

The Privilege to Keep and Bear Arms

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"No greater wrong can ever be done than to put a good man at the mercy of a bad, while telling him not to defend himself or his fellows; in no way can the success of evil be made surer or quicker." - Theodore Roosevelt

2007 NOTE: This paper was written following the 2005 Legislature. In 2007 the Legislature passed a followup bill called the Motorist Protection Act (HB 1815). Governor Perry signed it into law and it became effective on September 1, 2007. It redefined the offense so that a person is only breaking the law if he or she intentionally, knowingly, or recklessly carries a handgun and 1) is not on his premises or premises under his control, or inside of or directly en route to a motor vehicle owned by the person or under the person's control, or 2) the handgun is in plain view, the person is engaged in criminal activity other than a class C traffic misdemeanor, prohibited by law from possessing a firearm, or a member of a criminal street gang.

The original version of the Right to Keep and Bear Arms in the Texas Constitution was adopted in 1836 as a part of the Declaration of Rights, which was adopted as Texas was earning its independence from Mexico and forming a Republic. It read as follows: "Every citizen shall have the right to bear arms in defence of himself and the republic." In 1845, as Texas prepared to be admitted as a state, the Constitutional Convention adopted a new Constitution and revised that language very slightly to read: "Every citizen shall have the right to keep and bear arms in lawful defence of himself or the State." Applying this section, the Texas Supreme Court said in 1859, "The right of a citizen to bear arms, in the lawful defense of himself or the state, is absolute."

In 1869, during Reconstruction, a change was made which significantly increased the power of the Legislature to infringe on this right. This version read as follows: "Every person shall have the right to keep and bear arms in the lawful defence of himself or the State, under such regulations as the legislature may prescribe." On August 13, 1870 the Legislature took advantage of its new power by passing "An Act Regulating the Right to Keep and Bear Arms." This law made it illegal to have about one's person "fire-arms . . . whether known as a six-shooter, gun or pistol of any kind," or certain other knives, at any church or religious assembly, school, ball room, social gathering, or election precinct. On April 12th, 1871, the Texas Legislature adopted a much more intrusive restriction, entitled "An act to regulate the keeping and bearing of deadly weapons." This law survives to this day as Texas Penal Code § 46.02(a), entitled "Unlawful Carrying Weapons" and known in

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the industry as "UCW."

In 1871 a convention in Austin convened to investigate various grievances. Its report, which was submitted to the U.S. Congress, stated: "The people have been disarmed throughout the State, notwithstanding their constitutional right "to keep and bear arms." In part to address these concerns, this provision was again modified following the Constitutional Convention of 1875, to read as follows: "Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime." This version is still in effect today.

The UCW law makes it illegal to carry a handgun on or about your person, which includes having one accessible in your vehicle. The original punishment specified in the 1871 law for a first offense included a fine of \$25.00 to \$100.00 and forfeiture of the hogleg. Today a violation is punishable by up to a year in jail and a \$4,000.00 fine.

As you might expect, there are exceptions to this law or it would effectively ban handguns altogether. One of these exceptions allows you to possess a handgun at your home or business. Another allows you to pack heat during "lawful hunting, fishing, or other sporting activity," but to qualify you must go directly to and from the premises and you are limited to carrying a gun of "a type commonly used in the activity." Other exceptions allow you to take a gun home after buying it or to take it in for repairs. Some of these exceptions are listed in § 46.15, and some appear only in court cases.

"Traveling"

"Government in all its actions is bound by rules fixed and announced beforehand--rules that make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge." - Friedrich Hayek, "The Road to Serfdom"

It is common knowledge that you can carry a handgun if you cross two county lines. It's also common knowledge that you can carry a handgun if your trip includes an overnight stay. But common knowledge is sometimes wrong, and it is wrong here.

The most confusing of all the exceptions to the UCW law, and the most frequently invoked, is called "traveling." Since the original UCW law was adopted, there has been an exception for people who are traveling. The current version is Penal Code § 46.15(b)(3). But the Legislature has never defined the term, and the Courts have carefully avoided doing so. I can show you numerous cases where the person successfully defended himself in part because he stayed overnight, or crossed two county lines. I can show you others where the person stayed overnight or crossed two county lines, and still lost in court. The length of the trip is important in deciding whether someone is traveling, but again there is no consistent rule. I can show you cases involving trips of various distances where the person was determined to be traveling, and others of similar distances where the person was

found not to be traveling. The problem is that the courts have carefully avoided defining traveling, instead considering the facts of each case and announcing the result with little or no explanation. Trying to make sense of this is all very interesting for a lawyer, but the intellectual exercise is a lot less enjoyable if you're facing jail time and paying for the lawyer's time.

