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A Farewell to Arms - An Analysis of Texas Handgun Control Law.

Robert G. Newman

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A FAREWELL TO ARMS?—AN ANALYSIS OF TEXAS HANDGUN CONTROL LAW

Robert G. Newman

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I. INTRODUCTION

On March 30, 1981, Ronald Reagan became the first President of the 1980's to be shot,¹ and he may not be the last. Reagan was shot with a cheap revolver known colloquially as a "saturday night special"² in a jurisdiction which has some of the strictest handgun laws in the country.³ Less than two months later, on May 13, Pope John Paul was shot by a Turkish terrorist while driving through a crowd in Vatican Square.⁴ Both assassination attempts brought fresh cries from groups wanting to ban the sale, manufacture, and possession of handguns.⁵ In light of the con-

1. U.S. NEWS AND WORLD REP., April 13, 1981, at 22.

2. Earley, *The Gun: A Saturday Night Special from Miami*, WASHINGTON POST, March 31, 1981, at 1.

3. See Jones, *The District of Columbia's "Firearms Control Regulations Act of 1975": The Toughest Handgun Control Law in the United States—Or Is It?*, 455 ANNALS 138, 139 (1981).

4. U.S. NEWS AND WORLD REP., May 25, 1981, at 20.

5. *Id.* at 20; *id.* April 13, 1981, at 22. "The Connecticut Senate—in session when word

troverly surrounding handguns, it is not surprising that organizations such as the National Rifle Association and the Center for the Study and Prevention of Handgun Violence have been at the front of the debate measuring public opinion and attempting to swing this opinion to their point of view.⁶

State and national legislatures are the focal point of attempts to reform laws concerning the possession of handguns. In 1981, handgun control bills were introduced in both the Senate and House.⁷ Anti-gun control forces introduced legislation to reform the Federal Gun Control Act of 1968 and thus protect the rights of firearms owners.⁸ During the 1981 Texas legislative session no fewer than eighteen bills, which in some manner affect possession of firearms, were introduced.⁹ Although none passed, the current fervor over the issue of handgun ownership indicates it is probable that changes will be made in Texas handgun control law. Careful consideration must be given to any revision to avoid further complication of an already confusing area of the law.

This comment focuses on the history of handgun control in Texas, discusses the present state of Texas law, examines present-day enforcement problems, and makes recommendations for future handgun control legislation. The jurisdictions examined and compared with Texas were chosen for the relative severity or leniency of their handgun control laws. In the context of this comment, handgun control laws are considered to be any law which regulates the possession of a handgun.

II. HISTORY OF HANDGUN LAW IN TEXAS

Texas has a long history of laws concerning handguns. The earliest statutory provisions were passed over one hundred years ago.¹⁰ When Texas achieved independence from Mexico, it adopted its first provision

came of the Pope's shooting—rammed through a stiffer gun control law that afternoon." *Id.* May 25, 1981, at 20.

6. See Wright, *Public Opinion and Gun Control: A Comparison of Results from Two Recent National Surveys*, 455 ANNALS 24, 25 (1981).

7. See S. 974, 97th Cong., 1st Sess., 127 CONG. REC. S.3777 (1981) (bill introduced by Senator Edward Kennedy); H. 3200, 97th Cong., 1st Sess., 127 CONG. REC. H1461 (1981) (bill introduced by Congressman Peter Rodino).

8. See S. 1030, 97th Cong., 1st Sess., 127 CONG. REC. S4100 (1981) (bill introduced by Senator McClure); H. 3300, 97th Cong., 1st Sess., 127 CONG. REC. H1566 (1981) (bill introduced by Congressman Volkmer).

9. Letter from Arlene Wilson, Legislative Assistant to Texas State Representative Bennie Bock, to Robert Newman (July 29, 1981).

10. See 1871 Tex. Gen. Laws, ch. 34, § 1, at 25, 6 H. GAMMEL LAWS OF TEXAS 927 (1898) (illegal carrying); *id.* § 1, at 25, 6 LAWS OF TEXAS at 927-28 (\$50 to \$500 fine for carrying pistol at public assembly).

relating to firearms in the Declaration of Rights of the Constitution¹¹ which provided that "[e]very citizen shall have the right to bear arms in defense of himself and the republic."¹² During the Civil War, Texas adopted the Confederate Constitution which duplicated the arms provisions of the United States Constitution.¹³ After the war, Texas returned to the provision in force during its status as a republic and a state.¹⁴

Although the legislature had not yet been given specific constitutional authority, Texas passed its first gun control law on November 6, 1866.¹⁵ Subsequent legislation prohibited the carrying of weapons at any public assembly, function, or election.¹⁶ In 1871 the Texas Legislature passed the predecessor of our present law regulating the possession of handguns.¹⁷ As a result of this legislation, pistols and other weapons were not allowed to be carried on or about the person except under specified conditions.¹⁸ Persons meeting those conditions were militiamen and police officers,¹⁹ travelers,²⁰ individuals on their own premises or place of business,²¹ and those who feared immediate and unlawful attack.²² The prohibition on wearing pistols was found to be constitutional under both the Texas and

11. See REPUBLIC OF TEX. CONST. DECLARATION OF RIGHTS § 14 (1836).

12. *Id.*

13. Compare C.S.A. CONST. art. 1, § 9(13) (1861) (well regulated militia is basis of people's right to keep and bear arms) with U.S. CONST. amend. II (right to keep and bear arms based upon need of militia).

14. See TEX. CONST. art. I, § 13 (1866).

15. See 1866 Tex. Gen. Laws, ch. 92, § 1, at 90, 5 H. GAMMEL, LAWS OF TEXAS 1008 (1898). A person committed an offense if he carried firearms on another's premises "without the consent of the owner." Punishment ranged from a \$10 fine to a jail sentence of from one to ten days. *Id.*

16. See 1870 Tex. Gen. Laws, ch. 46, § 1, at 63, 6 H. GAMMEL, LAWS OF TEXAS 237 (1898).

17. See 1871 Tex. Gen. Laws, ch. 34, § 1, at 25, 6 H. GAMMEL, LAWS OF TEXAS 927 (1898). The law passed in 1871 is substantially similar to present Texas law. Compare TEX. PENAL CODE ANN. § 46.02 (Vernon 1974) (carrying prohibited) and *id.* § 46.03 (Vernon Supp. 1982) (defense of traveling, possession on own premises and by peace officer allowed) with 1871 Tex. Gen. Laws, ch. 34 §§ 1, 2, at 25, 6 H. GAMMEL, LAWS OF TEXAS 927 (1898) (defenses of traveling, peace officers, and possession on own premises allowed).

18. See 1871 Tex. Gen. Laws ch. 34, § 1, at 25, 6 H. GAMMEL, LAWS OF TEXAS 927 (1898).

19. See *id.* § 1, at 25, 6 LAWS OF TEXAS at 929.

20. See *Waddell v. State*, 37 Tex. 354, 356 (1873) (pistol must be carried with baggage); 1871 Tex. Gen. Laws, ch. 34, § 1, at 25, 6 H. GAMMEL, LAWS OF TEXAS 927 (1898) (defense of traveling).

21. See *Baird v. State*, 38 Tex. 599, 601-02 (1873); 1871 Tex. Gen. Laws, ch. 34, § 1, at 25, 6 H. GAMMEL, LAWS OF TEXAS 927 (1898).

