

# SELF-DEFENSE, DEFENSE OF OTHERS, AND THE STATE

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## I

### INTRODUCTION

Self-defense often is described as being innate, inalienable, and individual. But the Supreme Court has never expressly held self-defense to be a constitutional right.<sup>1</sup> Instead, for most of American history, courts and commentators pared self-defense from criminal sanctions, plucked it from the common law, or sounded it from the penumbras of Due Process or the Ninth Amendment.<sup>2</sup>

*District of Columbia v. Heller*<sup>3</sup> is the closest the Court has come to stating that self-defense is a constitutional right. *Heller* held that the Second Amendment protects the right to keep and bear an arm in the home for self-protection.<sup>4</sup> The majority described individual self-defense as the “*central component*” of the Second Amendment,<sup>5</sup> a right that “*pre-exist[s]*” the written Constitution.<sup>6</sup> In *Heller*’s sequel, *McDonald v. City of Chicago*, the majority described the right to

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1. Geoffrey Christopher Rapp, *Defense Against Outrage and the Perils of Parasitic Torts*, 45 GA. L. REV. 107, 173 (2010) (“[T]he Supreme Court has never articulated self-defense as a constitutional right . . . .”); Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1818 (2007) (“Lethal self-defense is so broadly accepted that courts have rarely encountered grave restrictions on it, and thus haven’t squarely decided whether the federal Constitution protects it.”).

2. See *United States v. Waldman*, 835 F.3d 751, 754 (7th Cir. 2016) (looking to “the common law as a guide” where a federal statute is silent on a question of affirmative defenses); *Taylor v. Withrow*, 288 F.3d 846, 851 (6th Cir. 2002) (“[F]ailure to instruct a jury on self-defense when the instruction has been requested and there is sufficient evidence to support such a charge violates a criminal defendant’s rights under the due process clause.”); *State v. Rader*, 186 P. 79, 92 (Or. 1919) (Harris, J., concurring) (noting the practice of equity as a source of self-defense); Nicholas J. Johnson, *Self-Defense?*, 2 J.L. ECON. & POL’Y 187, 194–96 (2006) (identifying the Ninth Amendment as a source of self-defense in constitutional law).

3. 554 U.S. 570 (2008).

4. *Id.* at 628–29.

5. *Id.* at 599.

6. *Id.* at 592. *Heller* actually focused on a “pre-existing” right to keep and bear arms for self-defense, but this article will assume the “primary” right of self-defense predates the Constitution as much as the “auxiliary” right to have arms for that purpose. See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Towards an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 322–23 & n.46 (1991) (discussing primary and auxiliary rights).

self-defense as “basic” and “deeply rooted.”<sup>7</sup> Though *Heller* and *McDonald* still did not directly state that self-defense is constitutional law, these cases appear to make self-defense more a matter of federal constitutional concern than ever before.

Yet, these decisions—and the lower courts that have followed them—have done little to define this “central” feature of the Amendment. Sometimes judges or commentators suggest that the terms “preexisting,” “basic,” and “deeply rooted” mean the Second Amendment is fixed in English common law tradition.<sup>8</sup> Sometimes they use these terms to mean that the Second Amendment codifies natural rights philosophy.<sup>9</sup> Some decisions appear to expand these sources, suggesting that Second Amendment self-defense is not tied to any one culture, nation, or time, but is trans-cultural, trans-national, and trans-temporal.<sup>10</sup> Some reject any human agency for the right. For them, self-defense is not a creature of constitutions, common law, history, or tradition, but is written into the soul of man by God.<sup>11</sup>

This article investigates what it means to say the “central component” of the Second Amendment is self-defense and explores how that “central component” relates to firearm policy. It assumes that *Heller* understands Second Amendment self-defense to be derived from a body of Anglo-American jurisprudence that pre-exists the Founding. Given this assumption, self-defense, as well as its close relative, defense of others, has been far from inalienable, individual, or innate. Instead it has been heavily conditioned and constructed by the state.

Early self-defense law in the Anglo-American tradition presumed that homicide—even in self-defense—required the pardon of the sovereign. Only those slayers who killed as an actual or constructive agent of the state were completely innocent. Especially when self-defense extended beyond the home to the public, to the defense of others, and to the apprehension or prevention of a felony, state construction and regulation of self-defense was the rule, not the exception.

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7. See *McDonald v. City of Chicago*, 561 U.S. 742, 767–68 (2010) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

8. See *Heller*, 554 U.S. at 593–95; see also *Moore v. Madigan*, 702 F.3d 933, 935–37 (7th Cir. 2012) (citing *Heller*); *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011) (same); Jonathan Meltzer, *Open Carry for All: Heller and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1503–04 (2014).

9. See *Grace v. District of Columbia*, No. 15-2234, 2016 WL 2908407, at \*6 (D.D.C. May 17, 2016) (“[T]he first step in the historical inquiry [for the Second Amendment] is examining the right we inherited from English and natural law.”); see also Diarmuid F. O’Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513, 1523 (2011).

10. See *McDonald*, 561 U.S. at 767 (“Self-defense is a basic right, recognized by many legal systems from ancient times to the present day . . .”).

11. See *Morgan v. Commonwealth*, 15 S.W.2d 273, 275 (Ky. 1929) (“The right of self-defense is not derived from any statutory enactment, but is a God-given right which man had when he was yet a savage and which he did not surrender when he came into civil society.”); see also REPUBLICAN PARTY, WE BELIEVE IN AMERICA: REPUBLICAN PLATFORM 13 (2012), <https://prod-static-ngop-pbl.s3.amazonaws.com/docs/2012GOPPlatform.pdf> [<https://perma.cc/BY4B-Y3RG>] (“We acknowledge, support, and defend the law-abiding citizen’s God-given right of self-defense.”).

This article supports this historical investigation with new scholarship on political philosophy and theories of justification. These scholars argue that self-defense and defense of others depend on notions of public authority. As one theorist states, private citizens have power to execute their judgment “only insofar as they stand in the shoes of public officials to whom this authority belongs.”<sup>12</sup> These theories of justification arise from, and respond to, early modern or Enlightenment philosophy, but are not bound by them. Although the issue is contestable, this article assumes that the Constitution does not enact the political philosophy of Thomas Paine or John Locke any more than it “enact[s] Mr. Herbert Spencer’s Social Statics.”<sup>13</sup> It assumes that an accurate legal description of the “central component” of the Second Amendment does not depend upon what James Madison or Thomas Jefferson thought about self-defense, but rather requires an understanding of the common law canvas upon which the Second Amendment was written as glossed by our best account of political philosophy.

Self-defense as divine law will not be addressed in this article. It is an article of faith among many that self-defense comes from God and is beyond any human agency. But such a claim is not receptive to conventional tools of legal reasoning and therefore must be left to other forms of disputation by other types of scholars.

