and repealed in 1870 was quite similar to these antebellum laws.

3. Why did these Southern states adopt these laws, and did California have the same goal for its law?

The Southern concealed weapon laws adopted before the Civil War were in response to a very specific problem. The state legislatures had made a serious effort to suppress dueling, but juries were very reluctant to convict, because dueling was generally regarded as a legitimate way to settle differences. In response, the state legislatures adopted an extrajudicial approach to discourage dueling, requiring judges, legislators, lawyers, and militia officers to swear an oath that they had not participated in a duel.

Young men with political ambitions were reluctant to perjure themselves in those days. As a result, after the dueling oaths were required, insults that might previously have turned into a duel at a later time, were settled on the spot, as young men of the upper classes killed each other with concealed daggers and handguns.

I don't know if California's law, passed in 1863 and repealed in 1870, had the same motivation or not – but I do know that dueling was a major problem here in the 1850s, because we had a lot of Southerners who brought their dueling tradition with them – unlike other Northern states, that largely abandoned dueling after the death of Alexander Hamilton at the hands of Aaron Burr. A former California Supreme Court justice killed one of California's U.S. Senators in an 1859 duel, for example.

4. Were there any questions about the constitutionality of these concealed weapon laws?

There was always some question about the constitutionality of these measures in the nineteenth century. Kentucky's 1813 statute, for example, was struck down by the Kentucky Supreme Court in *Bliss v. Commonwealth* (1822) for violating the Kentucky Constitution's guarantee of the right to keep and bear arms. While upholding similar statutes, most state supreme courts in the nineteenth century recognized that concealed carrying could be prohibited *only* because *open* carrying of deadly weapons was protected by the arms guarantees of their respective state constitutions. The Louisiana, Georgia, and Texas Supreme Courts in addition found that a right to open carrying of firearms was protected by the Second Amendment to the U.S. Constitution – and this was *after* the *Barron v. Baltimore* decision of 1833, and *before* the Fourteenth Amendment raised the question of incorporation of the Bill of Rights.

5. California doesn't have a complete ban on concealed carrying of handguns, though, but a licensing system. Where did that law come from?

Immediately after the Civil War, as part of the Black Codes, former Confederate states that hadn't previously done so, passed race-specific statutes that either prohibited free blacks from owning or carrying weapons, or created discretionary licensing systems. Any scholarly history of the period, such as Eric Foner's *Reconstruction*, discusses the problem, and the Republican response to it, the Fourteenth Amendment.

6. And what was the Fourteenth Amendment supposed to do?

The Fourteenth Amendment was explicitly passed to prohibit discriminatory treatment of blacks, with weapons regulations among the most commonly mentioned abuses of the Southern states. Again, any scholarly history of the period is explicit about the problem of the Southern states disarming blacks to keep them in economic and political submission. The most complete recent work on this is Stephen P. Halbrook's *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (Praeger Press, 1999). Many members of Congress, while debating the Fourteenth Amendment, were explicit that the right to self-defense – with a gun – was a fundamental human right, and that they intended to impose this protection of the right to carry a gun on the states. Opponents of the Fourteenth Amendment in Congress on a number of occasions acknowledged that this would be a result of its passage – that the states would not be free to disarm blacks.

7. So what happened? If the intent was so clear, why haven't the courts imposed this protection onto the states?

Compassion fatigue set in, as it became apparent that the problems of the freedmen and their relationship to the white majorities of the Southern states weren't going to be easy to fix. With *U.S. v. Cruikshank* (1876), the Supreme Court backed away from Congress's intent, and largely abandoned Southern blacks to state laws and Klan terror. But the Southern states weren't completely foolish; rather than leave race-specific gun control laws on the books, they rewrote their gun control laws in a race-neutral way, in some cases immediately, in other cases after specific incidents of uppity freedmen fighting back against the Klan.

Texas adopted a broad ban on carrying of handguns – openly or concealed -- but there are clues that suggest that it wasn't generally enforced against whites unless they had done something really outrageous, like living with a black woman. This is apparently what caused the shooting that led to the U.S. Supreme Court decision *Miller v. Texas* (1894).