22. See *Brownlee v. State*, 35 Tex. Crim. 213, 214, 32 S.W. 1043, 1044 (1895); *Coleman v. State*, 28 Tex. Ct. App. 173, 174, 12 S.W. 590, 590 (1889); 1871 Tex. Gen. Laws, ch. 34, § 2, at 25, 6 H. GAMMEL, LAWS OF TEXAS 927 (1898).

United States Constitutions in *English v. State*.²³ Any doubt which may have lingered as to the constitutionality of the prohibition was removed by an 1875 amendment to the constitution which specifically allowed state regulation of weapons for the purpose of preventing crime.²⁴ The amendment included the clause "the legislature shall have the power, by law, to regulate the wearing of arms, with a view to prevent crime,"²⁵ thus decreasing the citizens' rights to possess weapons.²⁶ Although Texas handgun laws, for the most part, remain unchanged,²⁷ the provision exempting certain people from prosecution was updated as recently as 1981.²⁸

III. THE PRESENT STATE OF TEXAS HANDGUN CONTROL LAWS

Texas gun control laws are presently incorporated into chapter 46 of the Texas Penal Code.²⁹ The objectives of the Penal Code to give clear guidelines as to what conduct is prohibited, protect guiltless conduct from condemnation, limit discretion on the part of police officers, and generally protect the public, therefore, must be kept in mind while analyzing present Texas handgun law.³⁰

A. *Illegal Carrying*

A handgun is defined in section 46.01 as a firearm "designed, made or adapted to be fired with one hand."³¹ A valid conviction for the illegal carrying of a weapon under prior Texas law required proof of intent.³² The current statute retains the element of intent, but lessens the prosecu-

23. 35 Tex. 473, 477 (1872). *But see* Cockrum v. State, 24 Tex. 394, 401-02 (1859) (law cannot be passed infringing on the right to keep and bear arms).

24. TEX. CONST. art. I, § 23.

25. *Id.*

26. Compare TEX. CONST. art. I, § 13 (1866) (right to keep and bear arms in defense of self and state) with TEX. CONST. art. I, § 23 (legislature has power to regulate to prevent crime).

27. See Collins v. State, 501 S.W.2d 876, 877 (Tex. Crim. App. 1973) (present statute substantively similar to one passed in 1871). Although Texas handgun laws are very old they are still an active area of criminal law. Since 1976 there have been 68,263 arrests for illegal carrying of a weapon in Texas. In 1980 alone there were over 16,000 arrests. Telephone interview with Charlene Cain, Uniform Crime Reporting Bureau, Texas Department of Public Safety, Administrative Technician, in Austin, Texas (Oct. 1, 1981).

28. See TEX. PENAL CODE ANN. § 46.03 (Vernon Supp. 1982).

29. See *id.* §§ 46.01-.08 (Vernon 1974).

30. See *id.* § 1.02 (Vernon 1974).

31. *Id.* § 46.01(5) (Vernon 1974); see Ruiz v. State, 368 S.W.2d 609, 610 (Tex. Crim. App. 1974).

32. See Waddell v. State, 37 Tex. 354, 356 (1872) (no violation of law without intent to violate).

tion's burden of proof by permitting the substitution of "knowingly" or "recklessly" being in possession of a handgun as the scienter element.³³ Section 46.02 also requires that the carrying of the handgun must be "on or about" the person.³⁴ The term "about" has been defined as "near by, close at hand, convenient of access;" in other words, the handgun must be close enough to the person so that he could reach it without materially changing his position.³⁵ Moreover, section 46.02 makes no distinction between a concealed or openly carried weapon, thus any person carrying a weapon violates this provision.³⁶ The final subsection of section 46.02 delineates the more severe penalty imposed on one who carries a handgun onto premises licensed to sell alcoholic beverages.³⁷ Although section 46.02 appears clear on its face, neither the legislature nor the courts have defined what constitutes "premises" in terms of a section 46.02 violation. Some indication of what the legislature intended the definition to be may be found in the Alcoholic Beverage Code where premises is defined as "the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds."³⁸

B. Defenses

Certain classes of persons are exempted from the prohibition against carrying handguns under section 46.03.³⁹ Because the section is not labeled a defense, affirmative defense, or exception, the burden of proof

33. See *Hazel v. State*, 534 S.W.2d 698, 702 (Tex. Crim. App. 1976) (culpable mental state required); TEX. PENAL CODE ANN. § 46.02(a) (Vernon 1974) (intentionally, knowingly, or recklessly carrying is an offense).

34. TEX. PENAL CODE ANN. § 46.02(a) (Vernon 1974); see, e.g., *Courtney v. State*, 424 S.W.2d 440, 441 (Tex. Crim. App. 1968) (pistol in unlocked glove compartment); *Welch v. State*, 97 Tex. Crim. 617, 619, 262 S.W. 485, 485 (1924) (pistol in purse on floor between front and back seat); *Wagner v. State*, 80 Tex. Crim. 66, 70, 188 S.W. 1001, 1002 (1916) ("near by, close at hand, convenient of access").

35. See *Courtney v. State*, 424 S.W.2d 440, 441 (Tex. Crim. App. 1968); *Wagner v. State*, 80 Tex. Crim. 66, 70, 188 S.W. 1001, 1002 (1916).

36. See *Farris v. State*, 64 Tex. Crim. 524, 525, 530-31, 144 S.W. 249, 249, 252 (1912) (defendant claimed no violation because pistol carried openly); TEX. PENAL CODE ANN. § 46.02 (Vernon 1974) (no mention of defense if pistol carried openly). *But cf.* TEX. PENAL CODE ANN. § 46.03 (Vernon Supp. 1982) (section provides classes of persons who are excused from compliance with section 46.02). There is no licensing system available to allow any special possession of a pistol. See *id.* § 46.02.

37. See *Milligan v. State*, 465 S.W.2d 157, 158 (Tex. Crim. App. 1971); TEX. PENAL CODE ANN. § 46.02(c) (Vernon 1974). Carrying on licensed premises constitutes a third degree felony instead of the class A misdemeanor simple carrying constitutes. TEX. PENAL CODE ANN. § 46.02(c) (Vernon 1974).

38. TEX. ALCOHOLIC BEV. CODE ANN. § 11.49 (Vernon 1978). See *State v. Camper*, 261 S.W.2d 465, 468 (Tex. Civ. App.—Dallas 1953, writ ref'd).