The history of self-defense at common law shows that the core self-defense right identified in *Heller* is not as indisputably individualistic, inalienable, and innate as is often assumed. Instead, the state’s role in this concept has been dominant throughout history. Understanding the history of this core of the Second Amendment right has potential implications for public policy and law concerning firearms. It suggests that the state has a power, and perhaps an obligation, to ensure that private capacity to render lethal force conforms to minimum standards of safety, training, and discipline.

## II

### THE COMMON LAW OF SELF-DEFENSE AND DEFENSE OF OTHERS

The common law of self-defense doesn’t begin with the individual, it begins with the sovereign.<sup>14</sup> In the first century after the Norman invasion of England, the patchwork of local regulations, private vengeance, and family feuds were

12. Malcolm Thorburn, *Justifications, Powers and Authority*, 117 YALE L.J. 1070, 1126 (2008).

13. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); cf. Jim Chen, *There’s No Such Thing as Biopiracy . . . and It’s a Good Thing Too*, 37 MCGEORGE L. REV. 1, 24 (2006) (“[T]he patent and copyright clause of the Constitution did not endorse the property-rights philosophy of John Locke, Immanuel Kant, or Georg Wilhelm Friedrich Hegel.”) (quoting *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting)).

14. See Joseph H. Beale, Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567, 567 (1903) (“[T]he right to kill in self-defense was slowly established, and is a doctrine of modern rather than medieval law.”); see generally Bernard Brown, *Self-Defence in Homicide From Strict Liability to Complete Exculpation*, 1958 CRIM. L. REV. 583 (1958) (tracing the history of self-defense from strict liability to legal justification).

gradually supplanted by an all-encompassing “king’s peace.”<sup>15</sup> Initially, the king’s peace existed only at “certain times, in certain places, and in favour of certain privileged persons.”<sup>16</sup> But eventually, the king’s peace came to “cover all times, the whole realm, [and] all men.”<sup>17</sup> Those “put outside the king’s peace and protection” were deemed “outlaw[s],” and, theoretically, could be killed by any private party.<sup>18</sup>

Roughly concurrent with the consolidation of the king’s peace, homicide split into two types—justifiable and excusable.<sup>19</sup> Justifiable homicide was faultless and required an acquittal.<sup>20</sup> Excusable homicide—including homicide *se defendendo*—presumed fault but permitted appeal to the sovereign’s grace.<sup>21</sup>

Initially, a homicide was justified only in limited circumstances. Homicides expressly ordered by the crown, as when executing a death sentence;<sup>22</sup> and those committed by necessity when arresting a manifest felon,<sup>23</sup> a “hand-having thief,”<sup>24</sup> or an outlaw<sup>25</sup> were justified. But this limited set of justifiable homicides “would have been regarded less as cases of . . . self-defence than as executions.”<sup>26</sup> Eventually, the common law extended the justification rationale to the prevention of forcible felonies,<sup>27</sup> and expanded the categories of felonies that justified homicide to include arson, robbery, and burglary.<sup>28</sup>

15. See J.E.A. JOLLIFFE, *THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND* 182 (4th ed. 1961); F. W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 10 (A.H. Chaytor & W.J. Whittaker eds., 1979).

16. MAITLAND, *supra* note 15, at 10. Examples would be at a coronation, on the public highways, or in protection of the king’s own servants. *Id.*

17. *Id.*; see also Brown, *supra* note 14, at 583 (“The first business of a ruler is the elimination of all forms of self-help . . .”).

18. 3 W. S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 605 (3d ed. 1923); see also 2 BRACTON *ON THE LAWS AND CUSTOMS OF ENGLAND* 362 (George E. Woodbine ed., Samuel E. Thorne trans., 1968) (“[An outlaw] may be slain by anyone with impunity, especially if he resists or takes to flight so that his arrest is difficult”); Thomas A. Green, *The Jury and the English Law of Homicide, 1200–1600*, 74 *MICH. L. REV.* 413, 438 (1976).

19. See Green, *supra* note 18, at 419.

20. See *id.*

21. See *id.*

22. See Rollin M. Perkins, *Self-Defense Re-Examined*, 1 *UCLA L. REV.* 133, 142 (1954).

23. See Beale, *supra* note 14, at 572, 574.

24. Green, *supra* note 18, at 439. A “hand-having thief” was one caught with the goods in his possession. *Id.*

25. See *id.* at 419.

26. 2 SIR FREDERICK POLLOCK & FREDERIC W. MAITLAND, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 479 (2d ed. 1898); see also Brown, *supra* note 14, at 584–85 (noting that justifiable homicides were limited to three very specific circumstances: executions, foresters who kill trespassers on Royal lands who resist arrest, and “a hand-having thief or other manifest villain who tried to resist arrest”).

27. See Green, *supra* note 18, at 442; see also 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*180; 1 EDWARD HYDE EAST, *PLEAS OF THE CROWN* 271–72 (1803). Pollock & Maitland are not certain that such a homicide to prevent a felony would have been justifiable at common law in the thirteenth century. See 2 POLLOCK & MAITLAND, *supra* note 26, at 479 n.2.

28. Green, *supra* note 18, at 436.

In practice, the facts that distinguished private vengeance, excusable self-defense, and justifiable killing remained, as they are today, notoriously fuzzy and contingent.<sup>29</sup> Legal historian Thomas Greene suggests that medieval judges and juries may have manipulated this lack of clarity to the ends of crime control.<sup>30</sup> Expanding the range of justifiable homicides may have been in response to an “unprecedented . . . rise in professional crime.”<sup>31</sup>

Though the factual circumstances of a given homicide may have resisted clear categorization, the legal distinction was well established and consequential:<sup>32</sup> Homicide was justified only when one acted as an actual or implicit agent of the sovereign.<sup>33</sup> Justified homicide led to acquittal; homicide solely in self-defense required the king’s special mercy.

A person who killed another, even to preserve his own life, had to seek pardon from the sovereign.<sup>34</sup> Whatever the moral quality of self-defense, the common law tilted in favor of the preservation of human life and the maintenance of public order. As Coke reported, “although a man kills another in his defence [sic]. . . without any intent, yet it is felony . . . for the great regard which the law has to a man’s life . . . .”<sup>35</sup> The necessity of self-preservation alone did not justify homicide in the eyes of the law, and the formal requirement of forfeiture for self-defense wasn’t abrogated until 1828.<sup>36</sup>

Those who killed in self-defense had to submit a request for pardon to the king or to his ministers.<sup>37</sup> The Statute of Gloucester (1278),<sup>38</sup> for example, provided that those accused of homicide who claimed self-defense had to remain

29. See 2 POLLOCK & MAITLAND, *supra* note 26, at 478 (noting the “very similar case” of an execution and the “slaying of an outlaw or a hand-having thief or other manifest felon who resists capture.”); Beale, *supra* note 14, at 568 (“The line between homicide in execution of the law and homicide by misadventure or *se defendendo* was not yet clearly defined . . .”).

