Stephen P. Halbrook, "Tort Liability for the Manufacture, Sale, and Ownership of Handguns?" *Hamline Law Review*, vol. 6, No. 2, July 1983, pages 351-82.

INTRODUCTION: BANNING HANDGUNS THROUGH TORT LAW

A new strategy has been devised by those who would ban the ownership of handguns by common citizens. Proponents are beginning to file suits against manufacturers, distributors, and owners of pistols and revolvers where those instrumentalities are employed by third parties in wrongful injury or death. It is protected that standards of either strict liability or negligence per se will make it financially impossible to make, sell, or own handguns, should suppliers and consumers of this product be required to absorb all losses of all persons victimized with handguns.

Under this theory, whenever a handgun has been sold to the general public, it would be said to be transformed into an unreasonably dangerous, and hence defective, product. Whenever an injury has been occasioned by the reckless or criminal use of a handgun, regardless of whether it has been innocently transferred to or stolen by the perpetrator, the owner and every person responsible for its previous transfer and manufacture would be liable for all damages. Manufacturers and dealers would be responsible for placing the weapon into the channels of commerce, and purchasers would be responsible since they support the industry.[1]

The same theory asserts that handguns have no social utility for self-defense, and that citizens would be better off never resisting robbery, assaults, or rape. Allegedly designed solely as an instrument of death, the handgun, in some animistic fashion, appears to proponents of this

[1]Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims,* 10 N. Ky. L. Rev, 41, 46 (1982).

theory as the proximate cause of death and injury.[2]

It is the purpose of this article to address two simple yet fundamental issues. The first issue is whether there is any basis under existing tort law governing firearms to hold a manufacturer, seller, or owner liable for the injuries caused by a third party. Answering this inquiry entails exploration of the liability of firearm dealers and owners for the negligent or criminal use of firearms by other persons. It will also involve examination of products liability law as it applies to manufacturers of firearms, particularly pistols and revolvers.

The second issue to be addressed is whether federal constitutional constraints preclude the imposition of strict liability or negligence per se rules for the mere manufacture, sale or ownership of handguns misused by third parties.[3] Examination of this issue raises two questions. Assuming arguendo that the second and fourteenth amendments protect the right to keep and bear arms, and therefore to manufacture and to purchase handguns, is the application of strict liability in tort consistent with pertinent United States Supreme Court rulings? Further, was individual possession of handguns intended by the framers of these amendments to be protected from infringement by federal and state tort laws respectively?

I. Tort Liability of Handgun Owners, Dealers, and Manufacturers

A. Liability of Owners and Dealers for Torts Committed by Third Parties

Suits alleging negligence by owners and dealers in firearms which were misused by third parties have been decided by determining whether the defendant knew or should have known of a clear potential for misuse. This potential may be based on the youth or on the criminal proclivities of the third party. No court of record has held that status as an owner or dealer is sufficient in itself to constitute any kind of negligence. To date, only one reported decision has involved an assertion of strict liability for the legal distribution of a handgun, and in that case the

---

[2]The above theories and strategies were expressed by Windell Turley, Howard L. Siegel, and James E. Rooks, Jr., in the first conference organized on this subject, Victim Recovery: Firearms Litigation in the Eighties, Washington, D.C. (Nov. 6, 1982). *See* Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims,* 10 N. Ky. L. Rev, 41 (1982); Fisher, *Are Handgun Manufacturers Strictly Liable in Tort?,* 56 Cal. St. B.J. 16 (1981); Podgers, *Handguns: New Target for Tort Lawyers,* 67 A.B.A. J. 1443 (1981).

[3]Of course, there may be significant constraints under the constitutions of particular states which may be more stringent than the federal standards addressed here. The constitutions, statutes, and judicial opinions of most if not all sates recognize the right to use (and hence the utility of) handguns for self-defense, hunting, or other proper purposes. There may also be other federal constraints not addressed here, such as unenumerated rights, due process, and equal protection.

court held a strict liability standard to be unwarranted.[4]

The traditional rule is that the mere keeping of a firearm in the home does not constitute negligence where a minor injures another with it. In *Lopez* v. *Chewiwie*,[5] a case which involved the accidental death of a thirteen year old by a playmate of like age, the Supreme Court of New Mexico held:

> We begin the consideration of this case with the knowledge that loaded fire arms [sic] are kept in a great many homes in this state. The general policy of our state relative to firearms is found in our constitution and statutes. Article 2, Sec. 6, of our Constitution provides: "The people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons."
>
> We think the better rule is that absent knowledge of the part of the parent that a child of the age of the one involved here is indiscreet or reckless in the handling of firearms, that the mere keeping of a loaded gun on the premises and leaving the boy there alone, does not make the parent liable for torts committed by the minor.[6]

---

[4]Bennet v. Cincinnati Checker Cab Co., 353 F. Supp. 1206, 1210 (E.D. Ill. 1973) (*Bennet* is discussed *supra* at text accompanying notes 16-21). *See also* Adkinson v. Rossi Arms Co., 659 P.2d 1236, 1239-40 (Alaska 1983) (assailant convicted of manslaughter in a shooting incident denied relief for direct personal losses against firearm manufacturer and distributor).