39. See TEX. PENAL CODE ANN. § 46.03 (Vernon Supp. 1982).

does not appear to have been firmly allocated to the defendant or to the prosecution.⁴⁰ Section 2.03(e) requires that defenses which have not been so designated be treated as a defense for both evidentiary and procedural purposes.⁴¹ Thus, the courts are required to instruct the jury that the defendant must create only a reasonable doubt in the jury's mind as to the validity of the prosecution's claim, or he does not fall within the exemptions of section 46.03.⁴²

The first class of persons exempt under section 46.03 are public servants: peace officers, members of the armed forces or national guard, and penal institution guards in the actual discharge of their duties.⁴³ The legislature, in line with the wishes of the judiciary that "peace officer" be defined,⁴⁴ provided a list of public servants who are peace officers.⁴⁵ Furthermore, a person may carry a pistol if he is "on his own premises or premises under his control."⁴⁶ On the other hand, an employee claiming the right to carry a pistol on his employer's premises must establish his legal control over the premises in order to comply with section 46.03.⁴⁷ Although the term "premises" is not defined by the statute, courts have continually used the definition previously established by nineteenth cen-

40. See Searcy & Patterson, *Practice Commentary*, 4 TEX. PENAL CODE ANN. 264-65 (Vernon 1974). See generally *Hutspeth v. State*, 158 Tex. Crim. 188, 189, 254 S.W.2d 130, 131 (1953); *Jones v. State*, 91 Tex. Crim. 240, 242, 238 S.W. 661, 662 (1922); *Blackwell v. State*, 34 Tex. Crim. 476, 476, 31 S.W. 380, 380 (1895); TEX. PENAL CODE ANN. § 2.03(e) (Vernon 1974). The defendant was required to prove that he came within the defenses, but today the statute is not labeled an affirmative defense requiring such proof. See TEX. PENAL CODE ANN. § 2.03(e) (Vernon 1974); Searcy & Patterson, *Practice Commentary*, 4 TEX. PENAL CODE ANN. 264-65 (Vernon 1974).

41. See TEX. PENAL CODE ANN. § 2.03(e) (Vernon 1974).

42. See *Johnson v. State*, 571 S.W.2d 170, 173 n.4 (Tex. Crim. App. 1978).

43. TEX. PENAL CODE ANN. § 46.03(1), (6) (Vernon Supp. 1982); cf. *Ransom v. State*, 73 Tex. Crim. 442, 444, 165 S.W. 932, 933 (1914) (peace officer required to be in actual discharge of his duties). The grammatical construction of the statute, when combined with prior cases, implies that members of the armed forces and prison guards also must be in actual discharge of their duties in order to lawfully carry pistols. See generally *Jones v. State*, 91 Tex. Crim. 240, 242, 238 S.W. 661, 662 (1922); *Ransom v. State*, 73 Tex. Crim. 442, 444, 165 S.W. 932, 933 (1914); TEX. PENAL CODE ANN. § 46.03(1) (Vernon Supp. 1982).

44. See generally *Tippett v. State*, 80 Tex. Crim. 373, 374, 189 S.W. 485, 486 (1916); *Jones v. State*, 65 S.W. 92, 92 (Tex. Crim. App. 1901).

45. See TEX. CODE CRIM. PRO. ANN. art. 2.12 (Vernon 1974); TEX. PENAL CODE ANN. § 1.07(a)(25) (Vernon 1974).

46. See TEX. PENAL CODE ANN. § 46.03(2) (Vernon Supp. 1982); cf. *Zallner v. State*, 15 Tex. Ct. App. 23, 25 (1883) (tenant controls his premises and owner has no right to enter them with pistol).

47. Cf. *Campbell v. State*, 28 Tex. Ct. App. 44, 45, 11 S.W. 832, 832 (1889) (temporary residence or own premises); *Baird v. State*, 38 Tex. 599, 601-02 (1873) (business premises are considered a particular farm, shop, or dwelling place).

tury courts which defined it as a particular business or residence.⁴⁸

The traveling provision of section 46.03 is responsible for much of the controversy arising out of the handgun control statutes of Texas.⁴⁹ Originally, traveling was an affirmative defense.⁵⁰ Under current law, the defendant need only produce evidence to raise the defense that he is a traveler. The burden then shifts to the prosecution to rebut this defensive evidence beyond a reasonable doubt.⁵¹ There is confusion as to what constitutes traveling inasmuch as there is no statutory definition of traveling.⁵² The question is one of fact for the jury to determine.⁵³ Although the courts have requested that the legislature define exactly what is meant by traveler,⁵⁴ the legislature has, as yet, failed to respond. Those accused of violating section 46.03 have repeatedly attempted to define traveler, but the Texas Court of Criminal Appeals has consistently held these definitions improper.⁵⁵ Perhaps the only way to determine what constitutes a traveler is to delineate what the court of criminal appeals has determined a traveler is not. Simply spending the night away from home on a trip does not entitle one to traveler status.⁵⁶ Nor are distance and time determinative of what constitutes traveling.⁵⁷ One who is initially entitled to

48. Interview with Terrence W. McDonald, Board Certified Criminal Law Specialist, Adjunct Professor of Criminal Law, St. Mary's Law School, in San Antonio, Texas (Sept. 14, 1981).

49. See *Evers v. State*, 576 S.W.2d 46, 51 (Tex. Crim. App. 1979); TEX. ATTY. GEN. OP. Nos. H-22, H-185 (1973).

50. See *Blackwell v. State*, 34 Tex. Crim 476, 476, 31 S.W. 380, 380 (1895).

51. See *Searcy & Patterson, Practice Commentary*, 4 TEX. PENAL CODE ANN. 266 (Vernon 1974); cf. TEX. PENAL CODE ANN. § 2.03(e) (Vernon 1974) (defenses not labeled as such still maintain same burden of proof requirements as those labeled defenses); TEX. PENAL CODE ANN. § 46.03 (Vernon 1974) (section entitled "non-applicable").

52. See TEX. PENAL CODE ANN. § 46.01 (Vernon 1974).

53. See, e.g., *Evers v. State*, 576 S.W.2d 46, 50 (1979) (jury not required to believe defense of traveling; question of fact); *Hill v. State*, 100 Tex. Crim. 212, 212-13, 272 S.W. 450, 450 (1925) (traveling ordinarily question of fact); *Armstrong v. State*, 98 Tex. Crim. 335, 336, 265 S.W. 701, 701 (1924) (traveling question of fact).

54. See *Bain v. State*, 38 Tex. Crim. 635, 636, 44 S.W. 518, 518 (1898). The court in *Bain* lists cases showing that even at a time when modes of travel were far more simple, the problem of what constituted traveling existed. *Id.* at 636, 44 S.W. at 518.

55. See, e.g., *Taylor v. State*, 77 Tex. Crim. 587, 590, 179 S.W. 1161, 1162 (1915) (traveling need not be defined in jury charge); *Younger v. State*, 76 Tex. Crim. 243, 244-45, 173 S.W. 1039, 1040 (1915) (judge correctly refused charge that crossing into another county constituted traveling); *Hickman v. State*, 71 Tex. Crim. 483, 483-84, 160 S.W. 382, 382 (1913) (jury charge correctly refused; start of journey question for jury).

56. See, e.g., *Darby v. State*, 23 Tex. Ct. App. 407, 408, 5 S.W. 90, 91 (1887) (spending several nights away from home places one within the statutory defense of traveling); *Irvine v. State*, 18 Tex. Ct. App. 51, 52-53 (1885) (gone for two days constitutes traveling); *Rice v. State*, 10 Tex. Ct. App. 288, 289 (1881) (cattle drive over a month in duration was traveling).