The traveling exemption used to be a defense to prosecution. In practice, this meant that if a gun was found in your possession, you would be arrested and prosecuted, and have to hire a lawyer to prove your innocence. The statute was amended a few years ago so that the UCW law "does not apply" to a person who is traveling, to place the burden of proof on the State. In practice this change appears to have made little difference.

Are you confused? You're not alone. Since 1871, the courts have described the law as "indefinite," "enigmatic," "the subject of much debate," "not models of clarity," and lacking a "bright-line test." In 1898 the Court of Criminal Appeals, the highest court in Texas for criminal matters, specifically suggested that the Legislature define the term. The Court has admitted for more than a century and a quarter that it cannot define "traveling," saying more than once that the law is "in a condition of hopeless confusion." Until 2005 the Legislature never listened.

Remember, "Ignorance is no excuse." If you are going to have a handgun, you are responsible for determining in advance what is legal then conforming your conduct to the law. If you wanted to compile a list of all the places and circumstances when carrying a handgun is legal, you would have to read Chapter 46 of the Penal Code, then sort through more than a hundred years of court cases and determine which of those cases is still good law. If you will not or cannot determine what is legal, you may have to face the consequences.

As a result of the UCW law, for more than a century and a quarter Texans have risked prosecution and punishment whenever they have had handguns in their possession. In effect, Texans have had a privilege to keep and bear arms, not a right.

In 2005, the 79th Legislature took a major step to restore this right.

Legislature to the Rescue!

"The natural progress of things is for liberty to yield and government to gain ground. Men fight for freedom; then they begin to accumulate laws to take it away from themselves." - Thomas Jefferson

Normally when lawmakers ply their trade, the result is one of two things. Either there are more things we want to do that we are prohibited from doing, or there are more things we don't want to do that we are forced to do. HB 823 is a rare example of a law that actually expands our freedom.

For some time the TSRA has been interested in passing legislation to reform this area of law. This year for the first time it became politically feasible to pass such a bill. Last

summer Representative Terry Keel (R-Austin) decided to write the bill. As former Sheriff of Travis County and a former prosecutor, Representative Keel was familiar with the problems this law has created. As Chairman of the House Committee on Criminal Jurisprudence, he had the influence to do something about it.

Don't ask me how she did it, but Alice Tripp somehow forged an alliance with the American Civil Liberties Union to support the bill. Scott Henson from the ACLU testified in support of the bill before the House Criminal Jurisprudence Committee, and later before the Senate committee. It passed the House committee on a six to zero vote. When considered by the House as a whole, it passed without objection.

Alice asked me to travel to Austin to testify before the Senate Criminal Justice Committee in favor of the bill. I did so in May, along with Mr. Henson and Sputnik, the legislative advocate for the Texas Motorcycle Rights Association. Alice and Tara Mica from NRA were invaluable in helping me prepare. The bill passed out of the Senate committee on a four to one vote.

The bill passed the Senate 29 to 2. Governor Perry signed it into law on June 17, 2005.

What does House Bill 823 Do?

"Self defense is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the laws of society." - Sir William Blackstone, 3 Commentaries on the Laws of England *4, 1765

HB 823 creates a presumption that a person is "traveling" if certain conditions are met. A person who is traveling would not be breaking the law simply by possessing a handgun. Here is the actual text of the portion of the bill modifying the law on traveling:

Section 46.15, Penal Code, is amended by adding Subsection (i) to read as follows:

- (i) For purposes of Subsection (b)(3), a person is presumed to be traveling if the person is:
 - (1) in a private motor vehicle;
 - (2) not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic;
 - (3) not otherwise prohibited by law from possessing a firearm;
 - (4) not a member of a criminal street gang, as defined by Section 71.01; and

(5) not carrying a handgun in plain view.