30. Green, *supra* note 18, at 442.

31. *Id.*

32. See Perkins, *supra* note 22, at 141.

33. See Beale, *supra* note 14, at 572 (explaining that justifiable killing was limited to “warrant or . . . custom”); Benjamin Levin, *A Defensible Defense?: Reexamining Castle Doctrine Statutes*, 47 HARV. J. ON LEGIS. 523, 528 (2010) (“The only justifiable homicide, therefore, was one committed under the auspices of the state, or at least in clear furtherance of the state’s interests.”); Rollin M. Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537, 539 (1934) (“[O]nly those homicides were innocent which were caused in the enforcement of justice . . .”).

34. See 2 POLLOCK & MAITLAND, *supra* note 26, at 479 (“The man who commits homicide by misadventure or in self-defence deserves but needs a pardon.”); see also 2 BRACTON, *supra* note 18, at 372–73 (noting the role of the king in granting pardon where a person acted self-defense).

35. Semayne’s Case, (1604) 77 Eng. Rep. 194, 195 (KB). The common law exception was the “castle doctrine” which permitted lethal force to defend one’s dwelling. See *id.*

36. See The Offences Against the Person Act of 1828, 9 Geo. 4, c. 31, § 10 (stating that “[p]unishment or [f]orfeiture shall be incurred by any [p]erson who shall kill another by [m]isfortune, or in his own [d]efence, or in any other [m]anner without [f]elony.”); see also 2 POLLOCK & MAITLAND, *supra* note 26, at 481 (citing 9 Geo. 4, c. 31, § 10). Pollock and Maitland note, however, that even before 1828 “[j]ustices allowed jurors to find a man ‘not guilty,’ instead of giving a special verdict about misadventure or self-defence.” *Id.* at 481 n.3.

37. See 2 POLLOCK & MAITLAND, *supra* note 26, at 479–80.

38. 6 Edw. 1, c. 9 (Eng.).

in jail, plead the defense to the king's justices, and upon report of the justices to the sovereign, "the King shall take [the accused] to his Grace, if it please him."<sup>39</sup> The pardon was not costless. The individual may have had to surrender his goods to the king as a condition of the pardon.<sup>40</sup> Even then, the individual still was vulnerable to a private action by the family of the slain.<sup>41</sup>

Eventually pardons for homicide in self-defense became a formality, operating by "course of law" rather than through supplication.<sup>42</sup> Henry VIII, for example, passed a statute that clarified that one who kills a robber on the highway or burglar breaking into a home at night should not have to surrender his property, but may be acquitted.<sup>43</sup> But this statute merely clarified when the killing of a robber or a thief was done on behalf of the law, and therefore justifiable. It did not eradicate the distinction between justifiable and excusable homicide,<sup>44</sup> which remained in the treatises on criminal law well into the nineteenth century.<sup>45</sup>

The legal distinction between homicide on behalf of the sovereign and homicide as a private act of self-preservation persisted even as theories of natural law came to influence English treatise writers in the seventeenth and eighteenth centuries.<sup>46</sup> For example, in the seventeenth century, Coke wrote that killing a potential robber who threatens bodily injury is justified, but killing an assailant who threatens only bodily harm is merely excusable, for "[s]uch a precious regard the law hath of the life of man" that even if it was necessary, and even though a pardon may save his life, "yet he [s]hall forfeit all his goods and chattels."<sup>47</sup> Matthew Hale set out the general rule that the king is to monopolize violence and that "private per[s]ons are not tru[s]ted to take capital revenge [on each other]."<sup>48</sup> By contrast, private persons may kill thieves and the man who kills them has performed a public service, perhaps even a public duty.<sup>49</sup> Edward Hyde East's *Pleas of the Crown* makes the distinction apparent: for a homicide to be

39. *Id.* See also 3 HOLDSWORTH, *supra* note 18, at 312; Brown, *supra* note 14, at 586.

40. *Semayne's Case*, 77 Eng. Rep. at 195 ("[A]nd in such case [of self-defense] he shall forfeit his goods and chattels . . ."); Green, *supra* note 18, at 425 (noting that by the middle of the 1300s, forfeiture had "in effect become a penalty [for] . . . homicide in self-defense").

41. 2 POLLOCK & MAITLAND, *supra* note 26, at 482 ("The king could not protect the man-slayer from the suit of the dead man's kin."); Green *supra* note 18, at 419.

42. See Beale, *supra* note 14, at 570; see also Brown, *supra* note 14, at 587; Green, *supra* note 18, at 419.

43. Killing a Thief Act 1532, 24 Hen. 8, c. 5 (Eng.).

44. See Beale, *supra* note 14, at 571.

45. See Claire O. Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621, 637 (1996).

46. See Bernard J. Brown, *The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law*, 7 AM. J. LEGAL HIST. 310, 310 (1963) (noting that homicides in self-defense and by misadventure "were, until the eighteenth century, treated for purposes of punishment on an equal footing").

47. 3 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 55 (London: E & R Brooke ed. 1797); see also Beale, *supra* note 14, at 572. *But see* Perkins, *supra* note 22, at 139–45 (casting doubt on Beale's account of the rules for justifiable homicide).

48. 1 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 481 (1736); see also Beale, *supra* note 14, at 574 (citing Hale for this distinction).

49. See *id.* at 484, 486, 487, 489.

justified, there must be a felony.<sup>50</sup> One who came to beat someone else or to take his goods could be killed in self-defense, but it was only an excusable homicide.<sup>51</sup> However one who “take[s] his goods *as a felon*” could be killed, and it was justified.<sup>52</sup>

Michael Foster’s eighteenth century treatise repeatedly alludes to the law of nature as a source of self-defense. But even Foster’s treatise shows the close relationship between self-defense, public crime control, and justification at common law. According to Foster, “homicide in advancement of ju[s]tice” is also “founded in nece[ss]ity” because no government can allow a wrongdoer to flout the orderly imposition of justice.<sup>53</sup> It is the duty of individuals “where a felony is committed, and the felon fleeth from ju[s]tice,” to prevent the felon’s escape.<sup>54</sup> If the fleeing felon is killed, “this will be deemed ju[s]tifiable homicide.”<sup>55</sup>

Although self-defense may be understood as rooted in natural law, according to Foster, positive law coordinates this natural law with duty. Foster offers the examples of using lethal force to repel a murderer, robber, burglar, or arsonist and concludes that in these circumstances “nature and [s]ocial duty cooperate.”<sup>56</sup> The citizen’s duty to enforce the law against felons and the citizen’s instinct for self-preservation are then in accord. When they are not, as when a man kills another while defending himself in the heat of an unplanned fight, then the homicide is only excusable, not justifiable.<sup>57</sup>

The persistence of the distinction between justified self-defense and excusable self-defense at common law only makes conceptual sense if one understands that the homicide is justified when the slayer acts in some sense on behalf of the state. It is merely excused when the slayer acts solely on his own behalf.<sup>58</sup> Or, as Beale summarizes, what distinguished justifiable from excusable homicides is the line “between execution of the law and cases of private defense.”<sup>59</sup>

Killing in defense of others was, at common law, derivative of self-defense. At first, defense of others required some close relationship between the persons, as in the case of spouses or masters and servants. Foster remarks that a servant may interpose himself to prevent a felony from being committed against a master, and if he happens to kill the would-be felon, the homicide is justifiable.<sup>60</sup> The

50. EAST, *supra* note 27, at 271–72.

51. *Id.* at 272.