[5]51 N.M. 421, 186 P.2d 512 (1947) (high power rifle), *See* Dick v. Higgason, 322 S.W.2d 92, 94-95 (Ky. 1959) (no negligence by owner where 12 year old child found bullets in a desk, took a 22 caliber rifle and wounded plaintiff).

[6]*Lopez,* 51 N.M. at 422, 186 P.2d at 513. Concerning minors, see Dixon v. Bell, 5 Maule & Selwyn 198 (1816) (liability for entrusting loaded gun to 13 year old servant girl); Ward v. University of the S., 209 Tenn. 412, 354 S.W.2d 246 (1962) (dealer negligent *per se* in sale of pistol to 19 year old, whose intervening negligence was proximate cause of accident); Lundy v. Hazen, 90 Idaho 323, 411 P.2d 768 (1966) (negligence per se to sell .22 caliber revolver to thirteen-year-old, jury issue whether proximate cause of injury where mother's conduct may have implied consent). By analogy, compare Bojorquez v. House of Toys, Inc., 62 Cal. App. 3d 930, 933, 133 Cal. Rptr. 483, 484 (1976) (refusal "to ban the sale of toy slingshots by judicial fiat") with Moning v. Alfono, 400 Mich. 425, 428, 254 N.W.2d 759, 762 (1977) (jury issue whether unreasonable risk of harm exists "in marketing slingshots directly to children"). On the issue of storage, compare Napiearlski v. Pickering, 278 A.D. 456, 458, 106 N.Y.S.2d 28, 30 (1951) ("We are aware of no authority in this state which holds that having a gun in one's house is negligence, even though a child may find access to its hiding place.") and Staruck v. County of Otsego, 285 A.D. 476, 478, 138 N.Y.S.2d 385, 387 (1955) ("The gun which he stole had been hidden and there was no reasonable ground to believe that he would find it and steal it.") with Palmisano v. Ehrig, 171 N.J. Super. 310, 311, 408 A.2d 1083, 1084-85 (App. Div. 1979), *cert denied*, 82 N.J.

The importance of the second amendment to the United States Constitution[7] to suits alleging negligence or strict liability for the sale of firearms, was suggested in a recent case decided by the Mississippi Supreme Court. *Robinson* v. *Howard Brothers of Jackson, Inc.*, [8] a wrongful death suit, involved the sale of a pistol and ammunition to an individual who certified that he was over twenty-one years of age, but whose driver's license indicated that he was actually twenty years old. The sale was thus a technical violation of the Gun Control Act of 1968.[9] The court held that the store was not liable for the purchaser's murder of his paramour because the intervening criminal act was not foreseeable.[10] In dicta, the court gratuitously suggested the possible relevance of a constitutional right to have, and thus to buy and sell, arms in these terms:

> Section 33-5-1 Mississippi Code Annotated (1972) provides that the militia of the State of Mississippi shall not consist of all able-bodied male citizens of the state between the ages of 18 and 45 years who are not exempt by law of this state or of the United States. The possible effect of this statute *considered in conjunction with the Second Amendment of the United States Constitution* and Section 214 of the Mississippi Constitution of 1890 was not argued and is not before the Court for decision in this case.[11]

287, 412 A.2d 793 (1980) (jury issue presented as to defendant's negligence in storing firearms with ammunition) and Kuhns v. Brugger, 390 Pa. 331, 340, 135 A.2d 395, 404 (1957) ("[C]ommon prudence, in behalf of self-protection, justified the possession of the pistol for immediate use at night," but owner negligent to absent himself and leave it "in a place frequented by young children.").

[7]U.S. Const. amend. II provides: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."

[8]372 S.2d 1074 (Miss. 1979).

[9]18 U.S.C. §§ 922 (a)(6)(1), 924(a) (1976). This act made it a felony for a dealer to sell a handgun to anyone under 21 years of age.

[10]372 So. 2d at 1076.

[11]*Id.* at 1074 n.1 (emphasis added). MISS. CONST. Art. IX, § 214 states: "All able-bodied male citizens of the State between the ages of eighteen and forty-five years shall be liable to military duty in the Militia of this State, in such manner as the Legislature may provide." *See* Parman v. Lemmon, 119 Kan. 323, 324, 344 P. 227, 233 (1926) (rehearing). The *Parman* court found no parental liability for furnishing a shotgun to a teenager, stating "the Legislature did not intend to make law violators of 60 per cent. [sic] of the militia of the state . . . ." The dissent considered the second amendment as "a basic principle of state-craft of deep concern to all who are clothed with authority and who feel their responsibility to hand on undiminished to future generations those liberties which are our proud American heritage." *Id.* at 231 (Dawson, J.,

