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The history of LGBT gun-rights litigation

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As a result of the terrorist attack in Orlando, greater attention is being paid to the self-defense rights of sexual minorities. In Las Vegas, where many people work in nightclubs, the group Out For Liberty will be offering free firearms safety classes to LGBT nightclub employees: “Managers, bartenders, security, DJs, drag queens are all encouraged to attend.” The Houston-area Shiloh Gun Range is giving free concealed-handgun license classes to the LGBT community. In Sarasota, Fla., the gun store Young Guns & Safety will be teaming up with the local chapter of Pink Pistols to encourage firearms training for LGBT persons. The owner says: “We’re here for you. We don’t want you to be bullied anymore.” On Facebook, Erin Palette is collecting the names of safety volunteers to provide basic instruction to anyone, “but especially LGBT people.” So far, more than 200 have stepped forward. Thus, there is now a Google Map of LGBT-Friendly Firearms Instructors.

In constitutional Second Amendment litigation, the modern era began with *District of Columbia v. Heller*. The gay rights movement was there right from the start. This post will summarize the past and present of gay rights activism for the Second Amendment rights of sexual minorities and of all other Americans.

How it began

A 25-year-old gay man named Tom G. Palmer was walking in San Jose one day with a gay friend. They were accosted by “19 or 20” men. “They’ll never find your bodies,” the criminals said. Palmer drew his handgun, and the criminals fled. This was typical; about three-quarters of firearms deployments for self-defense end the crime immediately, without a shot being fired. (Gary Kleck, “Armed Resistance to Crime,” *Journal of Crim. Law & Criminology*, 1995, p. 185.)

Today, Palmer is a senior fellow at the Cato Institute. In February 2003, a young lawyer named Alan Gura filed the case that would become *District of Columbia v. Heller*, challenging the District’s handgun ban and its separate ban on using any firearm for home defense. Palmer was one of the six plaintiffs.

Essayist Jonathan Rauch has called himself “an unrepentantly atheistic Jewish homosexual.” In 2000, he penned “Pink Pistols” for Salon. Rauch recounted the story of Austin Fulk, who was hanging out in a park where gay teenagers congregated. Out of a pickup truck, four young men piled out, one with a baseball bat, another with a crowbar or tire iron.

“I thought I was about to die,” says Austin; but he is alive, and that is because his companion reached into the truck and whipped out a pistol from under the seat, leveled it at the gay-bashers and fired a single shot over their heads. All at once, their courage deserted them. They ran back to their car and drove away.

Rauch urged that “homosexuals should embark on organized efforts to become comfortable with guns, learn to use them safely and carry them. They should set up Pink Pistols task forces, sponsor shooting courses and help homosexuals get licensed to carry. And they should do it in a way that gets as much publicity as possible.”

There is a parallel between Jewish history and the gay future, Rauch suggested. In the past, Jews and gays were both “identified with weakness.” But as the state of Israel exemplifies, today’s Jews fight back. “You can hate Israel all you like, but you don’t bully it. Israel changed the way Jews see themselves, and it changed the way gentiles see Jews.” Emancipation from the image of weakness can and should be the gay future, urged Rauch.

After reading Rauch’s article, Gwendolyn S. Patton agreed and acted. Today, there are 45 Pink Pistols chapters. They advocate for the Second Amendment rights of gay, lesbian, bisexual, transgender and polyamorous persons. “Armed queers don’t get bashed” is one of their mottoes. Pink Pistols is decentralized. There are no dues and no membership lists. If you self-identify as a Pink Pistols member, you are one. Membership is not restricted by sexual orientation. Patton is not the “President,” but simply the “First Speaker.”

The *Heller* and *McDonald* cases

Gura’s case was heard by the Supreme Court in 2008, as *District of Columbia v. Heller*. The first argument in Pink Pistols’ amicus brief was “A. Recognition Of An Individual Right To Keep And Bear Arms Is Literally A Matter Of Life Or Death For Members Of The LGBT Community.” The brief provided extensive “statistics on crimes, including homicide, committed against gay persons because they were gay.”

Did banning guns for everyone, heterosexuals included, make gays safer? To the contrary, firearms were used in 33 percent of anti-gay assaults in D.C., compared with only 9 percent nationally. The brief cited circuit court cases that “The right to defend oneself from a deadly attack is fundamental.” *United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982); *United States v. Henry*, 865 F.2d 1260, 1988 WL 142975, at *5 (4th Cir., Dec. 27, 1988).