52. *Id.* (emphasis added); *see also* Beale, *supra* note 14, at 574.

53. SIR MICHAEL FOSTER, CROWN CASES 270 (3d ed. 1792).

54. *Id.* at 271; *see also* PAUL R. HYAMS, RANCOR AND RECONCILIATION IN MEDIEVAL ENGLAND 97 (2003) (“Local people were bound by a very ancient obligation to pursue and arrest a hand-having thief.”).

55. FOSTER, *supra* note 53, at 271.

56. *Id.* at 274.

57. *Id.* at 275–76.

58. *See* Beale, *supra* note 14, at 575; Finkelstein, *supra* note 45, at 637.

59. Beale, *supra* note 14, at 575.

60. *See* FOSTER, *supra* note 53, at 274.

concept was one of “mutual and reciprocal defence,”<sup>61</sup> or even (when undertaken by the master or parent) defense of property.<sup>62</sup>

In time, the law expanded the sphere of persons one could defend beyond close relations and servants to the public at large.<sup>63</sup> Although Blackstone spoke of special relationships as creating a mutual defense, the English treatise writers wrote that private citizens could, and perhaps were obliged to, prevent capital felonies attempted in their presence or apprehend those who committed such felonies.<sup>64</sup> As one nineteenth century American treatise writer noted: “It is not only every person’s right, but it is his legal duty, to prevent a felony, even if he has to go to the extreme of taking the life of the person attempting to commit it.”<sup>65</sup> A private party could also kill a felon, if such killing was necessary to prevent the felon from escaping.<sup>66</sup> To do so was thought to simply accelerate the ultimate penalty of death for the felon, who forfeited his life by committing the crime.<sup>67</sup> In this way, theories of self-defense and defense of others merged with a duty to enforce the law against actual or attempted felons.

Early American cases on the criminal law reproduced these common law distinctions between justifiable and excusable homicide. In one of the earliest recorded criminal cases in the United States, a judge instructed a New Jersey jury “that homicide was, in some cases, justifiable, and in others was excusable . . . .”<sup>68</sup> In “the most important murder trial of the early republic,”<sup>69</sup> the 1806 Massachusetts case of *Commonwealth v. Selfridge*,<sup>70</sup> the grand jury charge again made an express distinction between a justified homicide to prevent a felonious attack and excusable homicide to prevent a non-felonious attack.<sup>71</sup> *Selfridge*, as Richard Singer notes, “is the first case—and certainly the first American case—to use the term ‘self defense’ to describe what up until that point in legal history was characterized as a justifiable prevention of felony.”<sup>72</sup> American law near the Founding recognized a conceptual distinction between justifiable homicide and

61. 3 WILLIAM BLACKSTONE, COMMENTARIES at \*3. But apparently contrary to Foster, Blackstone describes it as an “excuse” to homicide, not a justification. *See id.* at \*4

62. *Id.* *See also* Marco F. Bendinelli & James T. Edsall, *Defense of Others: Origins, Requirements, Limitations and Ramifications*, 5 REGENT U.L. REV. 153, 155 (1995) (discussing origin of defense of others as related to property rights).

63. Bendinelli & Edsall, *supra* note 62, at 155, 200–02.

64. 3 BLACKSTONE, *supra* note 61, at \*3, 178, 179; 1 HALE, *supra* note 48 at 484, 486, 487, 489.

65. WM. L. CLARK, JR., HAND-BOOK OF CRIMINAL LAW 137 (1894).

66. *See* John L. Watts, *Tyranny by Proxy: State Action and the Private Use of Deadly Force*, 89 NOTRE DAME L. REV. 1237, 1243–44 (2014) (citing *Tennessee v. Garner*, 471 U.S. 1, 14 (1985)).

67. *Id.*

68. *State v. Wells*, 1 N.J.L. 424, 427 (1790).

69. Saul Cornell, *Early American Gun Regulation and the Second Amendment: A Closer Look at the Evidence*, 25 LAW & HIST. REV. 197, 199 (2007).

70. 2 Am. St. Trials 544 (1806).

71. *See* Cynthia V. Ward, “Stand Your Ground” and Self-Defense, 42 AM. J. CRIM. L. 89, 100 n.39 (2015) (quoting grand jury charge from *Selfridge*).

72. Richard Singer, *The Resurgence of Mens Rea: II—Honest but Unreasonable Mistake of Fact in Self Defense*, 28 B.C.L. REV. 459, 477 (1987) (footnote omitted).



excusable homicide, just as it had been recognized in English common law.<sup>73</sup> It was only in the generations afterward, as American law grew independent from its English progenitors that a unique American self-defense law emerged and the distinction between justifiable homicide in the service of law enforcement and homicide as pure self-preservation began to collapse.<sup>74</sup>

To summarize, although natural law theories of self-defense found their way into criminal law treatises in the eighteenth century, these theories were not fully integrated into the common law system of Anglo-American jurisprudence at the Founding. The common law up to the nineteenth century retained a distinction between killing at the behest of the crown or as an adjunct to law enforcement and killing purely as a matter of self-defense or necessity.<sup>75</sup> Justifiable homicide was the work of the sovereign, directly or indirectly, for “the law mu[s]t require [the homicide] otherwise it is not justifiable”;<sup>76</sup> excusable homicide, by contrast, was the work of the great universal “principle of [s]elf-pre[s]ervation.”<sup>77</sup> Whatever the common consequence to the alleged offender, the two forms of homicide were conceptually distinct. Justifiable homicide deserved no punishment or condemnation; excusable homicide retained at least a shadow of suspicion “to caution men how they venture to kill another upon their own private judgment.”<sup>78</sup> It is doubtful, then, that the kind of inalienable and individual right to self-defense commonly articulated in gun debates today is as deeply rooted in our Anglo-American common law tradition as has been assumed.