More typical were the discretionary licensing laws that were adopted throughout the South in the 1870s and 1880s, but did not appear in most the North or the West until the 1920s. Florida is one of the most detailed cases available to us; there was a race riot in Gainesville, Florida, in 1893. Blacks protected themselves from white mobs with Winchester repeating rifles. Not surprisingly, the statute first adopted that year required a license to carry, either concealed or openly, a pistol or repeating rifle. As Justice Buford's concurring opinion in *Watson v. Stone* (1941) explained: "The statute was never intended to be applied to the white population and in practice has never been so applied."

8. So, how did discretionary licensing solve the problem of the Fourteenth Amendment?

Because race was never specifically mentioned, discretionary licensing allowed sheriffs, police chiefs, or judges, depending on the state, to issue licenses to carry concealed weapons to whomever they wished. This isn't the only example of this sort of discretionary licensing of the time being used to implement racist laws without having to say directly what the goal of the legislators was. San Francisco, for example, used a similar form of licensing of laundries to force Chinese out of the hand laundry business in the 1880s, and this was struck down in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

A law that, while facially race neutral, affects one race far more than another, has disparate racial impact. Similar San Francisco ordinances that had disparate racial impact include the 1870 Cubic Air Ordinance and the Queue Ordinance of 1876, requiring all men's heads to be shaved within an inch of their scalp going into the San Francisco Jail. Chinese men at the time wore their hair in a queue that had great religious significance, so forcing them to cut their hair was an effective way to get them to pay fines rather than go to jail.

In a number of U.S. Supreme Court decisions, disparate impact, along with racist intent and historical background, have been factors in applying strict scrutiny, and determining that equal protection has been violated. Most appropriate to California's current concealed weapon licensing law appears to be *Hunter v. Underwood*, 471 U.S. 222 (1985), which found a voting rights provision of the Alabama Constitution of 1901 to be unconstitutional because it came out of a constitutional convention whose goals were disfranchisement of blacks, and that disproportionately impacted blacks.

9. Do you have any evidence that California's concealed weapon law was adopted with racist motives?

Yes. I have spent a bit of time reading through books, documents, and newspapers of the period, looking for evidence as to the motives behind the law. There is very little in the way of direct statements about the purpose or intent of Penal Code 12025, which was adopted in 1923, or its predecessor adopted in 1917. Indeed, considering how significant an impact this law was going to have, it is a bit surprising that there is only one newspaper article that makes any explicit statement of purpose that I can find, or that the Legislative Intent Service, a private firm that does this sort of thing as well, can find. That article is a July 15, 1923 *San Francisco Chronicle* article that explains what the new law does, and at whom it was directed.

One provision of the bill prohibited handgun possession by resident aliens; there was some question about the constitutionality of that part of the bill. While upheld by the California Supreme Court in the case *In re Rameriz* (1924), it was struck down by the California Court of Appeals in *People v. Rappard* (1972). According to the article, "It was largely on the recommendation of R. T. McKissick, president of the Sacramento Rifle and Revolver Club, that Governor Richardson approved the measure."

Later in the article, McKissick acknowledged that there might be a problem with the ban on resident aliens owning handguns, but he is quoted that if it was sustained by the courts, it would have a "salutary effect in checking tong wars among the Chinese and vendettas among our people who are of latin descent."

We have a direct statement of discriminatory intent, and we have a very strong similarity between California's current law and similar discretionary permit laws adopted in other states for what are now known to have been racist motives.

10. Perhaps McKissick's remarks were only about the ban on possession of handguns by resident aliens?

Well, that's certainly possible. Chinese immigrants could not become U.S. citizens until 1952, but their children, born in the U.S. were citizens, and would not be affected by the handgun possession ban. Similarly, the phrase "our people who are of latin descent" seems to include both Mexican immigrants, who could become naturalized citizens, and Americans who were merely of Hispanic ancestry. So McKissick seems to be speaking of more than just the alien handgun ban provision.