It was contrary to natural law for a government to guarantee that people who attack “LGBT individuals may do so with the confidence that their intended victims will be unarmed.” Further, coerced disarmament “jeopardizes the privacy rights of LGBT individuals recognized by this Court in *Lawrence*, when the exercise of such rights makes one an unarmed target.” (The

2003 *Lawrence v. Texas* case held that governments may not criminalize intimate sexual relations between consenting adults.)

Two years later, in *McDonald v. Chicago*, the Supreme Court held that the 14th Amendment requires states to obey the Second Amendment, just as they must respect all fundamental rights. Justice Samuel Alito's opinion for the court noted that advocates for Second Amendment enforcement "contend that the right is especially important for women and members of other groups that may be especially vulnerable to violent crime." Among the sources he cited was the Pink Pistols amicus brief from *Heller*.

Right to bear arms

The D.C. Council resisted compliance with the Supreme Court. For example, the council categorically prohibited residents from carrying defensive handguns outside the home. So Gura brought the case of *Palmer v. District of Columbia*, with Tom G. Palmer as the lead plaintiff. The federal district court ruled in favor of the plaintiffs. The D.C. Council promptly enacted a licensing law, which allowed the discretionary issuance of licenses only to persons who had some exceptional need. Self-defense against ordinary crime was not a "good reason."

This resulted in a new case; its litigation had a complicated and inconclusive procedural history. The bottom line is that there is now a third case, which challenges the refusal to issue carry permits. That case is *Matthew Grace & Pink Pistols v. District of Columbia*. According to the [complaint](#):

Plaintiff Matthew Grace is a law-abiding, responsible, adult resident of the District of Columbia....He is a member of Pink Pistols....[O]n one occasion gun shots were fired in front of his home; four shell casings were found directly in front of his home on the sidewalk. There was a person carrying a firearm in his neighborhood robbing people at gunpoint who was never caught. And his wife was robbed on a public street in the District in broad daylight.

His handgun carry permit application was denied.

The federal district court [ruled in favor of Grace and Pink Pistols](#). The Circuit Court of Appeals [voted 2-1 to stay that decision](#), pending expedited appeal.

The other right-to-carry case in which Pink Pistols was involved is the 9th Circuit's en banc *Peruta v. San Diego*. The case challenged similarly restrictive issuance by a minority of California sheriffs. The [Pink Pistols amicus brief](#) began:

We wish to dispel the misleading and insulting caricature that supporters of Second Amendment rights are either tobacco-chewing, gap-toothed, camouflage-wearing rednecks or militia posers who are morbidly fascinated with firepower. The Supreme Court held in *McDonald v. City of Chicago* that the 14th Amendment recognized in 1868 the need for then-recently emancipated black citizens in the South to bear arms for self-defense against the Klan and others who preyed upon African-Americans on the basis of twisted notions about white-male supremacy. 561 U.S. 742, 770-73 (2010). A century and a half later, it is still the case that some groups have a particularly acute need for armed self-defense. For example, sexual minorities—

whether gay, lesbian, bisexual or transgender—are especially subject to violence based on discriminatory animus....The FBI reports that, nationwide, approximately one-fifth of all hate crimes are motivated by such [anti-gay] bias, which makes this category of hate crime second only to crimes based on racism.

In California, the problem is even worse: 27.9% of hate crimes are driven by the assailants' loathing of the victim's sexual orientation or gender identity....

After reciting other statistics, including the large increase in multi-assailant attacks, the brief stated: "These grim figures make it easy to understand why the legal philosophy of Amicus Pink Pistols is that, '[w]ithout self-defense, there are no gay rights.' "

Other briefs

In *Jackson v. San Francisco*, Pink Pistols wrote in support of a petition for certiorari, regarding an ordinance that required defensive arms in the home to be locked up at all times, except when being carried on the person. Before the 9th Circuit in *Fyock v. Sunnyvale*, Pink Pistols argued against a ban on standard magazines for common defensive arms, such as popular handguns from Smith & Wesson, Ruger, Springfield or Glock.

Pink Pistols returned to the magazine issue for the 10th Circuit's Colorado Outfitters Association v. Hickenlooper. Its amicus brief examined the district court evidence about the effects of magazine bans and argued that the defendant had not come remotely close to carrying his burden of proof that the ban would do more good than harm. (I represented some of the plaintiffs in that case, namely 54 Colorado sheriffs. The 10th Circuit ruled that no plaintiff had any standing on any of the several issues.)

Fifteen years ago, Jonathan Rauch wrote that "Gay-bashing is a kind of low-level terrorism." Now, high-level terrorism has come to the United States, as it has to many other nations. Thus, the relationship between gay rights and gun rights appears likely to continue.

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