Some commentators challenge self-defense as a purely individual, inviolate right retained from the state of nature.<sup>79</sup> These challenges offer support to this descriptive account of Anglo-American common law. Professor Jud Campbell has observed that the Framers “widely agreed” that “retained natural rights could be regulated in the public interest by the people or their representatives.”<sup>80</sup> The focus was on developing structures and norms of government that worked in the public interest, not primarily on protecting areas of natural liberty from government regulation.<sup>81</sup> “Consequently,” Campbell writes, “most retained

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73. However, “there is no indication that courts ever enforced forfeiture [for excusable homicide] in the United States.” *Id.* at 473.

74. *See id.*

75. *See* 4 BLACKSTONE, *supra* note 27, at \*181–82; *see also* Finkelstein, *supra* note 45, at 637.

76. 4 BLACKSTONE, *supra* note 27, at \*178.

77. *Id.* at \*182.

78. *Id.* at \*187.

79. *See* Samuel L. Bray, *Power Rules*, 110 COLUM. L. REV. 1170, 1190–91 (2010) (describing one power rule as “to separate the person who exercises the power from the person with decisionmaking authority about whether it should be exercised”); *see generally* Thorburn, *supra* note 12 (discussing notions of authority as essential to notions of justification in criminal law).

80. Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 98 (2017).

81. *Id.* at 97–98 & n.62.

natural rights were *individual* rights that could be *collectively* defined and controlled.”<sup>82</sup>

One way of controlling such natural rights, as discussed before, is to harmonize private self-interested violence with public interest. As Joshua Stein has written, “broadened right[s] to self-defense,” in American criminal law, “came, paradoxically, from a desire to empower or deputize Americans to combat violence.”<sup>83</sup> In a state in which the “king’s peace” had been replaced by a more republican “citizens’ peace,” the way to counter widespread private violence was for the state to confer public authority upon every citizen to fight it.<sup>84</sup>

Professor Malcolm Thorburn has noted that a fundamental component of justification in Anglo-American criminal law is an exercise of authority.<sup>85</sup> Justifications in the criminal law define what is permissible from what is forgivable. When a police officer physically restrains someone during an arrest, the criminal law does not treat the event as a moral wrong that the officer must excuse by reference to some utilitarian or deontological rationale.<sup>86</sup> Police are justified in holding someone against their will when they effect an arrest because of their authority as police officers.<sup>87</sup>

By contrast, a private individual who holds another against her will ordinarily must explain why his behavior does not constitute a crime. The difference is the deference with which the law treats the judgments of the officer as opposed to the private citizen. The criminal law is not structured to provide a free-floating authorization for everyone to do whatever is best. The most important question, according to Thorburn, is not whether the act was justified in some utilitarian or deontological sense, but who gets to decide whether the act is justified and when.<sup>88</sup> It is the discretion to justify—who gets to exercise that discretion, the scope of that discretion, and the norms to guide that discretion—that is the most important normative issue with respect to justification.<sup>89</sup>

In cases of self-defense, the law instructs one decisionmaker (the court) to review the judgment (to harm or kill a person) of another decisionmaker (the person claiming self-defense) as to whether that judgment was justified in that case.<sup>90</sup> In most cases of self-defense, the decision on justification and the decision to act are made by the individual in the moment because deference to another authority is not possible. This is the classic account of when self-defense is

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82. *Id.* at 98.

83. Joshua Stein, *Privatizing Violence: A Transformation in the Jurisprudence of Assault*, 30 LAW & HIST. REV. 424, 425 (2012).

84. *Id.* at 437.

85. See generally Thorburn, *supra* note 12 (discussing how authority and justification interact in the institutional structure of criminal law).

86. *Id.* at 1072.

87. *Id.* at 1092.

88. *Id.* at 1074–75.

89. See *id.* at 1075 (identifying these three critical normative issues).

90. See *id.* at 1097 (setting out this three step process).

available in criminal law; it is only available when appeal to some superior authority in the legal order is unavailable.<sup>91</sup> In this account, if both a private citizen and a police officer were simultaneously confronted with a person with a suspected weapon, the private citizen must defer to the police officer's decision as to whether deadly force was necessary and proportional to the threat.<sup>92</sup> According to this reading of justification, where the private individual is authorized by the law to exercise self-defense, it is not because he or she is acting according to an inalienable right in the state of nature. Instead, the very structure of justification in Anglo-American criminal law means these individuals exercise an authority derivative of the state. The same kind of justificatory reasoning that applies to police officers who violate otherwise applicable criminal law applies to private individuals as well.<sup>93</sup> One who kills another in self-defense is not justified because of inalienable right, but because she acts as a "public official[] pro tempore."<sup>94</sup>

### III

#### IMPLICATIONS

Popular accounts of self-defense as an inalienable reservation of individual right is hard to square with the actual law of self-defense in the common law tradition. At the time of the Constitution's ratification, the common law had not completely integrated the natural rights arguments of Locke and his contemporaries, much less the liberal philosophy of John Stuart Mill or the neoliberalism of twentieth century philosophers like Robert Nozick.<sup>95</sup> The faultlessness of a homicide turned on notions of crime prevention, public order, and punishment, rather than notions of human autonomy. Additionally, the liberal conception of self-defense may not be the best account of the practice in Anglo-American law, as demonstrated by Professor Thorburn, whatever moral philosophers may think of the subject.<sup>96</sup> But, even if it is conceded that self-defense is heavily constructed by the state as a matter of legal history and in some accounts of political philosophy and criminal law theory, what relevance is it to Second Amendment law and doctrine?

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91. *Id.* at 1108 ("Private citizens do not have a standing power to make these decisions [about self-defense or arrests]; rather, they are entitled to decide when it is appropriate to use force in self-defense, to prevent a greater evil, or to effect an arrest only where recourse to state officials is impracticable."); *see also* District of Columbia v. Heller, 554 U.S. 550, 594-95 (2008) ("Americans understood the 'right of self-preservation' as permitting a citizen to 'repe[] force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'" (citation omitted)).

92. *See* Thorburn, *supra* note 12, at 1109 (making a similar argument).

93. *See id.* at 1128.

94. *Id.* at 1129. *But see* John Gardner, *Justification Under Authority* (Oxford Legal Research Paper Series, Paper No. 5, 2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1345763](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1345763) [<https://perma.cc/599L-9H6W>] (casting doubt on this description of self-defense).

95. *See supra* Part II.

96. *See supra* Part II.