The non-liability of an owner whose rifle was stolen by a convicted rapist and used in a murder was established in *Thomas v. Bokelman.*[12] The owner of the rifle permitted the ex-convict, a relative, to reside temporarily with his family. Although the ex-convict was aware that the three rifles were present in the house, he had never been involved in a firearms-related crime. The Supreme Court of Nevada affirmed summary judgment for the gun owner on the ground that "a defendant who could not foresee any danger from an intervening force is not negligent."[13]

The above cases indicate that the mere keeping of a firearm in the home in itself creates no foreseeable risk of harm and establishes no duty toward persons injured by the intervening acts of minors or criminals. The rule under traditional negligence theory that liability does not exist for the ownership per se of a handgun may be buttressed by the existence of constitutional provisions guaranteeing a right to keep arms. Establishment of a rule of negligence per se or strict liability for keeping a gun would entail a radical departure from existing law.

As to suits involving dealers, no case could be found where liability was imposed when there was compliance with applicable federal and state statutes. However, a jury issue exists as to whether it is negligence for a retailer to sell firearms to persons who fail to identify themselves according to legal requirements, who are subsequently discovered to have been violent convicted felons, and who commit felonies with the firearm.[14]

In *Franco* v. *Bunyard*,[15] an escaped inmate service a life sentence for kidnaping, purchased a pistol from a retailer who failed to require proper identification and the completion of federal From 4473, the firearms transaction record. The next day, the fugitive robbed a store and kidnaped three employees, two of whom he murdered. The Supreme Court of Arkansas held that his use of the pistol in that manner was foreseeable based on his past record, and thus a jury question existed as to the retailer's negligence. However, the court held that Western Auto Supply Company, the national franchiser, was not liable as a matter of law even though it

---

dissenting) (initial opinion). Justice Dawson's opinion was adopted by the court on rehearing. *Id.* at 233.

[12]86 Nev. 10, 462 P.2d 1020 (1970).

[13]*Id.* at 11, 461 P.2d at 1021.

[14]Compare Decker v. Gibson Prods. Co., 679 F.2d 212 (11th Cir. 1982) (jury question as to whether sale of a firearm to a felon whose civil rights were restored and whose purchase was approved by sheriff could be reasonably foreseen to result in murder) with Hulsman v. Hemmeter Dev. Corp., 647 P.2d 713 (Hawaii 1982) (gun seller entitled to summary judgment because "federal statutes regulating firearm sale did not create a duty on a seller in a negligence action nor did it create a private right of action for damages." *Id.* at 720).

[15]261 Ark. 144, 547 S.W.2d 91, *cert. denied*, 434 U.S. 835 (1977).

supplied the firearm to the retailer.[16]

The theory that suppliers of firearms should be strictly liable for illegal uses of firearms is not a new one. In *Bennet v. Cincinnati Checker Cab Co.*,[17] a woman who had been shot by an ex-convict employed as a cab driver, sued the importer of the revolver. The plaintiff asserted that the importer was strictly liable for the injuries, was negligent in that it should have foreseen the criminal use of the revolver, and breached its duty to protect others from criminal attack.[18] The United States District Court addressed these claims as follows:

> [T]here are two rather obvious reasons why plaintiff cannot recover on the "strict liability" theory.
>
> First, plaintiff has not mentioned product defectiveness, a necessary allegation in an action based upon this theory. . . .
>
> Second, Omega is not responsible for the consequences of the type occurring here. . . . .
>
> " . . . Under all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law."[19]

The court concluded that there was "no duty upon a manufacturer of nondefective product to anticipate the various unlawful acts possible through the misuse of that item."[20] In the absence of a special relationship,[21] the importer-seller had no duty to protect the plaintiff from criminal attack. Accordingly, the supplier's motion for summary judgment was sustained.[22]

The criminal intervention factor which negates proximate cause was the basis for the court's decision in *Romero v. National Rifle Association of America*.[23] A National Rifle

---

[16]*Bunyard*, 261 Ark. at 145-46, 547 S.W.2d at 92-93. See Hetherton v. Sears, Roebuck & Co, 593 F.2d 526 (3d Cir. 1979), where proximate cause was a jury issue when retailer sold 22 caliber rifle and ammunition in violation of state law to convicted violent felon, who six weeks later shot plaintiff in an attempted robbery. However, in *Hetherton* only the ammunition was a "deadly weapon" under the Delaware Statute. *See* DEL. CODE ANN. tit. 24, § 904 (1981).

[17]353 F. Supp. 1206 (E.D. Ky. 1973).

[18]*Id.* at 1209.

[19]*Id.* at 1210 (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS 176 (3d ed. 1964)).

[20]353 F. Supp. at 1209.

[21]For example, bailor-bailee or master-servant. *Id.*

[22]*Id.*

[23]No. 80-2576 (D.D.C. Feb. 11, 1981), *appeal docketed*, No. 82-1881 (D.C. Cir.).