11. Was this one law unusual in promoting a racist agenda?

Not at all. Racism was endemic in that period. California, for example, had prohibited resident aliens from buying land a few years earlier, and newspapers of the period are quite blunt that the goal was to prevent Japanese immigrants from buying land and becoming successful farmers. Other bills that were under debate in that same session sought to prohibit Japanese from leasing land, or from having their minor children, who were born here, buy it instead.

The *San Francisco Chronicle* ran an editorial at this time that emphasized the importance of buying a house, not living in an apartment, because this discouraged large families. The headline for the editorial? “Race Suicide.” And they make it clear that they aren’t talking about the human race – and it appears that they didn’t particularly worry about non-whites reading the editorial and taking offense.

12. Were there other reasons for this law?

No question about it – there was a dramatic increase in violent crime around the time of World War I, and Prohibition and the widespread use of automobiles plays a big part in that problem. The *Chronicle* is full of armed robbery incidents, especially by minors, often using cars. The newspapers often used the expression “land pirates” to describe them. Another concealed weapon regulation law that was introduced at about the same time, but wasn’t passed, was apparently aimed at discouraging criminal acts. It would have made possession of a concealed gun when arrested for a felony evidence that a felony was intended, and prohibited concealed weapon licenses for aliens and those under 18.

But what I also found interesting was in reading newspapers of the time, especially the *San Francisco Chronicle*, was the evidence that carrying of guns by law-abiding adults was fairly common, and not regarded as especially bad. The July 15, 1923 *Chronicle* article – the only real evidence of intent that we have – describes the law as, “Aimed at disarming the lawless, the bill provides exemptions and exceptions to preserve the rights of those using firearms for competition or hunting or for protection in outing trips.”

There are articles describing how women have taken to carrying guns on a fairly widespread basis, and one judge from New York City suggests that in the near future, brides will walk the aisle with a gun strapped to their waist. An editorial from the *Chronicle* that mentions that if armed robbers attack you, it’s best to just give them what they want – but there is no suggestion that being armed was worrisome, peculiar, or in some way morally wrong: “The average citizen, even if armed, usually is at a distinct disadvantage when waylaid by bandits and in most cases the possible loss is not worth the risk of resistance. No lack of courage is evidenced by quiet submission to the demands of armed highwaymen.” Of course, a newspaper that runs an editorial decrying “Race Suicide” may have a narrower definition of “average citizen” than we would consider acceptable today.

13. Does discretionary concealed weapon licensing still have a racially disparate impact?

Yes. The last time the racial impact of California’s concealed weapon licensing system was studied was by the Office of Assembly Research for the California Legislature about 15 years ago. They concluded that those licensed to carry concealed weapons in California are very disproportionately white males. Yet, this is also the group that is least likely to be victims of violent crime. Murder victims, for example, are disproportionately black and Hispanic males. The most serious non-lethal crime is rape – one where men are seldom victims, and white men especially so.

I examined the 1990 concealed weapon permit issuance rates per county, and looked for correlations with various 1990 census data. While this sort of bivariate correlation isn’t the most sophisticated technique for statistical analysis, it does give some very interesting results. There is a +0.47 correlation between CCW issuance rates and the white percentage of California counties, meaning that as the percentage of whites in a county increases, so does permit issuance. The correlation for Hispanic and black populations are -0.40 and

-0.43, respectively, meaning that as the percentage of blacks and Hispanics increases, permit issuance declines very dramatically.

There are others who have done research on this issue. Steve Helsley, who retired after many years with the California Department of Justice, now works for the National Rifle Association. In 1974, he attempted to find out what the racial distribution of concealed weapon permits are in California, so he sent out a survey to police chiefs and sheriffs around the state. Mr. Helsley tells me that part way through gathering the data, the California Police Chiefs Association found about the survey, and sent a letter to its members asking them to not answer the surveys. It makes you wonder why they wouldn't want anyone to know the racial makeup of concealed weapon licensees in California.