It is relevant for at least three reasons. First, recognizing how pervasive the state has been in the history and philosophy of self-defense reveals the assumptions about self-defense nestled in the heart of the Court's Second Amendment jurisprudence. *Heller* and various other cases and commentators assume that self-defense in the English tradition is rooted in a particularly individualistic strand of liberal philosophy and natural law.<sup>97</sup> As a consequence, they assume the Second Amendment merely entrenches this conception of liberal and natural law philosophy in constitutional law.<sup>98</sup> Recognizing the state's role in constructing self-defense at common law suggests a different place for the baseline than the Court assumes in *Heller*. Second, it implicates the state as an actor when governments liberalize self-defense law through loosened gun regulations, stand your ground laws, or other similar mechanisms. The state is acting. It is choosing a baseline different than the one supplied by the common law. Perhaps the state is not acting in the sense of meeting all the doctrinal requirements of "state action." But, as Laurence Tribe once said about property rights, understanding the common law history of self-defense exposes the government's role in bending the "geometry of the . . . common law"<sup>99</sup>—a geometry in which ostensibly private parties perform uniquely public functions. Finally, accepting the role of the state in self-defense law provides some potential avenues for discussion, and perhaps agreement, in an otherwise incredibly polarized public dialogue on gun rights and gun regulations.

#### A. Baseline Assumptions About Self-Defense

The Court's Second Amendment jurisprudence does not delve into the details of the common law of self-defense other than to establish that its roots are ancient.<sup>100</sup> It assumes the common law of self-defense reflects a strong individual rights bias. But, as this article has attempted to show, the common law baseline of self-defense is not precisely where the Court assumes it to be. Instead of fixing Second Amendment self-defense law as it existed in 1791, the Court assumes a common law baseline more in keeping with liberal philosophy.

Baselines are critical in all kinds of legal disputes, including constitutional ones. Baselines provide reference points to determine when law has changed, when governments have acted or failed to act, and when rights have been violated.<sup>101</sup> Debates over Second Amendment rights to keep and bear arms have

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97. See *Heller*, 554 U.S. at 585, 593, 611; *Grace v. District of Columbia*, No. 15-2234 (RJL), 2016 WL 2908407, at \*6 (May 7, 2016 D.D.C.) ("[T]he first step in [Second Amendment adjudication] is examining the right we inherited from English and natural law."); O'Scannlain, *supra* note 9, at 1523–26.

98. See *e.g.*, *Grace*, No. 15-2234 (RJL), 2016 WL 2908407, at \*6; O'Scannlain, *supra* note 9, at 1523–26.

99. Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 25 (1989).

100. See *McDonald v. City of Chicago*, 561 U.S. 742, 767–68 (2010) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

101. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 883–902 (1987) (describing how *Lochner* can be used as a baseline for various constitutional law issues).

been argued with assumed and unarticulated baselines of self-defense. That the state was far more involved in shaping the norms of self-defense at common law than is conventionally understood exposes the contestability of the accuracy, and certainly the “naturalness,” of the *Heller*’s baseline.

Baselines may be challenged, of course. One may say that the Anglo-American common law baseline is immoral on some deontological or utilitarian basis. One may consider a sovereign-centered notion of self-defense, the “king’s peace,” or even the whole Weberian notion of a monopoly on the legitimate use of violence antiquated or corrupted, as fit for the dustbin of history as sovereign immunity, coverture, or holding human beings as property.

Even with no moral reservations, one may challenge the common law history of self-defense descriptively. One may say it no longer accurately captures our legal practice. Whatever the truth of the sovereign-centered notion of self-defense in the past, our present understanding of self-defense is the product of liberal philosophy and individual rights. Consequently, the history of self-defense that lay at the core of the Second Amendment is less important now than these liberal conceptions of the right.<sup>102</sup> Whether the objection is moral or descriptive, it is perfectly rational to say the Framers’ self-defense law is not our self-defense law, and to insist that our notions of the Second Amendment must reflect those changes in morality or law that have developed after 1791.

One may reject the legal significance of this common law history to modern debates about self-defense, guns, and gun policy. But its historical existence cannot be denied, and the necessity of deciding whether to adopt, modify, or reject this history cannot be avoided. Identifying as accurately as possible the common law history of self-defense only serves to focus the discussion. It does not thereby transform the common law into a found thing, unconstructed, pre-political, neutral, and natural.<sup>103</sup> If this article has attempted to prove anything, it is that our law of self-defense is not natural or neutral; it is a choice.

## B. Baseline Choices And The State

If the baseline of Second Amendment self-defense rests roughly where it was at English common law, then homicides are generally illegal. They are justified only when the slayer acts on behalf of the law or in advancement of certain public ends such as crime control, criminal justice, and punishment.<sup>104</sup> Once the baseline set by the common law tradition is recaptured, then it must be asked whether and

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102. U.S. CONST. amend. II. The change could be a result of gradual case-by-case adjudication in criminal law, or by codification. Or one could argue that there were convulsive shocks—like the Civil War and Reconstruction—that rendered this history of self-defense a useless relic. See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1797–98 (2007).

103. See Jack M. Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 916 (1989) (“Baselines embody important moral and political choices, but because they are starting points for analysis, they tend to suppress discussion of these choices.”).

104. See *supra* Part III.

under what conditions the responsibility for such a homicide can be delegated to private persons.

The division between state action and non-state action is a baseline choice that reflects a “normative theory of the legitimate or normal activities of government.”<sup>105</sup> Deviations from the common law baseline, wherever it may be set, determine when the government has acted.<sup>106</sup>

In a functioning state, the government’s obligations with respect to deadly force against others—at least in public<sup>107</sup>—could be “non-delegable.” Non-delegable government functions are “powers traditionally exclusively reserved to the State”<sup>108</sup> and having been “traditionally associated with sovereignty.”<sup>109</sup> The power to kill another human being was, according to English common law history, a power traditionally exclusive to the sovereign. When done on behalf of the sovereign, the killing was justified, because the individual acted as an actual or implicit agent of the king. When the killing was done purely for personal purposes, the act required active—and later implicit—forgiveness by the sovereign.

The doctrine of non-delegation means “[t]he government may delegate the task but not the responsibility, and the private actor performing that governmental function must act within the constitutional limitations that apply to the government.”<sup>110</sup> In the same way that a state could not rid itself of its Due Process or Eighth Amendment obligations by auctioning off the authority to perform an execution,<sup>111</sup> so the state cannot rid itself of the responsibility to ensure that deadly force in service of the law is exercised according to constitutional constraints.<sup>112</sup> Laws that empower private citizens to visit lethal force upon others in furtherance of crime control without a corresponding responsibility of the state shows the state’s attempt to shift the baseline.

In its most dramatic form, a government’s attempt to delegate both the act and the responsibility for a homicide against felons could be a form of “outlawry.” Outlawry at common law was the power of the king to declare a person outside the sovereign’s protection—outside of the law. Such a person could be captured and, if he ran, perhaps killed by any private party. As a North Carolina federal court described North Carolina’s law: “The effect of the

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105. Sunstein, *supra* note 101, at 888.