Association (NRA) employee hid a .22 caliber pistol and ammunition in a locked closet in an annex building. The pistol was stolen in a burglary, changed hands several times, and was finally used in a murder. The court refused to instruct the jury on a strict liability theory, but permitted them to decide whether negligence existed. When the jury found for the plaintiff, the court granted judgment *non obstante verdicto* for the NRA.

The basis of the District Court's decision was that the plaintiff failed to prove that the defendant had a duty to protect the plaintiff from an unreasonable risk of harm, had breached such a duty, and that such breach was the proximate cause of the harm. The court stated that because "the NRA exercised a high degree of care as to the firearms stored in its main building," it owed no duty regarding unauthorized storage in the annex building.[24] Even if a breached duty had been established, the court would still have found that "the casual connection between any wrongful act of the NRA and the ultimate murder of Mr. Gonzalez, [was] . . . too attenuated and remote to permit the jury reasonably to conclude that the NRA is legally responsible for his tragic death."[25]

In none of the above cases did a court question the right to keep or sell handguns as such, or the social utility of doing so. Owners and dealers are required to exercise reasonable care to prevent the negligent or illegal use of the firearms they keep or sell but they are not liable for misuses which are not reasonably foreseeable. Absent negligence, duty, and proximate cause, those who keep or sell handguns are not liable for injuries caused by unauthorized users or by purchasers. Nor has a strict liability standard for keeping or selling a handgun ever been imposed by a court of record. Thus, there appears to be no basis in the existing case law governing firearms, for the theory that it is negligence per se to keep or to sell a handgun, or to impose strict liability for keeping or selling a handgun.

B. Liability of Manufacturers for Defective Products

Since the manufacture of handguns is a prerequisite to the keeping and bearing of that class of arms, there may be a constitutional presumption that they are manufactured for protected purposes. In a case involving use of a firearm by an elderly man for self-defense, Louisiana's highest court upheld a decision containing the following language: "The Constitutions of the United States and Louisiana give us the right to keep and bear arms. It follows, logically, that to keep and bear arms gives us the right to use the arms for *the intended purpose for which they were manufactured*."[26] However, there is no constitutional right to manufacture a defective firearm which injures its user.

The law of products liability, premised originally on express and implied warranties, has progressed through negligence theories and, perhaps most importantly today, strict liability

---

[24]*Id.* at 11.

[25]*Id.* at 20.

[26]McKellar v. Mason, 159 So. 2d 700, 702 (La. Ct. App.), *aff'd*, 245 La. 1075, 162 So. 2d 571 (1964).

theories. Strict liability may be imposed when a product performs differently than a reasonable user would expect. Products liability suits alleging accidental injuries due to defective firearms for the most part result from barrel explosions, premature firing, and failure of the safety mechanism.[27] Similar suits which allege defective cartridges, shells, or other ammunition normally result from delayed discharge.[28]

Probably the most commonly alleged defect in strict liability handgun cases, relates to traditionally designed single action revolvers which are loaded in all six chambers and discharge upon being dropped. As a safety precaution, the chamber under the hammer of a single action should never be loaded. Some consumers may be unaware of the need for this precaution since modern double action revolvers may be fully loaded safely.[29] In *Bender v. Colt Industries, Inc.*,[30] the Missouri Court of Appeals held a manufacturer strictly liable for the plaintiff's injury which occurred when his loaded revolver, which was in the safety position,[31] fell from his pocket and

---

[27]Colling & Niemi, *Firearms Accidents,* AM. FIREARMS INDUSTRY 44, 48 (June 1982).

[28]See annotations of firearms and ammunition product cases in R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY §§ 33:6 and 33:7 (1976 & Supp. 1982). The development of the "inherently dangerous" rule in products liability cases is traced in E. LEVI, AN INTRODUCTION TO LEGAL REASONING 8-27 (1949). *See also* Langridge v. Levy, 150 Eng. Rep. 863 (1837) (discussing the liability of a seller who declared a gun safe that exploded in plaintiff's hand) and Favo v. Remington Arms Co., 67 A.D. 414, 73 N.Y.S. 788, 790 (1901) (manufacturer of gun suitable only for use with specific powder is not liable because it was inadequate for more explosive powder which was used, causing injury; the manufacturer is required only to make a gun suitable for use under the conditions existing at the time it is put on the market). In Herman v. Markham Air Rifle Co., 258 F. 475 (E.D. Mich. 1918), a manufacturer who shipped a loaded air rifle without examination was held liable for saleswoman's eye injury:

> The authorities cited by defendant to the effect that the sale of firearms, like this rifle, does not constitute negligence, are obviously not in point, as there is a wide difference between the furnishings to the public of such weapons in their usual condition, to be loaded by the user, and the furnishing of such weapon already loaded and ready to inflict serious injury.

Id. at 477.

[29]Double action revolvers may be fired by pulling the trigger without cocking the hammer, while single actions require that the hammer be cocked first.

[30]517 S.W.2d 705 (Mo. Ct. App. 1974).