57. See *Vogt v. State*, 159 Tex. Crim. 211, 212, 258 S.W.2d 795, 796 (trip beginning at

traveler's status, but who stops and partakes of business or pleasure not connected with the original purpose of the journey loses the privilege of carrying a pistol.⁵⁸ An individual also loses his traveler status once he arrives at his destination.⁵⁹ Crossing from one county into another has been held to be traveling,⁶⁰ but when applying such a general rule, distance may play a factor in the final determination.⁶¹ The only sound rule concerning the definition of traveling is that the trier of fact must consider both distance and mode of travel in arriving at the determination of the defendant's status.⁶² In the absence of definite standards, juries are left with little guidance and must rely on the particular facts of the case with no set rule of law on which to rely.⁶³

One of the newer provisions of the code, section 46.03(3), provides a defense for those persons engaging in lawful hunting, fishing, or sporting activity if the weapon is the kind commonly used in such endeavors.⁶⁴ This is a deviation from the prior case law which allowed pistol hunting only on one's own premises.⁶⁵ The application of this defense is still uncertain as neither the Texas courts nor the legislature have yet defined which weapons are normally employed in a particular sporting activity.⁶⁶

five p.m. with anticipated return at eleven p.m. or midnight insufficient to gain traveler status), *cert. denied*, 346 U.S. 901 (1953); *George v. State*, 90 Tex. Crim. 179, 181, 234 S.W. 87, 89 (1921) (40 mile auto trip in broad daylight does not entitle one to traveler's exemption).

58. *See, e.g., Colson v. State*, 52 Tex. Crim. 138, 139, 105 S.W. 507, 507 (1907) (went to saloon and got drunk); *Ratigan v. State*, 33 Tex. Crim. 301, 304, 26 S.W. 407, 408 (1894) (went to saloon); *Stilly v. State*, 27 Tex. Ct. App. 445, 446, 11 S.W. 458, 458 (1889) (gambling).

59. *See, e.g., Evers v. State*, 576 S.W.2d 46, 50-51 (Tex. Crim. App. 1979) (arrived at motel and checked into room); *Kiles v. State*, 398 S.W.2d 568, 569 (Tex. Crim. App. 1966) (returned home and then took drive in country); *Ballard v. State*, 74 Tex. Crim. 110, 111, 167 S.W. 340, 340 (1914) ("arrived at his destination, and put up at a house").

60. *See Ballard v. State*, 74 Tex. Crim. 110, 111, 167 S.W. 340, 340 (1914) (going from one county to another is traveling). *But see Stanfield v. State*, 34 S.W. 116, 116 (1896) (going to father's house in another county not traveling).

61. *See Kemp v. State*, 116 Tex. Crim. 90, 91, 31 S.W.2d 652, 653 (1930); *George v. State*, 90 Tex. Crim. 179, 181, 234 S.W. 87, 88 (1921).

62. *See Kemp v. State*, 116 Tex. Crim. 90, 91, 31 S.W.2d 652, 653 (1930); *George v. State*, 90 Tex. Crim. 179, 181, 234 S.W. 87, 88 (1921).

63. *See, e.g., Johnson v. State*, 571 S.W.2d 170, 171-72 (Tex. Crim. App. 1978) (jury could disbelieve defendant's evidence rebutting charge of carrying pistol); *Chatman v. State*, 513 S.W.2d 854, 856 (Tex. Crim. App. 1974) (jury may accept or reject any evidence given in pistol case); *Oliver v. State*, 455 S.W.2d 291, 294 (Tex. Crim. App. 1970) (jury may believe defense as to charge of illegal carrying).

64. TEX. PENAL CODE ANN. § 46.03(3) (Vernon Supp. 1982).

65. *See Titus v. State*, 42 Tex. 578, 579 (1875); *Baird v. State*, 38 Tex. 599, 602 (1873).

66. *See Searcy & Patterson, Practice Commentary*, 4 TEX. PENAL CODE ANN. 266 (Vernon 1974).

The final subsection of section 46.03 permits a person holding a security officer commission from the Texas Board of Private Investigators and Private Security Agencies to carry a pistol while discharging his duties or traveling to or from work if he is wearing a distinctive uniform and the weapon is in plain view.⁶⁷ A person who would normally be exempted by section 46.03(2),⁶⁸ which applies to one carrying a pistol if on premises under one's control, must comply with section 46.03(5), which requires certification as a security officer, if his employment is solely that of a private security guard.⁶⁹

The courts have also prescribed two non-statutory defenses.⁷⁰ A person carrying large sums of money is permitted to carry a handgun on a nonhabitual basis to protect himself and the money.⁷¹ Transporting a pistol recently purchased or in need of repair to and from a gunshop has also been judicially exempted from application of the statute.⁷²

C. *Specialized Restrictions*

The Penal Code also provides that firearms shall not be carried onto the grounds of any public or private educational institution or onto the premises of any polling place on the day of an election.⁷³ The code, again as in section 46.03, fails to provide a definition for the word "premises."⁷⁴ The defense of being a peace officer or a member of the national guard or armed forces is available under this section if the person is in the discharge of his official duties.⁷⁵

Persons convicted of a felony of violence or threatened violence are prohibited, under section, 46.05 from possessing any firearm off the premises where they live.⁷⁶ The Federal Gun Control Act of 1968,⁷⁷ however,

67. TEX. PENAL CODE ANN. § 46.03(5) (Vernon Supp. 1982).

68. *Id.* § 46.03(2).

69. *Id.* § 46.03(2).

70. *See Evers v. State*, 576 S.W.2d 46, 50 (Tex. Crim. App. 1979); *Henson v. State*, 158 Tex. Crim. 5, 6, 252 S.W.2d 711, 711 (1952).

71. *See Evers v. State*, 576 S.W.2d 46, 51 (Tex. Crim. App. 1979); *Boyett v. State*, 167 Tex. Crim. 195, 196, 319 S.W.2d 106, 107 (1958).

72. *See, e.g., Henson v. State*, 158 Tex. Crim. 5, 6, 252 S.W.2d 711, 711 (1952) (carrying home after purchase no violation); *Fitzgerald v. State*, 52 Tex. Crim. 265, 266, 106 S.W. 365, 365 (1907) (carrying pistol to and from blacksmith for repair no offense); *Mangun v. State*, 90 S.W. 31, 31 (Tex. Crim. App. 1905) (carrying pistol to be repaired no offense).

73. *See Alexander v. State*, 27 Tex. Ct. App. 533, 537, 11 S.W. 628, 629 (1889). The 1981 amendment to the Penal Code seems to have removed the requirement of actual discharge of an officers duties. *See TEX. PENAL CODE ANN. § 46.04(6)* (Vernon Supp. 1982).

74. *See id.* § 46.04 (Vernon 1974).

75. *See Gonzales v. State*, 53 Tex. Crim. 430, 431, 110 S.W. 740, 740 (1908); *TEX. PENAL CODE ANN. § 46.04(6)* (Vernon 1974).

76. *See, e.g., Shepperd v. State*, 586 S.W.2d 500, 504 (Tex. Crim. App. 1979) (may only

reduces the impact of this section of the Penal Code,⁷⁸ although the Texas statute does provide a vehicle for state prosecutions when the federal authorities do not.⁷⁹ Section 922(h) of the United States Code⁸⁰ provides that a person convicted of a felony or any crime punishable by one year or more in jail, is prohibited from owning a firearm or ammunition which has been shipped or transported in interstate commerce.⁸¹ The distinction in the Texas Penal Code as to felonies of violence is, therefore, unnecessary because most firearms are shipped in interstate commerce prior to sale.⁸²

IV. COMPARISON WITH OTHER JURISDICTIONS

The state of Texas has relatively moderate laws regulating the possession of handguns.⁸³ An examination of other jurisdictions' handgun control laws and a comparison of their crime rates to that of Texas⁸⁴ demonstrates how significant a role handgun law plays in the prevention of crime.