106. *See id.*

107. The castle doctrine is so rooted in Anglo-American common law that it would be difficult to call its adoption a shift, rather than the setting, of a baseline.

108. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

109. *Id.* at 353; *see also* *Watts*, *supra* note 66, at 1264–65 (exploring *Jackson* and non-delegation).

110. *Watts*, *supra* note 66, at 1265.

111. Outlawry has generally been considered a grievous due process violation. *See e.g.*, *Green v. United States*, 356 U.S. 165, 171 (1958) (“[T]he severe remedy of outlawry, which fell into early disuse in the state courts, was never known to the federal law.”); *Hovey v. Elliott*, 167 U.S. 409, 444 (1897) (“[I]f such power obtained, then the ancient common-law doctrine of ‘outlawry,’ and that of the continental systems as to ‘civil death,’ would be a part of the chancery law,—a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen.”).

112. *See Watts*, *supra* note 66, at 1265.

proclamation [of outlawry] is to license the public to kill the accused felon if he runs after being called on to surrender.”<sup>113</sup> Outlawry cannot be defended on the basis that private parties execute the lethal act. It is the state’s removal of the person from a baseline of legal protection that raises due process concerns.<sup>114</sup>

But one does not have to believe such a delegation amounts to outlawry to see the effects of a shift in the baseline. It is a truism that section 1983—which mirrors the state action doctrine—only punishes government actions, not inactions.<sup>115</sup> Generally, a municipality cannot be held liable for the failures of its agents.<sup>116</sup>

However, for some discrete failures, a municipality *can* be held liable. One such scenario is the “failure to train” theory of municipal liability. The quintessential “failure to train” case, described in *City of Canton v. Harris*, is to equip police officers with firearms, but fail to adequately train them in “the constitutional limitations . . . on the use of deadly force.”<sup>117</sup> Such a failure amounts to “deliberate indifference” to the rights of others because of the “moral certainty” that a police officer with a firearm may have to decide the constitutional requirements of using that weapon.<sup>118</sup> *Harris*’s example makes sense only if one understands there is a baseline that requires the state to ensure that its agents are given constitutionally adequate training to use lethal force on individuals. Deviations from this baseline are not just “inaction” but a deliberate choice to permit unconstitutionally excessive force.

Something like the quintessential “failure to train” case is happening nationwide with respect to what gun-rights advocates call “constitutional carry”—the right to carry firearms for self-defense and defense of others, with no training whatsoever.<sup>119</sup> Currently at least nine states—Alaska, Arizona, Idaho, Kansas, Maine, Mississippi, Vermont, West Virginia, and Wyoming—do not require a permit to carry certain firearms in public.<sup>120</sup> In none of these states is a

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113. *Autry v. Mitchell*, 420 F. Supp. 967, 970 (E.D.N.C. 1976).

114. *See id.* at 971 (“The extreme remedy granted the citizenry infringes, we think, a fundamental right: that one not be denied life, or be wounded, except by due process of law.”).

115. 42 U.S.C § 1983 (2012).

116. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (“*Respondeat superior* or vicarious liability will not attach under § 1983.”).

117. *Id.* at 396 (O’Connor, J., concurring).

118. *See id.* at 390 n.10 (majority opinion).

119. *See, e.g., Maine Lawmaker Submits ‘Constitutional Carry’ bill*, BANGOR DAILY NEWS (Feb. 26, 2015, 7:26 P.M.), <http://bangordailynews.com/2015/02/26/news/state/maine-lawmaker-submits-constitutional-carry-bill/> [<https://perma.cc/YQH3-XUVU>]; Matt Vespa, *Missouri Looks to Join Constitutional Carry Club*, TOWNHALL.COM (Apr. 29, 2016, 2:02 P.M.), <http://townhall.com/tipsheet/mattvespa/2016/04/29/missouri-looks-to-join-constitutional-carry-club-n2155373> [<https://perma.cc/VXK9-98CP>]. Other names for “constitutional carry” are “permit-less carry” or “Vermont carry.”

120. While some states do issue permits or provide optional training, no permit or training is legally required to carry a firearm in these states. *See* ALASKA STAT. § 11.61.220 (2015) (weapons misconduct under Alaska law involves only a failure to notify an officer of the presence of a concealed weapon); ARIZ. REV. STAT. ANN. § 13-3102 (2014) (weapons misconduct is limited to carrying firearms under certain prohibited conditions, such as in furtherance of a criminal offense); IDAHO CODE § 18-3302(3)–(4) (2016) (any person, resident, or non-resident in Idaho over the age of eighteen may carry a concealed

person required to receive any training on when and under what circumstances he can use lethal force.

Thirty-nine other states require a permit to carry a concealed weapon, but only twenty-seven of them require training in firearm use or safety to obtain the permit.<sup>121</sup> Further, even for those states that require firearm use and safety training, the amount and depth of training varies from jurisdiction to jurisdiction, and may or may not include such features as live firing training or instruction on use of deadly force. Even in those jurisdictions that require some training for concealed carry, they may not require similar training for open carry.<sup>122</sup>

In many cases, the articulated reason for loose gun regulation is the belief that widespread arms bearing will aid law enforcement and bring down the level of crime in the population at large.<sup>123</sup> And yet, these jurisdictions have empowered individuals to mete out lethal force directly or indirectly in service of crime

handgun outside the boundaries of a city, but only Idaho residents over twenty-one can carry a firearm inside the confines of a city without a permit); KAN. STAT. ANN. § 75-7c03(a) (2015) (“The availability of licenses to carry concealed handguns under this act shall not be construed to impose a general prohibition on the carrying of handguns without such license, whether carried openly or concealed, or loaded or unloaded.”); ME. REV. STAT. ANN. tit. 25, § 2001-A(2)(A-1) (2015) (“The provisions of this section concerning the carrying of concealed weapons do not apply to: [a] handgun carried by a person who is 21 years of age or older and is not otherwise prohibited from carrying a firearm . . . .”); MISS. CODE ANN. § 45-9-101(24) (2016) (“A license . . . is not required [when the weapons is] carried upon the person in a sheath, belt holster or shoulder holster or in a purse, handbag, satchel, other similar bag or briefcase or fully enclosed case . . . .”); W. VA. CODE § 61-7-7(c) (2016) (“Any person may carry a concealed deadly weapon without a license therefor[e] who is: (1) At least twenty-one years of age; (2) A United States citizen or legal resident thereof; (3) Not prohibited from possessing a firearm under this section . . . .”); WYO. STAT. ANN. § 6-8-104(b)(i) (2016) (noting that among other regulations, an individual must be “a resident of the United States and ha[ve] been a resident of Wyoming for not less than six (6) months” in order to carry without a permit); *State v. Rosenthal*, 55 A. 610 (1903) (upholding a right to permit-less carry in Vermont, per the Vermont Constitution of 1777).