[31]The blow to the hammer spur caused the fracture of the fragile rear tip. *Cf.* Walker v. Nat'l Gun Traders, Inc., 116 So. 2d 792, 793 (Fla. Ct. App. 1960) (spur filed off the safety notch and retailer was found negligent for failing to inspect used revolver). The court stated, "It follows that the distributor of an inherently dangerous product such as a second hand revolver

discharged. The manufacturer contended that the .357 magnum in that case was "an exact replica" of the Colt Army Revolver which was made in 1873, and that the plaintiff had "wanted an authentic six-gun."[32] The court responded that the manufacturer could have inserted a physical block safety which would have detracted from the revolver's authenticity less than its modern magnum caliber. "Apparently making the weapon more dangerous will not affect its authenticity, making it safer would."[33] In short, a design which was the state of the art at one time may be defective today.

In contrast to the handgun consumer who was injured in *Bender*, the case of *Sturm, Ruger & Co., v. Bloyd*,[34] involved an injury to a bystander when a .357 magnum Blackhawk revolver was dropped on a concrete floor. The safety warning which came with the Colt replica adequately warned its purchaser not to load a round under the hammer. The purchaser was thereby negligent in doing so and in leaving it in a potentially dangerous position without warning the other person of the danger. The *manufacturer* obtained a directed verdict under the following reasoning:

By their very nature firearms are dangerous, but do not kill people. It is the action of people in their use of firearms that kill or injure people. . .

. . . . Ruger, the manufacturer, is not a guarantor of the safety of the revolver. The evidence discloses that the subject revolver was not unsafe when used in the normal and usual manner. . .

. . . The maker is not required to design the best possible product or one as good as others make or a better product than the one he had, so long as it is reasonably safe. A gun, although inherently dangerous, does not come within the category of those substances or chattels which, by their very nature, are not only inherently dangerous but unsafe for general use.[35]

One of the most significant recent decisions involving an allegedly defective handgun was rendered by the Supreme Court of Alaska, in *Sturm, Ruger & Co. v. Day*.[36] The plaintiff's .41 magnum single action revolver was fully loaded and quarter cocked when it slipped out of his hands. As he grabbed for the gun, his finger pulled the trigger, the revolver was fired, and the bullet struck his leg. Although the hammer was in the loading position, the instruction booklet

---

has a duty to those members of the public who may be injured by the ordinary use of the product." *Id.* at 793.

[32]517 S.W.2d at 706-07.

[33]*Id.* at 707.

[34]586 S.W.2d. 19 (Ky. 1979).

[35]*Id.* at 21-22.

[36]594 P.2d 38 (Alaska 1979), *cert. denied*, 454 U.S. 894 (1981).

warned that the gun might fire in this position as a result of "excessive pull on the trigger."[37] The jury awarded over three million dollars on the theory that the latest safety device available had not been used in manufacturing the revolver.[38]

The Alaska Supreme Court reversed and remanded for a new trial on the ground that the trial court refused to consider the comparative fault of the plaintiff, who may have been negligent in failing to heed the instructions and in dropping the firearm.[39] Although the revolver conformed to the state of the art, and was in fact designed similarly to most single action revolvers of the last century, the court affirmed the trial judge's instructions to the jury that, "conformity to the state of the art does not constitute a defense to strict liability claims." [40] The court found punitive damages proper, but excessive, due to the company's "procrastination in changing the basic design, at an increased cost of $1.93 per gun."[41]

Unlike the quarter cocked revolver in *Day*, in *Zahrte v. Sturm, Ruger & Co.*,[42] the plaintiff apparently had the hammer fully down on his 30 caliber western style, single action revolver when he tossed in onto the stoop of his house, causing the gun to discharge and causing him injury. In addition to instructing the jury to apportion the loss if it found any fault by the manufacturer, the court directed that the plaintiff could not recover if he assumed the risk of a known danger.[43] The resulting verdict for the manufacturer was upheld because "the jury could have reasonably concluded that plaintiff was subjectively aware of the danger of the hammer being full on a live round, and that he voluntarily proceeded to expose himself to that danger. Thus, plaintiff's lack of knowledge of the specific 'defect' was irrelevant."[44]

By contrast, in *Cobb v. Insured Lloyds*[45] a Hawes "Western Marshall" revolver, which was lying on the floorboard of an automobile with its hammer fully down against a cartridge, discharged and injured a passenger. The gun owner, the manufacturer and the distributor were sued. The instructions provided with the gun stated that "the revolver should always be carried

---

[37]*Id.* at 41.

[38]*Id.* The damages were mostly punitive in nature.

[39]*Id.* at 42.

[40]*Id.* at 45.

[41]*Id.* at 47.

[42]498 F. Supp. 389 (D. Mont. 1980).

[43]*Id.* at 391, 394.

[44]*Id.* at 394. The court's Special Verdict form is set out at 498 F. Supp. At 395 n.6. This decision has been modified to allow assumption of risk. Zahrte v. Sturm, Ruger & Co., 661 P.2d 17 (Mont. 1983).