A. New York

New York has had strict handgun control for nearly seventy years.⁸⁵ Legally, to possess a handgun in New York one must first obtain a license by meeting several requirements. The applicant must (1) have a good moral character, (2) not be a convicted felon, (3) have never suffered from

possess at home); *Scott v. State*, 571 S.W.2d 893, 895 (Tex. Crim. App. 1978) (person convicted of violent felony may not possess in alley); *Runo v. State*, 556 S.W.2d 808, 809-10 (Tex. Crim. App. 1977) (felony involving act of violence removes right to possess away from home).

77. 18 U.S.C. §§ 921-928 (1976).

78. Compare *Mena v. State*, 504 S.W.2d 410, 414 (Tex. Crim. App. 1974) (robbery involves violence) and TEX. PENAL CODE ANN. § 46.05 (Vernon 1974) (violent felon may not possess gun) with *United States v. Beebe*, 467 F.2d 222, 225 (10th Cir. 1972), (possession of marijuana felony even if sentence suspended) *cert. denied*, 416 U.S. 904 (1974) and 18 U.S.C. § 922(h)(1) (1976) (felon may not possess firearm).

79. See TEX. PENAL CODE ANN. § 46.05 (Vernon 1974); cf. *Kreshesky v. Codd*, 391 N.Y.S.2d 792, 793-94 (Sup. Ct. 1976) (Congress did not intend to preempt entire area of gun control); 18 U.S.C. § 927 (1976) (no intent to occupy field to exclusion of states).

80. 18 U.S.C. § 922(h) (1976).

81. See *Barrett v. United States*, 423 U.S. 212, 218-19 (1976); 18 U.S.C. § 922(h) (1976).

82. See Note, *Interstate Commerce Nexus Requirement Defined for Firearm Possession by Felon*, 29 MERCER L. REV. 867, 872 (1978).

83. See Appendix I at 619.

84. Texas has a violent crime rate of 507 per 100,000 people, which is moderate when compared to New York. See Appendix I at 619.

85. See N.Y. PENAL LAW § 400 (McKinney 1980); *Kates, Reflections on the Relevancy of Gun Control*, 13 CRIM. L. BULL. 119, 121 (1977).

mental illness, and (4) exhibit no good cause for denial of the license.⁸⁶ Various types of licenses exist for handgun possession.⁸⁷ The licensing scheme permits possession by a homeowner in his dwelling, by a businessman at his place of business, by a bank messenger, by a jailor, by an antique pistol collector, and permits a concealed carrying if sufficient cause exists.⁸⁸ The applicant must not only apply to the local police in order to obtain a license, but he must also pass an investigation by the local police force as well as the Federal Bureau of Investigation.⁸⁹ This system of handgun control is far more restrictive than the Texas system, and it has been held constitutional by the New York Court of Appeals under both the state and federal constitutions.⁹⁰ A comparison of the New York murder and violent crime rate with that of Texas leads one to question the success of the more stringent New York handgun control law.⁹¹ Although New York has a slightly lower murder rate, it has experienced nearly twice the rate of violent crimes as Texas.⁹²

B. Washington, D.C.

The present handgun control statute in the District of Columbia became effective in 1976.⁹³ Possession of a pistol within the auspices of the District's law requires the possessor to have registered the weapon under the prior existing registration law.⁹⁴ As a result of this law, the sale of handguns has been virtually prohibited in the District.⁹⁵ The registration process requires an applicant, among other things, to be twenty-one years old, to have no convictions of violent crime, and to know the District's

86. See *Archibald v. Codd*, 399 N.Y.S.2d 235, 236 (Sup. Ct. 1977); N.Y. PENAL LAW § 400(1) (McKinney 1980).

87. See N.Y. PENAL LAW § 400(2) (McKinney 1980).

88. See *Klapper v. Codd*, 356 N.Y.S.2d 431, 431-32 (Sup. Ct. 1974); N.Y. PENAL LAW § 400(2) (McKinney 1980).

89. See *Klapper v. Codd*, 356 N.Y.S.2d 431, 431-32 (Sup. Ct. 1974); N.Y. PENAL LAW § 400(4) (McKinney 1980).

90. See *Moore v. Gallup*, 45 N.Y.S.2d 63, 66 (Sup. Ct. 1943), *aff'd* 293 N.Y. 845, 59 N.E.2d 439 (Ct. App. 1944). Compare *Mena v. State*, 504 S.W.2d 410, 414 (Tex. Crim. App. 1974) (felon who committed violent crime may still have weapon on own premises) and TEX. PENAL CODE ANN. § 46.05 (Vernon 1974) (felon may possess where he lives) with N.Y. PENAL LAW § 400(1) (McKinney 1980) (no felon may have pistol license).

91. See Appendix I at 619.

92. See Appendix I at 619.

93. See D.C. CODE ANN. § 6-2301 (1981). The first handgun control statute in the District was codified in 1892. See *McIntosh v. Washington*, 395 A.2d 744, 752 n.18 (D.C. 1978).

94. See *Fesjian v. Jefferson*, 399 A.2d 861, 864 (D.C. 1979); D.C. CODE ANN. § 6-2312 (1981).

95. See *Fesjian v. Jefferson*, 399 A.2d 861, 864 (D.C. 1979); Jones, *The District of Columbia's "Firearms Control Regulations Act of 1975": The Toughest Handgun Control Law in the United States— Or Is It?*, 455 ANNALS 138, 139 (1981).

gun laws.⁹⁶ Furthermore, once these requirements are met, the pistol may only be possessed in a dwelling, place of business, or on the land of the owner, unless he is a law enforcement officer or member of the armed forces in actual performance of official duties.⁹⁷ This law is much more restrictive than the Texas law, yet statistics again reveal a murder and violent crime rate of similar proportions to Texas.⁹⁸ While the purpose of the District's strict gun control law is to promote health, safety, and welfare,⁹⁹ statistics show the more lenient Texas handgun control law is equally successful.¹⁰⁰

C. Vermont

Handgun control laws in Vermont are the most lenient in the country.¹⁰¹ The Vermont law on carrying dangerous weapons provides that an offense is committed only when an individual carries the pistol with an intent to injure another.¹⁰² There are no reported cases on this point because intent without some overt action to manifest that intent is impossible to prove in a court of law. Once an individual has exhibited his intent to injure a fellow man, he will have committed aggravated assault under Vermont law.¹⁰³ From a prosecution standpoint it is preferable to convict a person for aggravated assault, carrying a maximum penalty of fifteen years imprisonment and a ten thousand dollar fine, rather than for illegally carrying a handgun, which provides a penalty of only two years or two hundred dollars.¹⁰⁴ The result of Vermont's law on possession is that

96. See D.C. CODE ANN. § 6-2313 (1981). To receive a license the applicant must (1) be twenty-one years old; (2) never have been convicted of any violent crime or weapons offense; (3) not have been convicted within the last five years of any narcotics violations, making threats or bodily assaults; (4) not have been judged insane or placed in a mental institution within the last five years; (5) not have any physical defects making handgun possession dangerous; (6) never have been adjudicated negligent in any firearm mishap causing death or bodily injury; (7) know the District's firearms laws; and (8) have good vision. *Id.* § 6-2313.