Now, there are other possible causes of these strong correlations, such as the strong correlation between race, crime rates, and urbanization, but with the history of racism that underlies concealed weapon permit systems, it certainly seems like a good assumption that the racist intentions behind the law are still in effect today. There are few, if any, permits for other dangerous activities in our society that have this level of almost unlimited discretion.

14. Is there another model of concealed weapon regulation besides *laissez faire*, complete bans, and discretionary issuance of licenses to carry concealed weapons?

Yes. Starting in 1961, as part of a compromise that put background checks and waiting periods in effect for handgun purchase, Washington State replaced its discretionary licensing system with a non-discretionary licensing system. In a non-discretionary licensing system, there are very specific definitions of who is eligible, and who is ineligible for a permit. If you meet the written criteria – and most adults who don't have a criminal record, mental illness commitments, or a history of drug or alcohol abuse meet the criteria – you get a permit.

With slight variations, this model was adopted by Florida in 1987, and another two dozen states since then, including Texas, Kentucky, Tennessee, Arizona, Maine, Georgia, South Carolina, West Virginia, Virginia, North Carolina, Wyoming, Oklahoma, Mississippi, Louisiana, Oregon, Nevada, Montana, Idaho, Pennsylvania, and Alaska. There are specific definitions of who shall be issued a permit. Felons are prohibited; those convicted of violent misdemeanors in the last 10 years, or in some states, in the last five years. People who have been convicted of various drug or alcohol offenses are prohibited in most states, or who have been adjudicated mentally ill or disabled. Most states also require completion of various classes in firearms safety and legal use of deadly force.

There is a bit of variation – Oregon, for example, allows a sheriff to deny a permit based on a pattern of behavior by an applicant that indicates that he would be a hazard to himself or others with a gun. But the rules are pretty narrowly defined so that the sheriff may not simply ignore equal protection of the law.

These laws are quite analogous to how California issues driver's licenses – there are specific criteria for who gets a permit, and the rules are applied so evenhandedly that no one wonders about political influence, bribery, or cronyism. The analogy is quite a good one, because guns, like cars, are potentially very dangerous machines. Indeed, cars cause more deaths each year than guns. Like guns, there are some people who demonstrate that they can't be trusted with a powerful and dangerous machine like a car, and we set certain minimum criteria for age, financial responsibility, and demonstrated operational skill -- but we trust the vast majority of adults to operate cars on public roads.

15. What provoked so many states to change their concealed weapon license laws?

Increasingly, in the last few years, the tendency of police to look the other way when they found a person carrying a gun without a permit – but who was otherwise obeying the law – has evaporated. In Florida in particular, when crime rates start to rise dramatically in the late 1980s, large numbers of otherwise law-abiding citizens started to carry a gun illegally, out of fear of criminal attack. The legislature legalized what had already become fairly common.

16. What happened when these states adopted these liberalized rules about issuance?

They issued lots of permits. In Florida, 2% of the population had concealed handgun licenses at one point. In Idaho, 4% of the population has concealed handgun licenses. Similar results have happened almost everywhere – the percentage of the population with licenses has risen to the 1-4% level – and there have been very, very few problems caused by all those licenses.

I started studying this question in 1989 when I was writing my second book, *For the Defense of Themselves and the State: The Original Intent and Judicial Interpretation of the Right to Keep and Bear Arms*. During research for that book, I ran into the new Florida concealed handgun license law. While I thought at the time that concealed handgun licensing could have been liberalized a bit without a problem, I was skeptical that making things *this* relaxed would work, so I started gathering data as state after state changed their laws. The results were published in a paper coauthored with criminologist David Kopel in the *Tennessee Law Review* in 1995.

17. So, does the sheriff have a rational basis for making concealed carry permits hard and arbitrary to get?

No. To my surprise and relief, it turned out that the expected disaster of minor disputes turning into the gunfight at the OK Corral – the Wild West model that many of the opponents of these changes had predicted – didn't happen. Murder rates generally fell slightly or stayed steady after adoption of these non-discretionary handgun license laws.