[45]387 So.2d 13 (La. Ct. App. 1980).

in [the safety] position. With the hammer in this position the firing pin will not touch the rear of the cartridge in the cylinder.[46] In finding inadequate warnings and failure to incorporate the latest safety device in the design, the Court reasoned that "the revolver was being used for a purpose reasonably foreseeable by the manufacturer. Revolvers are often carried fully loaded. The above quoted instructions state how to load all six chambers. Also, revolvers are often carried in automobiles for protection."[47]

A small number of the defective handgun suits filed involve double action revolvers and semiautomatic pistols.[48] Perhaps the most far reaching recent jury decision involving a semiautomatic weapon is a 1981 Texas case.[49] This case involved a Colt MK IV .45 caliber which discharged when the plaintiff bumped the half-cocked hammer on a chair, causing the gun to discharge. The jury found a defective design and inadequate warnings as to the potential danger.[50] Ironically, the U.S. government found this same model .45 sufficiently safe to adopt it

---

[46]*Id.* at 16.

[47]*Id.* at 18. *See* Ferguson v. Sturm, Ruger & Co., 524 F. Supp. 1042, 1044 (D. Conn. 1981) (gun discharged when hammer allegedly on safety position; decision only on issue of statute of limitations).

[48]Apparently the only recently reported semiautomatic pistol case is Poyner v. Erma Werke Gmbh, 618 F.2d 1186 (6th Cir.), *cert. denied*, 449 U.S. 841 (1980) (.22 caliber semiautomatic; decision only concerns jurisdiction). Recently settled cases include Kuerbitz v. R. G. Indus., No. CA 3-79-0050-R (E.D. Tex. Jan. 16, 1981), 25 AM. TRIAL LAW. A. L. REP. 38 (1982) (slide lifted from frame of .25 caliber semiautomatic causing discharge inside police officer's gun belt); Harris v. Smith & Wesson, Inc., No. C. 345387 (Ariz. Super. Jan. 29, 1981), 24 AM. TRIAL LAW. A. L. REP. 87 (1980) (.25 caliber allegedly discharged while being oiled around the trigger).

Since 1979, the American Trial Lawyers' Association has reported only one verdict, and no settlements, involving a double action revolver. Shekell v. Sturm, Ruger & Co., No. 80-70-GF (D. Mont. May 28, 1981), 25 AM. TRIAL LAW. A. L. REP. 38 (1982) (.32 caliber revolver dropped on floor, plaintiff's comparative negligence set at 80%). Reported cases include Cosper v. Smith & Wesson Arms Co., 53 Cal. 2d 77, 346 P.2d 409 (1959), *cert. denied*, 362 U.S. 927 (1960) (cylinder allegedly exploded; decision based on statute of limitations); Campbell v. Colt Indus., Inc., 349 F. Supp. 166 (W.D. Va. 1972) (trigger mechanism allegedly defective; unclear whether double or single action; decision based on statute of limitations).

[49] Gregg v. Colt Indus. Operating Corp., No. 5317 (Tex. D.C. Sept. 5, 1980), 24 AM. TRIAL LAW. A. L. REP. 86 (1981). Plaintiff's counsel, Rockne W. Onstad, informed the author that the case was settled prior to arguments on appeal, and that the Colt Corporation has not altered the design but has increased warnings.

[50]*Id.*

for a military use, and approximately three million are so used.[51]

Although most products liability cases involving handguns stem from accidental discharges occasioned by dropping the weapon or by safety failure, no decision imposes any requirement that the gun be so difficult to shoot as to interfere with its purpose. The objective is to diminish accidental firings, not the capacity of the firearm for instant use when appropriate. As the following two cases indicate, a safety mechanism must not interfere with marksmanship, prevent intentional discharge or otherwise defeat the very purpose of the firearm.

The presence of sufficient safety mechanisms was the key to the judgment *non obstante veredicto* entered by the federal district court in *DeRosa v. Remington Arms Co.*[52] In that case, a police officer pumped a shell into the chamber of his Model 870 shotgun, disengaged the safety, put his finger inside the trigger guard and accidentally pulled the trigger, killing his fellow officer. The plaintiff sought to establish that the design was defective by contending that the trigger should have been harder to pull. The court responded to this argument by stating that "any sharp increase in the amount of pressure required to pull a trigger could have a deleterious effect on the accuracy and speed of a marksman. . . ."[53] Finding that no further safety mechanisms were compatible with the shotgun's intended use, the *De Rosa* court held that:

> Based upon the evidence, the shotgun as designed by Remington was a matter of law not unreasonably dangerous for its foreseeable use. Moreover, the intervening carelessness of fellow officer Paton was such that no defect in design of the gun can be said to have caused this tragedy.[54]

While almost all suits against firearms manufacturers and distributors are occasioned by accidental injuries, the California case of *Thomas v. Olin Mathieson Chemical Corp.*[55] involved the alleged failure of a firearm to discharge when it should have. Specifically, after seeing defendant's advertisements stating that its Winchester Model 70 Supergrade Rifle was appropriate for hunting big game, the plaintiff purchased and used the rifle on his safari to India. The safety mechanism failed and the gun failed to shoot a Bengal tiger. The court upheld a cause of action for breech of express warranty in which plaintiff pleaded "that he incurred substantial expense in reliance on defendant's warranty that the gun he purchased was suitable for big game hunting in a foreign country and that defendant knew that plaintiff intended to, and would, incur

---

[51]*Id.*

[52]509 F. Supp. 762 (1981).