97. See *United States v. Shannon*, 144 A.2d 267, 267 (D.C. 1958); D.C. CODE ANN. §§ 6-2311, 22-3204 (1981).

98. See Appendix I at 619.

99. See D.C. CODE ANN. § 6-2301 (1981).

100. See Appendix I at 619.

101. Telephone interview with Bob Dowlett, N.R.A. Institute of Legislative Action, in Washington, D.C. (July 27, 1981). See generally VT. STAT. ANN. tit. 13, § 4003 (1974).

102. See VT. STAT. ANN. tit. 13, § 4003 (1974).

103. See *State v. D'Amico*, 385 A.2d 1082, 1084 (Vt. 1978) (attempt to cause bodily harm with deadly weapon is aggravated assault); VT. STAT. ANN. tit. 13, § 1024(a)(1) (1974) (aggravated assault committed if person attempts to cause or causes bodily injury to another).

104. Compare VT. STAT. ANN. tit. 13, § 1024(b) (1974) (aggravated assault punishable by up to 15 years in prison and \$10,000 fine) with *id.* § 4003 (carrying dangerous weapons punishable by up to two years in prison and \$200 fine).

a person may carry a pistol either openly or concealed with no fear of legal repercussion.¹⁰⁵ Vermont's statistics show it has a lower murder and violent crime rate, per capita, than any of the more stringent jurisdictions examined.¹⁰⁶

D. England

English handgun control laws are far more strict than Texas. Pistols are restricted to such a degree that even blank cartridge revolvers must be registered to prevent their conversion into firearms.¹⁰⁷ Air pistols were brought under the regulations requiring licenses in 1966.¹⁰⁸ Yet, even with England's strict handgun laws, no reduction has been noted in the rate of violent crime;¹⁰⁹ instead, England has been experiencing a rise in violent crime.¹¹⁰ The number of illegally held pistols is said to exceed the number of those legally held after fifty years of strict gun control.¹¹¹ The conclusion which must be reached from these facts is that handgun control laws do not effectively control the illegal possession of handguns, nor do such laws affect their use in violent crimes.

E. Analysis of Comparisons

Proponents of more restrictive handgun control laws contend that such laws are successful in preventing handguns from being used in crimes. The statistics, however, indicate nearly equal crime rates in jurisdictions, such as Texas, with relatively lenient handgun laws.¹¹² Factors other than the mere passage of a more restrictive handgun control must, therefore, be involved in controlling the rate of violent crime.

The 1975 Federal Bureau of Investigation Uniform Crime Report lists many factors as having an effect on crime rates.¹¹³ The fact that handgun

105. Telephone interview with Bob Dowlett, N.R.A. Institute of Legislative Action, in Washington, D.C. (July 27, 1981).

106. See Appendix I at 619.

107. C. GREENWOOD, *FIREARMS CONTROL: A STUDY OF ARMED CRIME IN ENGLAND AND WALES* 67 (1972).

108. See *id.* at 88.

109. See *id.* at 243.

110. See *id.* at 168-69, 173.

111. See *id.* at 239.

112. See Appendix I at 619. Homicide and violent crime rates do not show a proportional rise with rates of handgun availability. See Kates, *Reflections on the Relevancy of Gun Control*, 13 *CRIM. L. BULL.* 119, 120 (1977).

113. See *FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES v* (1975). The report lists the following: age, sex, race, economic status, density of population, size of population, and seasonal weather conditions. *Id.*

control is not one of these factors is particularly significant.¹¹⁴ Additionally, a University of Wisconsin study,¹¹⁵ described as the most reliable and comprehensive investigation ever done on handgun control laws,¹¹⁶ concluded that "gun laws have no effect on either handgun ownership or on crime rates, suggesting that this type of legislation is totally irrelevant to its purpose."¹¹⁷ The study further concluded that different types of gun control laws do not lessen criminal usage of weapons.¹¹⁸ The report also found gun control laws have no significant effect on the availability of firearms to criminals or on the rates of violent crime.¹¹⁹ Finally, even advocates of handgun control admit socio-economic factors may have an effect on crime rates independent of handgun control laws.¹²⁰

V. FUTURE OF HANDGUN CONTROL IN TEXAS

Although the efficacy of handgun control laws has been seriously questioned, the Texas Legislature will probably attempt to reform handgun laws in the future. In view of the ineffectiveness of handgun control laws, in general, and the particular problems posed by the Texas statute, what changes can or should be made in Texas law?

Since the Texas Constitution only allows regulation of the wearing of handguns for the purpose of preventing crime,¹²¹ outright prohibition of

114. *See id.*

115. *See Murray, Handguns, Gun Control Laws and Firearms Violence*, 23 SOC. PROB. 81 (1976).

116. *See Kates, Reflections on the Relevancy of Gun Control*, 13 CRIM. L. BULL. 119, 120 (1977); *Murray, Handguns, Gun Control Laws and Firearms Violence*, 23 SOC. PROB. 81, 85 (1976). The study took into account every conceivable demographic variable including density of population, percent of blacks, percent of unemployed, percent below poverty line, sex ratio, median years of education, percent employed in manufacturing, percent of interstate migrants, percent old south, percent of population 25 years of age and over with college degrees, percent white collar workers, median family income, percent foreign born, percent young adults, and total population. *Murray, Handguns, Gun Control Laws and Firearm Violence*, 23 SOC. PROB. 81, 85 (1976).

117. *See Murray, Handguns, Gun Control Laws and Firearms Violence*, 23 SOC. PROB. 81, 90 (1976). *But see Edwards, Commentary: Murder and Gun Control*, 18 WAYNE L. REV. 1335, 1339 (1972).

118. *See Murray, Handguns, Gun Control Laws and Firearms Violence*, 23 SOC. PROB. 81, 90 (1976).

119. *See id.* at 90, 91. *But see U.S. Conference of Mayors, Handgun Control* p. 17 (1980), reprinted in *Jones, The District of Columbia's Firearms Control Regulations Act of 1975: The Toughest Handgun Control Law in the United States—Or Is It?* 455 ANNALS 138, 143 (1981).

120. *Jones, The District of Columbia's "Firearms Control Regulations Act of 1975": The Toughest Handgun Control Law in the United States—Or Is It?*, 455 ANNALS 138, 144 (1981) (U.S. Conference of Mayors admit impact of other factors).

121. TEX. CONST. art. 1, § 23; *see, e.g., Collins v. State*, 501 S.W.2d 876, 877 (Tex. Crim.

the ownership of handguns would be unconstitutional.¹²³ Undoubtedly, the enactment of stringent licensing laws, such as those existing in New York or Washington, D.C. where one must have a license to legally possess a pistol, could meet serious constitutional challenges on two grounds.¹²³ First, a licensing statute falls outside the realm of regulating the wearing of arms since such statutes regulate not only the wearing of a pistol in public, but the possession of a handgun under any circumstances.¹²⁴ The availability of data challenging the ability of handgun control to harness violent crime provides the basis for a second constitutional attack. Since handgun control laws apparently do not prevent crime¹²⁵ the legislature would then exceed its constitutional authority by enacting a licensing statute which exceeds the constitution's limitations on such regulations.¹²⁶ If the statute had been written today, with the available data on the ineffectiveness of handgun control laws, it is possible the statute would not survive constitutional challenge.¹²⁷

Although strict licensing schemes would probably be unconstitutional, there are provisions of Texas handgun control law which can be reformed and clarified. For example, the defense of "traveling"¹²⁸ has never been defined by the legislature and has left the courts making decisions on a case by case basis.¹²⁹ The legislature can take several possible routes in

App. 1973) (legislature has power to regulate wearing to prevent crime); *Lewis v. State*, 7 Tex. Ct. App. 567, 568 (1880) (regulations set by legislature to prevent crime are constitutional); *State v. Duke*, 42 Tex. 455, 458-59 (1875) (legislature has right to regulate).