121. See *Concealed Weapons Permitting*, LAW CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/gun-laws/policy-areas/firearms-in-public-places/concealed-weapons-permitting/> [<https://perma.cc/E2YX-RXFA>].

122. Louisiana, for example, allows open carry without a license, but concealed carry license applicants must complete a Department of Public Safety–approved firearms training course with at least nine hours of instruction, including three hours concerning “the use of deadly force and conflict resolution.” See LA. STAT. ANN. § 1379.3(D) (2016). Similarly, Colorado allows open carry without a license, but requires concealed carry applicants to complete a firearms safety training course approved by the authorities, or demonstrate firearm competence according to alternative identified methods. See COLO. REV. STAT. §§ 18-12-202, 203 (2016).

123. See, e.g., Eric Nicholson, *Factcheck: Dan Patrick Says Open Carry Laws Decrease Crime by 25 Percent*, DALLAS OBSERVER (Jan. 5, 2016, 4:01 A.M.), <http://www.dallasobserver.com/news/factcheck-dan-patrick-says-open-carry-laws-decrease-crime-by-25-percent-7906682> [<https://perma.cc/Y6QU-YZQS>] (discussing Texas Lieutenant Governor Dan Patrick’s assertion about a twenty five percent decrease in crime in states that permit open or concealed carry); Larry Pratt, *Open Carry Deters Crime*, U.S. NEWS (Apr. 25, 2012, 4:08 P.M.), <http://www.usnews.com/debate-club/should-people-be-allowed-to-carry-guns-openly/open-carry-deters-crime> [<https://perma.cc/XSX3-962N>] (stating that open carry is becoming more widespread because of its demonstrable effect in decreasing crime); Dwight R. Worley, *Self Defense Argument at Center of Gun Debate*, USA TODAY (Feb. 25, 2013, 10:00 A.M.), <http://www.usatoday.com/story/news/nation/2013/02/25/self-defense-gun-debate/1945591/> [<https://perma.cc/438X-CDNM>] (reviewing debate on the frequency with which guns are used for self-defense); *Fact Sheet: Guns Save Lives*, GUN OWNERS OF AM., <https://www.gunowners.org/sk0802htm.htm> [<https://perma.cc/H85A-SBE4>].



control, without meeting the constitutional minimum of training required of police officers or other express agents of the state. The public policy of many jurisdictions is, in effect, to empower a group of adults to police everyone, with only the threat of post-hoc criminal liability to regulate their behavior.

Whether a municipality is liable for permitting inadequately trained gun owners to carry firearms for defense of themselves and others is beyond the scope of this article.<sup>124</sup> Nor does this article prove that all persons who defend themselves with lethal force necessarily become agents of the state, subjecting themselves and the municipality to section 1983 liability. This short article cannot hope to clean up the “conceptual disaster area” of state action.<sup>125</sup> Instead, the goal is to raise the possibility that, when it comes to empowering private individuals to render lethal force in the service of crime control, there may be a greater role and responsibility for government than the liberal natural law discussion of self-defense and gun rights would suggest. The issue of untrained or inadequately trained citizenry authorized by law to kill others takes on a different cast if one understands this as a policy decision, a departure from a baseline of the common law, rather than the expression of some inalienable reservation of rights that existed before the Founding.

### C. Legislating Both Gun Rights And Gun Responsibilities

Finally, recognizing these baselines could help bridge the poles of our gun politics. Some gun rights advocates have sought to federalize protections of gun rights, primarily through federal legislation that would lead to nationwide reciprocity for concealed carry permits.<sup>126</sup> Early versions of this reciprocity movement relied upon Congress’s power to enforce civil rights through its Fourteenth Amendment section five power.<sup>127</sup> One can imagine similar bills promoted by pro-gun groups to advocate prohibiting state universities from keeping firearms off campus, just as the section five power is used to prohibit other types of discrimination on campus.<sup>128</sup>

If such pro-gun legislative proposals were to be debated in Congress, they could provide an entrée for other civil rights protections. The federal government

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124. Certainly, such a theory would have to contend with the proposition that there is no general constitutional duty for any unit of government to protect a private individual from the harm of another private individual. *See DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 202 (1989).

125. Charles L. Black, Jr., “*State Action, Equal Protection, and California’s Proposition 14*,” 81 HARV. L. REV. 69, 95 (1967).

126. *See* Constitutional Concealed Carry Reciprocity Act of 2015, S. 498, 114th Cong. (2015); National Right-to-Carry Reciprocity Act of 2015, H.R. 402, 114th Cong. (2015).

127. U.S. CONST. amend. XIV, § 5. *See* National Right-to-Carry Reciprocity Act of 2011, H.R. 822, 112th Cong. § 2 (a)(2) (2011).

128. *See* 42 U.S.C. § 2000d-7(a)(1) (“A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . title IX of the Education Amendments of 1972 . . . .”); *Johnson v. Univ. Cincinnati*, 215 F.3d 561, 571 (6th Cir. 2000) (“Plaintiff’s Title VII claims are permissible against the University in federal court notwithstanding the Eleventh Amendment . . . .”); *Okruhlik v. University of Arkansas ex rel. May*, 255 F.3d 615 (8th Cir. 2001).

already plays a significant role in ensuring local law enforcement complies with constitutional standards; in extraordinary cases, they have the authority to oversee the reformation of police practices to remedy past constitutional violations and prevent future ones.<sup>129</sup> To the extent that states, through their open carry and concealed carry policies, essentially permit significant policing functions to be conducted by private actors, a similar set of considerations may come into play.

Understanding the unique public nature of self-defense historically may help buttress the arguments for such federalization of what appears to be a private phenomenon. Consequently, mandatory minimums for training, including, for example, training on the use of lethal force, de-biasing training to ensure that racial minorities are not unfairly targeted by armed citizens, and perhaps mandatory requirements for insurance, would ensure that *all* persons (public and private) authorized to use firearms to enforce the law better address—*ex ante*—the costs of the wrongful use of lethal power.

#### IV

#### CONCLUSION

*Heller* said that self-defense was the “central component” of the Second Amendment. But the philosophical and legal assumptions that accompany that assertion demand investigation. This article has attempted to supply a more nuanced account of the historical and philosophical self-defense baseline than is provided by gun policy debates and legal opinions. It suggests that as a matter of common law history and political philosophy, the state has a far more active role in shaping this core right than is typically acknowledged. Of course, describing the location of the baseline says little about whether it should remain there. But the faint hope of this article is that, if we can at least agree on where we stand, we can devote more time discussing where we should go.

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129. See, e.g., 42 U.S.C. § 14141 (2012).