[53]*Id. at 768.*

[54]*Id. at 763. Cf.* Philippe v. Browning Arms Co., 375 So. 2d 151 (La. Ct. App. 1979), *aff'd,* 395 So. 2d 310 (La. 1980) (defective safety mechanism failed when plaintiff's hand slipped to end of shotgun barrel).

[55]255 Cal. App. 2d 806, 63 Cal. Rptr. 454 (1967).

these expenses in reliance on the express warranty pleaded."[56]

If the reasoning in this case was to be followed and extended, the failure of a handgun to discharge in a more serious situation where the user sought to repel a deadly attack would clearly lead to a cause of action by the victim or his survivor.[57] This is especially true since handguns are typically advertised as useful for self protection. It could easily be argued that the manufacturer should reasonably foresee self-protection as the most typical function of the handgun.

The purpose of existing products liability law, as it applies to handguns and other firearms, is to facilitate safety and mechanical reliability. There are several areas of dispute as to the extent to which consumers should be protected. Should manufacturers be able to produce, and consumers to purchase, traditionally designed, functional revolvers which fail to incorporate the most recently discovered safety mechanisms? To what extent must the law protect consumers from their own folly and assumption of risk? Should a manufacturer be liable for a product when the government deems reasonably safe for the military? Are large verdicts involving substantial punitive damages effective in encouraging advances in manufacturing safety, or are they ultimately paid for by firearms consumers?[58]

Regardless of the extent to which the law resolves the ostensible conflict between manufacturers' and consumers' interests, both groups have an interest in safe, reliable products. The law's purpose should be to see that members of the general public who so desire can obtain safe and reliable firearms, not to deprive them of that product.

II. CONSTITUTIONAL RESTRAINTS AND TORT LIABILITY

A. The Preclusion of Tort Liability for the Exercise of Constitutional Rights

There are strict limits on the civil liability which can be imposed for the exercise of a constitutional right. Traditionally, liability for libel has not been viewed as abridging the right of free speech, just as an action for civil assault would not infringe on the right to keep and bear arms. A similar comparison was expressed at the time the Constitution was being ratified when it was argued that a free press:

> consists, in *avoiding to impose any previous restraints on publication,* and not in

---

[56] *Id.* at 457. Express and implied warranty actions traditionally required privity of contract, *see e.g.* Smith v. Sturm, Ruger & Co., 524 F.2d 776 (9th Cir. 1975) (alleged discharge while holstered), unlike negligence and strict liability suits. Piercefield v. Remington Arms Co., 375 Mich. 85, 133 N.W.2d 129 (1965), established that liability to a bystander exists under a warranty action where a defective shotgun shell caused a barrel explosion.

[57] *See* Klages v. Gen Ordnance Equip. Co., 240 Pa. Super. 356, 367 A.2d 304 (1976) (failure of mace pen to prevent criminal attack).

[58] A $3,000,000 verdict was recently awarded to a narcotics agent when his Marlin .90 over-and-under shotgun allegedly misfired when grabbed by a suspect. *See* Trout v. Marlin Firearms Co., No. 77-17068 (Fla. Cir. Ct. Mar. 22, 1982) 25 AM. TRIAL LAW. A. L. REP. 323.

> refraining to censure or punish such things as produce *private or public injuries*. Every free man has *a right to the use of the press,* so he has to *the use of his arms.* But if his publications give an unmerited or deadly stroke to *private reputation,* . . . he abuses his privilege, as unquestionably as if he were to plunge his sword into the bosom of a fellow citizen . . . .[59]

This view, probably typical of its time, exemplifies the intended meanings of the first and second amendments as recognizing rights but not as sanctioning injurious behavior. Until recent times, the United States Supreme Court paid little attention to possible restraints on tort law which might discourage the exercise of constitutional rights. But today state libel laws cannot be so overly stringent as to infringe on the right to free speech as guaranteed by the first and fourteenth amendments.[60] To the extent that there may be an individual right to keep and bear arms, would the second and fourteenth amendments similarly preclude the adoption of a strict liability tort standard which could deprive the general populace of handguns? In the absence of any Supreme Court rulings on the subject, it would be enlightening to analyze those possible constitutional restraints on the proposed strict liability standard as are suggested by analogy to the constitutional restraints on libel actions. This comparison is particularly appropriate in that courts have, on occasion, accorded second amendment rights an equal status with first amendment rights.[61]

In *New York Times v. Sullivan* the United States Supreme Court decisively determined "the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."[62] The Court held "the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action" in that case to be "constitutionally insufficient."[63] Assuming arguendo that the second and fourteenth amendments protect an individual right to keep and bear firearms, such as handguns, it would be appropriate to analyze how the same type of reasoning as used in *New York Times* would limit tort liability for the exercise of this right.