The full text of the bill is here:

<http://www.capitol.state.tx.us/cgi-bin/tlo/textframe.cmd?LEG=79&SESS=R&CHAMBER=H&BILLTYPE=B&BILLSUFFIX=00823&VERSION=5&TYPE=B>

This presumption that HB 823 would create **only** applies if all these requirements are met. These are critical limits on the scope of the bill.

“Not otherwise prohibited by law from possessing a firearm”

State and federal law prohibit many persons from possessing firearms, including felons and persons under felony indictments; fugitives from justice; drug addicts; persons adjudicated as mentally defective or committed to a mental institution; illegal aliens and persons with nonimmigrant visas; persons who received dishonorable discharges from the Armed Forces; persons who have renounced their citizenship; persons subject to protective orders or similar orders; and persons convicted of misdemeanor crimes of domestic violence. Federal law also prohibits persons under 18 from possessing handguns, although there are exceptions for legitimate activities. State law has similar provisions which prohibit possession of guns by felons, persons convicted of certain family violence offenses, and persons under protective orders. There is also a section making it illegal to allow children access to guns, again with exceptions for legitimate reasons.

A person prohibited from possessing firearms under state or federal law would not qualify for the traveling presumption under HB 823. Therefore that person would be subject to prosecution for UCW and also under the above statutes for merely possessing a firearm.

“Not otherwise engaged in criminal activity”

HB 823 would **not** permit every person to go wherever he likes and do whatever he wants with a gun. Here are three crimes under Texas law that would still apply:

1. **Assault** under Texas Penal Code § 22.01, and Aggravated Assault (involving use or display of a deadly weapon) under Texas Penal Code § 22.01.
2. **Deadly Conduct** under Texas Penal Code § 22.05. Pointing a gun at another person would normally be a violation of this section, and would also create a presumption of recklessness and danger.
3. **Disorderly Conduct** under Texas Penal Code § 42.01. Subsection (8) makes it an offense under this section to display a firearm or other deadly weapon in a public place in a manner calculated to alarm. This ties in with HB 823's requirement not to have the handgun in plain view.

These are only three examples of many offenses under state and federal law that would preclude one from claiming the presumption of “traveling” under HB 823. If you are committing a crime while possessing a handgun, you will not be allowed to invoke the bill's

presumption that you are traveling. Therefore you will be subject to prosecution under the UCW law and the other laws that you are violating.

“Not a Member of a Criminal Street Gang”

“Criminal Street Gang” means three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities. I hope you don’t have to worry about this.

“Not Carrying a Handgun in Plain View”

This is simply common sense. I don’t have to tell you that carrying a gun in plain view can alarm people and get you in trouble. Leaving it in plain view can get it stolen. But you do need to be careful to keep the gun covered when you are transporting it to and from the car.

How Do I Sign Up?

"If you disarm someone you become morally responsible for their safety."
- Michael D. Bartman, posted to Thinkers International

HB 823 is not an automatic shield that will protect you from UCW prosecutions. It does not allow you to carry a gun in your car whenever you like. You have to be smart enough to take advantage of it. “Smart” in this instance means well-informed.

Almost every time I have been pulled over, the first words out of the officer’s mouth were, “Do you know why I stopped you?” He’s basically asking if you have anything you want to confess. The second question is normally, “Where are you headed?” Then the officer asks for your driver’s license. If you tell the officer you’re headed to work (or any other local destination), then hand him a DL showing a local address, then you’ve just provided excellent evidence that you are not traveling. The legal term for this is a “confession.” At this point you could be arrested for Unlawful Carrying Weapon. It will be up to you hire a lawyer and prove in court that you were traveling. Since most trips are local and do not meet the guidelines for traveling, chances are that you will not be able to provide that proof.

In addition to the change to the portion of the Penal Code that deals specifically with weapons, HB 823 also amended the portion of the Code that deals with presumptions. One of the changes HB 823 made to that part of the Code says, “If the state fails to prove beyond a reasonable doubt that the facts giving rise to the presumption do not exist, the jury must find that the presumed fact exists.” This seems to say that if the state fails to prove that you are a felon or otherwise disqualified from claiming the presumption, then the jury must find that you were traveling. This would make the presumption that you were traveling irrebuttable, which means that you are conclusively deemed to be a traveler, and thus legally permitted to possess the handgun and not guilty of UCW.