122. See TEX. CONST. art. I, § 23. The right to keep arms in Texas exists for the dual purpose of personal safety and defense of the state. *State v. Duke*, 42 Tex. 455, 459 (1875). The Court recognized the right to keep a pistol at home or a place of business. *Id.* at 459.

123. See generally *State v. Duke*, 42 Tex. 455, 458-59 (1875) (legislature has power to regulate wearing of arms); TEX. CONST. art. I, § 23 (legislature may regulate wearing to prevent crime).

124. Compare TEX. PENAL CODE ANN. § 46.02 (Vernon 1974) (may not possess on or about person) with N.Y. PENAL LAW § 400 (McKinney 1980) (must have license to possess under any circumstances).

125. See C. GREENWOOD, FIREARMS CONTROL: A STUDY OF ARMED CRIME IN ENGLAND AND WALES 220-23 (1972); Murray, *Handguns, Gun Control Laws and Violence*, 23 SOC. PROB. 81, 85-87 (1976); FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 48-59 (1979).

126. TEX. CONST. art. I, § 23.

127. See *English v. State*, 35 Tex. 473, 479-80 (1871). The need to prevent crime in civilized states provided authority to the legislature to regulate the wearing of pistols. *Id.* at 479-80. See generally Comment, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U. CHI. L. REV. 185, 188-89 (1970).

128. TEX. PENAL CODE ANN. § 46.03(3) (Vernon Supp. 1982).

129. See, e.g., *Evers v. State*, 576 S.W.2d 46, 50 (1978) (defense of traveling question of fact for jury); *Hill v. State*, 100 Tex. Crim. 212, 212-13, 72 S.W. 450, 450 (1925) (traveling ordinarily question of fact for jury); *Taylor v. State*, 77 Tex. Crim. 587, 590, 179 S.W. 1161, 1162 (1915) (requested charge was not law and court did not provide another definition).

removing the confusion surrounding the definition of traveling. The defense of carrying a pistol in one's own automobile or an automobile under one's control should be established.¹³⁰ Based upon conclusions of the University of Wisconsin study, mere availability of a gun in a car would not lead to increased criminal usage.¹³¹ The legislature could, in the alternative, define traveler as any person who is driving outside the county of his residence.¹³² A driver's license with an out-of-county address would establish prima facie evidence of such a defense.¹³³ Both of the possible solutions would allow the police officer at the scene of a potential violation to make an on the spot determination of the citizen's rights or status concerning possession of a handgun without requiring an inconvenient arrest and costly trial.¹³⁴ The legislature might also provide the courts with an all encompassing definition of the term "premises."¹³⁵ In the punishment enhancement provision for possession of a pistol on premises licensed to sell alcoholic beverages, the legislature has failed to address a potential problem area.¹³⁶ A person who is legally in possession of a handgun in a parking lot covering more than one enterprise could find himself charged with illegal carrying if that lot also serviced a liquor store.¹³⁷ The problem could be solved if the legislature defined premises as the property exclusively serving a business selling alcoholic beverages and, thereby, remove the possible interpretation of a multi-use lot.¹³⁸ The non-statutory defense allowing a businessman to carry a pistol with him on a non-habitual basis could be codified to allow carrying whenever an individual is transporting a large sum of cash from his business to the bank or his home.¹³⁹

130. See HB. 1410, TEX. LEG., 67TH SESS. (1981) (unpublished bill).

131. See Murray, *Handguns, Gun Control Laws and Firearm Violence*, 23 Soc. PROB. 81, 91 (1976).

132. Interview with Terrence W. McDonald, Board Certified Criminal Law Specialist, Adjunct Professor of Criminal Law, St. Mary's Law School, in San Antonio, Texas (Sept. 14, 1981).

133. *Id.*

134. Providing the officer with an easy method of determining violations fits the objectives of the code. See TEX. PENAL CODE ANN. § 1.02(5) (Vernon 1974).

135. See generally Searcy & Patterson, *Practice Commentary*, 4 TEX. PENAL CODE ANN. 240 (Vernon 1974).

136. See *id.*

137. Interview with Terrence W. McDonald, Board Certified Criminal Law Specialist, Adjunct Professor of Criminal Law, St. Mary's Law School, in San Antonio, Texas (Sept. 14, 1981).

138. Cf. Searcy & Patterson, *Practice Commentary*, 4 TEX. PENAL CODE ANN. 240 (Vernon 1974) (supermarket parking lot may be covered).

139. Cf. *Evers v. State*, 576 S.W.2d 46, 51 (Tex. Crim. App. 1979) (must be carrying large sum of money and not be habitually carrying pistol); Interview with Terrence W. McDonald, Board Certified Criminal Law Specialist, Adjunct Professor of Criminal Law, St. Mary's Law School, in San Antonio, Texas (Sept. 14, 1981) (basically unfair to allow busi-

The police officer on the scene would easily be able to determine if the businessman came within the exception either by his possession of a large sum of cash or by the possession of a bank deposit slip showing that he had just made a deposit. He would also have to show that he was a legitimate businessman and was taking a prudent route home.

By labeling section 46.03 "exceptions to prosecution," the Texas Legislature would place the entire burden on the state.¹⁴⁰ The state would be required to negate each possible exception in the indictment, and could do so by using the arresting officer's statements before the grand jury or in the complaint.¹⁴¹ If the statutes providing for valid possession were correctly reformed, a law abiding citizen should never be indicted or arrested.¹⁴²

Finally, the legislature must try a different approach to prevent the use of handguns in violent crime. Section 1.02 of the Penal Code states that one of the code's objectives is to protect the public's safety through the deterrent influence of punishment.¹⁴³ The possession of a handgun or any firearm during the commission of any felony should be made an offense in and of itself.¹⁴⁴ The deterrent effect of such a statute could be enhanced by the refusal to allow probation, parole, or good time credit for any time served on such a conviction.¹⁴⁵ The offense should be classed as a first degree felony, thereby mandating a minimum five year prison sentence.¹⁴⁶

nessman to protect himself only on non-habitual basis).

140. Compare *Evers v. State*, 576 S.W.2d 46, 50 (Tex. Crim. App. 1979) (jury need not believe defense) with *Searcy & Patterson, Practice Commentary*, 4 TEX. PENAL CODE ANN. 264-65 (Vernon 1974) (state must disprove defense, once raised, beyond reasonable doubt).