Indeed, a number of vocal opponents of the new laws have since admitted that no such problem has developed. John B. Holmes, Jr., the District Attorney for Harris County, Texas, where Houston is located, gave a speech shortly after the new law took effect. The *Houston Chronicle* of January 23, 1996 quotes him as saying, "I think we'll have to add another floor or two to the medical examiner's office. We'll probably have to put on some more prosecutors and add another grand jury or two to determine whether somebody's killing of another is justifiable." On June 10th, the same paper quoted him as admitting that the problem didn't develop they he expected. "I am absolutely shocked by how well the licensees have behaved themselves, not just here in Harris County but statewide." Holmes was also quoted in *Texas Lawyer* magazine that he was "eating a lot of crow" about this matter.

More sophisticated statistical analysis – that is to say, multivariate correlation analysis that I understand enough to admire, but don't pretend to be able to judge adequately – has been done by Professor John R. Lott, Jr. of the University of Chicago. It suggests that adoption of non-discretionary concealed handgun licensing reduces murder rates by about 5.5%, along similarly modest but statistically significant declines in rape, robbery, aggravated assault, and this year's hot media event, mass murder.

18. Why is the decline so small? And why is there a decline at all?

Oddly enough, it doesn't appear to be because all these newly licensed people are shooting criminals, or even scaring them off in large numbers – though there have been a few incidents reported. It appears (and I should emphasize that this merely a supposition that Professor Lott and I have come to after scratching heads over the data), is that a relatively small percentage of violent crimes are committed by people who are capable of rational analysis. People that engage in economic crimes like armed robbery or burglary commit a small fraction of the murders, rapes, and aggravated assault in the course of those economic crimes. These rational economic criminals have apparently concluded that a widely armed population of potential victims is sufficiently dangerous that they have gone into other lines of criminal behavior. It also appears that non-violent property crimes, such as vending machine theft, rose at the same time that the serious violent crime rates fell.

19. Have there been crimes committed by these newly licensed carriers of guns?

Sure. As an example, Texas has about 190,000 licenses outstanding, and there have been about 1600 arrests. But a very large percentage of those arrests were technical violations of the new law at a time when both licensees and police were unclear as to which places were lawful to carry and which were not. Almost a third of these arrests were *before* the new licenses had taken effect January 1, 1996, and so aren't meaningful.

There have been a number of arrests for various non-violent crimes, such as marijuana possession. But this doesn't mean that the person was arrested while carrying a gun, and even then, only 48% of the arrests were resolved by a conviction. Another 45% of the arrests never even made to trial -- suggesting that perhaps police were arresting people who they didn't have much of a case against. The arrest rate for Texas licensees is about 1/4 of the arrest rate for the average Texan.

I try to keep up on deaths resulting from non-discretionary licensing, but reporting has been sporadic. There have been a few killings by licensees. At least three cases in Texas of which I am aware of were charged as crimes, but found to be justifiable by the grand jury, and I saw a recent news clipping concerning a justifiable homicide in Kentucky by a licensee.

There are some, no question about it, actual violent crimes by licensees -- but it's not clear that the presence of a license made any real difference for the crimes in question. I am aware of a murder-suicide committed by a man in Florida -- and significantly, the state law was about to change so that he would no longer have been eligible. It is hard to imagine, however, that the crime he committed -- murder of his estranged ex-wife, then his own suicide -- would have been any different if he had lacked a license to carry a gun.

The Violence Policy Center, one of the gun control groups and an opponent of non-discretionary permit laws, keeps a list of Texas licensees that have been charged with serious crimes. In looking over their list of a half dozen serious crimes, I find it interesting that all but one were cases where the license made no difference. They were either premeditated violent felonies where the crime was far more serious than carrying without a license, or crimes that started out with the licensee armed on his property -- where no license is required. In the absence of a license, these would have had the same outcome.

And the one exception? A Mr. Sastrup made what would be in California an clearly unlawful use of deadly force, and just about anywhere what I would consider an immoral use. He shot a person who was burglarizing a vehicle, and was running away. But Texas has a somewhat more relaxed standard on use of deadly force for nighttime burglary -- and that case still hasn't gone to trial, apparently because the DA has been delaying.