The problem is that HB 823 does not explicitly say that the presumption is irrebuttable. If

the presumption is rebuttable, HB 823 means only that the Court will begin with the assumption that you were traveling. The State would be allowed to present evidence that you were not. So if evidence is available that you were not traveling, you have to deal with all the old confusing case law, and try to prove that you meet the requirements. The most likely source of evidence that you were not traveling is your big mouth. Because the courts may interpret this presumption as either rebuttable or irrebuttable, you should be cautious and avoid providing any evidence that you were not traveling.

So what do you need to do? Here are my suggestions:

- ▶ Meet the requirements for the bill to apply. Don't have a gun if it's illegal for you to possess it. Don't commit crimes with a handgun in the car. Don't join a criminal street gang.
- ▶ Most importantly, don't keep a pistol in plain view. Not only is this necessary to meet the bill's requirements, but it's also common sense that the officer won't have a reason to arrest you for UCW unless he sees your shootin' iron.
- ▶ Don't give the officer a reason to arrest or charge you. Do not lie, but try to avoid giving any specific information about your trip. If you feel an overwhelming urge to answer questions, say you're traveling and leave it at that. Remember, "anything you say can and will be used against you in a court of law." You have the right to remain silent - use it!

Conclusion

"Gun control? It's the best thing you can do for crooks and gangsters. I want you to have nothing. If I'm a bad guy, I'm always gonna have a gun. Safety locks? You will pull the trigger with a lock on, and I'll pull the trigger. We'll see who wins." - Sammy "the Bull" Gravano, Mafia informant

Both supporters and opponents of the Texas concealed handgun law approached that legislative battle as if it were Armageddon. I believe HB 823 is unquestionably a more significant change to the law.

According to the Texas Department of Public Safety, as of February 21, 2005 there were 237,121 currently active concealed handgun licenses in Texas. The total population of Texas as of the 2000 Census was 20,851,820. So about 1.1% of Texans take advantage of the legal protections offered by the concealed handgun law.

I doubt any scientific study has ever been performed to measure the percentage of vehicles in Texas that contain guns, but most estimates I have heard place the number around 50%. That means that HB 823 will protect many, many more Texans from prosecution for merely possessing a handgun. If you feel as I do that law-abiding citizens have a right to possess handguns, then you must agree that this is a major step in restoring that right.

I believe this is the single biggest reform of Texas gun laws in history. But it will not help you unless you consider the issues carefully, and prepare yourself to take advantage of its protections.

NOTE:

Thanks to Stephen Halbrook for his writing on the history of the Texas Constitution.

The purpose of this paper and presentation is to make members of the public aware of some recent legislation, so they can investigate if they wish. It is not intended to provide any legal advice, so you should not rely on it for that purpose. The laws in this area change frequently as statutes are amended, and they change unpredictably when various courts render their decisions. The information was current as of the date of the presentation, but no assurance is made that it will continue to be accurate.

This article is intended as a public service. If a client's freedom depended on having a definite answer to one of the legal issues discussed in this paper, you can bet I would take the time to get a definite answer. If my freedom was at stake and there were legal issues involved, I would pay a lawyer to give me specific advice for my situation. For these reasons I take no responsibility for anyone who reads this paper, thinks he knows the law, and finds out he was wrong.

About the Author

The author is an attorney with experience in firearms law. He is also an NRA Training Counselor, Chief Range Safety Officer, and Certified Firearms Instructor in all civilian disciplines (Basic Rifle, Muzzleloading Rifle, Basic Pistol, Muzzleloading Pistol, Basic Shotgun, Muzzleloading Shotgun, Metallic Cartridge Reloading, Shotgun Shell Reloading, Home Firearms Safety, and Personal Protection in the Home). He volunteers with Texas 4-H Shooting Sports, training instructors as Rifle and Pistol instructors.

He is a Life Member of the National Rifle Association and the Second Amendment Foundation. He currently serves as the NRA-ILA Election Volunteer Coordinator (EVC) for Texas Congressional Districts 1 and 4. He has served on the East Texas Friends of NRA Committee since 1993, and on the State Fund Committee. He competes regularly in United States Practical Shooting Association and International Defensive Pistol Association matches. He has spoken and written to lawyers, judges, and others on firearms law issues for a number of years. He is also a former national officer with the Young Republicans, and has been involved with local, state, and national campaigns.