141. See *Searcy & Patterson, Practice Commentary*, 1 TEX. PENAL CODE ANN. 59 (Vernon 1974) (exceptions must be negated by state in charging instrument; penal statutes that generally prohibit conduct provide little trouble); Interview with Terrence W. McDonald, Board Certified Criminal Law Specialist, Adjunct Professor of Criminal Law, St. Mary's Law School, in San Antonio, Texas (Sept. 14, 1981).

142. Interview with Terrence W. McDonald, Board Certified Criminal Law Specialist, Adjunct Professor of Criminal Law, St. Mary's Law School, in San Antonio, Texas (Sept. 14, 1981).

143. See TEX. PENAL CODE ANN. § 1.02(1)(a) (Vernon 1974) ("to insure the public safety through: 1(a) the deterrent influence of the penalties hereinafter provided").

144. The commission of a nonviolent felony by a person possessing a handgun leads to the conclusion that the gun may be part of the illegal scheme and will be used if the felon's plan is interfered with.

145. See generally Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1433 (1968). Professor Wechsler states that penal law punishments have some preventative measure on crime but that they also serve to remove dangerous people from circulation in our society. *Id.* at 1433; see Appendix II at 24.

146. See TEX. PENAL CODE ANN. § 12.32 (Vernon 1974) (person judged guilty of first degree felony will be punished with from five to ninety-nine years in Texas Department of Corrections).

VI. CONCLUSION

The objectives of handgun laws are not accomplished by the control of handguns. The high incidence of violent crime in our society is the result of a variety of factors, mere possession of a pistol not being one. The experience gained during Prohibition and the present lack of government control concerning the possession and use of drugs indicate that those who wish to possess an illegal item will find some means of doing so. Further, handgun control will be even less successful since a pistol is not consumed as are drugs and alcohol, but once acquired will last for generations. Texas will have no better success with controlling the illegal use of handguns than any other jurisdictions. Very simply, handgun control is not crime control.

APPENDIX I
Digest of State Firearms Law¹⁴⁷

State	Purchase Permit?	Waiting Period?	Min. Age?	Permit Req. To Carry Openly?	Permit Req. To Carry Concealed?	Murder/Violent Crime Rate Per 100,000	
Alabama	No	48 hrs.	18	No	Yes	13.2	413.3
Alaska	No	No	No	No	C-P	13.3	491.1
Arizona	No	No	18	No	C-P	8.9	593.0
Arkansas	No	No	No	No	No	9.1	366.2
California	No	72 hrs.	18	No	Yes	13.0	811.1
Colorado	No	No	No	No	Yes	5.8	522.1
Connecticut	No	Delivery Next Day	18	Yes	Yes	4.2	414.2
Delaware	No	No	Minor	No	Yes	5.7	537.3
Florida	No	No	16	Yes	Yes	12.2	833.9
Georgia	No	No	18	Yes	C-P	17.1	558.7
Hawaii	Yes	TRGP	20	Yes	Yes	7.2	289.7
Idaho	No	No	16	No	Yes	5.4	288.7
Illinois	No	No	18	No	C-P	10.7	481.3
Indiana	No	48 hrs.	21	Yes	Yes	8.3	338.3
Iowa	No	No	21	No	Yes	2.2	181.2
Kansas	No	No	Minor	No	C-P	5.5	353.6
Kentucky	No	No	Minor	No	C-P	9.5	248.0
Louisiana	No	No	21	No	C-P	16.9	676.3
Maine	No	No	16	No	Yes	2.8	202.5
Maryland	No	7 days	21	No	C-P	9.8	795.5
Massachusetts	Yes	TRGP	21	Yes	Yes	3.7	531.3
Michigan	Yes	TRGP	21	No	Yes	9.1	614.2
Minnesota	No	No	18	No	No	2.3	221.0
Mississippi	No	No	Minor	No	Yes	12.6	323.6
Missouri	Yes	TRGP	Minor	No	C-P	11.2	527.2
Montana	No	No	14	No	Yes	4.2	224.2
Nebraska	No	No	18	No	C-P	4.1	225.9
Nevada	No	No	18	No	Yes	17.5	835.6
New Hampshire	No	No	Minor	No	No	2.4	139.9
New Jersey	Yes	TRGP	18	No	Yes	6.6	501.2
New Mexico	No	No	No	No	No	12.4	586.0
New York	Yes	TRGP	16	Yes	Yes	11.9	917.4
N. Carolina	Yes	TRGP	21	No	C-P	10.7	446.1
N. Dakota	No	No	17	Yes	Yes	1.5	61.3
Ohio	No	No	17	No	C-P	8.1	457.5
Oklahoma	No	No	Minor	C-P	C-P	9.7	405.2
Oregon	No	No	14	No	Yes	4.2	545.4
Pennsylvania	No	48 hrs.	18	No	Yes	6.2	333.6
Rhode Island	No	72 hrs.	15	Yes	Yes	3.2	375.1
S. Carolina	HSP	HSP	HSP	C-P	C-P	12.6	678.3
S. Dakota	No	48 hrs.	18	No	Yes	2.0	159.1
Tennessee	No	15 days	Minor	No	No	9.8	414.0
Texas	No	No	Minor	C-P	C-P	16.7	507.9
Utah	No	No	14	No	Yes	4.8	304.2
Vermont	No	No	16	No	No	1.4	184.2
Virginia	No	No	18	No	Yes	8.6	301.0
Washington	No	48 hrs.	21	No	Yes	4.8	434.6
W. Virginia	No	No	21	Yes	Yes	6.8	168.1
Wisconsin	No	No	Minor	No	C-P	3.4	166.1
Wyoming	No	No	21	No	Yes	9.1	350.9
District of Columbia	HSP	HSP	21	Yes	Yes	9.3	693.0

147. See C. BAKAL, *THE RIGHT TO BEAR ARMS* 346-53 (1966), reprinted in Murray, *Handguns, Gun Control Laws and Firearm Violence*, 23 Soc. PROB. 81, 86-87 (1975); FEDERAL BUREAU OF INVESTIGATION, *UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES* 48-59, 85 (1979). Data was compiled from these sources to formulate the chart. The reader should refer to the actual sources and the individual state statutes for more detailed information. The symbols are as follows:

TRGP—time required for granting permit;
C-P—carrying prohibited with or without permit;
HSP—handgun sales prohibited.

APPENDIX II

Section 46.02 of the Texas Penal Code should be amended to read as follows:

§ 46.02. Unlawful Carrying of Weapons

- (a) A person commits an offense if he intentionally, knowingly, or recklessly carries on or about his person a handgun, illegal knife, or club.
- (b) Except as provided in Subsections (c) and (d), an offense under this section is a Class A misdemeanor.
- (c) An offense under this section is a felony of the third degree if it occurs on any premises licensed or issued a permit by this state for the sale or service of alcoholic beverages.
- (d) An offense under this section is a felony of the first degree if committed while in the commission of another felony.

Article 42.12 of the Texas Code of Criminal Procedure may be amended to include a section 37.

. . .

Sec. 37. No person shall be eligible for probation, parole, good time or conditional discharge if the defendant is convicted of or pleads guilty to a violation of Texas Penal Code § 46.02(d).

Section 46.01 of the Texas Penal Code should be amended to contain the following:

. . .

- (12) "Traveler" means any person driving a motor vehicle outside the county of his residence.
- (13) "Premises", for the purpose of § 46.02(c), means the property exclusively concerned with a business selling alcoholic beverages.