The principle that the Constitution protects all "who wish to exercise their freedom of speech even though they are not members of the press"[64] is analogous to the protection accorded by the specific terms of the second amendment to "the people" to keep and bear arms though they

---

[59]*Philodemos,* Pennsylvania Gazette, May 7, 1788, *reprinted in*, 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION No. 673, at 2577, 2579 (M. Jensen ed. 1976) (microfilm supplement).

[60]New York Times v. Sullivan, 376 U.S. 254 (1964).

[61]*Infra* notes 81-85 and 98, and accompanying text.

[62]376 U.S. 254, 256 (1964).

[63]*Id.* at 264-65.

[64]*Id.* at 266.

are not members of a select militia. "The end that government may be responsible to the will of the people"[65] would justify not only "free political discussion"[66] but also an armed populace, in that both may be utilized to check oppression. Both stem form the view of Madison, the draftsman of both the first and second amendments, "that the censorial power is in the people over the Government, and not in the Government over the people."[67]

The alleged lack of social utility of unpopular ideas fails to reduce their protected status. "The constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered."[68] By the same token, if handguns are constitutionally protected arms, they people may not be deprived of them even though some claim that they lack social utility.

Should the Constitution invalidate penal infringement on the right to bear arms, it would also prohibit the achievement of the same objective through the tort law: "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."[69] Making handgun manufacture, distribution or ownership economically impossible through strict tort liability or overly broad negligence standards would create an atmosphere where second amendment freedoms could not survive. "Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the first amendment freedoms cannot survive."[70]

In his concurring opinion in *New York Times v. Sullivan,*[71] Justice Black contended that the first and fourteenth amendments do not merely delimit a state's power to award damages against those who criticize public officials, but "completely prohibit a State from exercising such a power."[72] In support of his thesis that the press enjoys an absolute immunity in criticizing

---

[65]*Id.* at 269.

[66]*Id.*

[67]*Id.* at 275. The Court characterized Madison's view as a "a fundamental principle of the American form of government." *Id.*

[68] *Id.* at 271(citing NAACP v. Button, 371 U.S. 415 (1963)).

[69]*Id.* at 277.

[70]*Id.* at 278. Another effect would be to drive newspapers and the arms market underground, creating shadow entities which could commit true libel or make and sell defective firearms (including sales to known violent felons) with impunity.

[71]*Id.* at 293 (Black, J. concurring).

[72]*Id.* Both Justice Black's and Justice Goldberg's concurring opinions were joined by Justice Douglas, bringing the number of Justices who advocated an absolute immunity standard to three.

public officials, even with "actual malice," Justice Black relied on St. George Tucker as the chief interpreter of "the general view held when the First Amendment was adopted . . . ."[73] Quoting Tucker, Justice Black wrote:

> But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. "For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise of execute it."[74]

The framers of the Bill of Rights likewise would have doubted that a "free"[75] state would be secured where the people suffered physically or financially for the mere keeping and bearing of arms. This is demonstrated a few pages later in the very same work by Tucker upon which Justice Black relied:

> The right of self-defense is the first law of nature; in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Whenever standing armies are kept up, and the right of the people to keep and bear arms is, *under any color of pretext whatsoever, prohibited*, liberty if not already annihilated, is on the brink of destruction.[76]

The second leading Supreme Court opinion on the constitutional limits upon tort liability for free speech is *Gertz v. Welch*,[77] a sharply divided five-four decision. The majority held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standards of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[78] The Justices in the minority were divided over whether the case should be disposed of under absolute immunity, a knowing falsity or reckless disregard standard, or

---

[73]*Id.* at 296 n.2. "St. George Tucker, a distinguished Virginia jurist, took part in the Annapolis Convention of 1786, sat on both state and federal courts, and was widely known for his writings on judicial and constitutional subjects." *Id.*

[74]*Id.* at 297 (citing 1 W. BLACKSTONE, COMMENTARIES 297 (Tucker ed. 1803) (editor's appendix) [hereinafter cited as BLACKSTONE]).

[75]U.S. CONST. amend. II.

[76]BLACKSTONE, *supra* note 74, at 300 (emphasis added). It is interesting that Tucker headed an expedition during the Revolution to bring arms and ammunition from the West Indies. Dobie, *Federal District Judges in Virginia Before the Civil War,* 12 F.R.D. 451, 459 (1951).

[77]418 U.S. 323 (1974).

[78]*Id.* at 347.

strict liability.[79]

The *Gertz* decision is significant in that it prohibits a strict liability standard where free speech is exercised in a libelous manner. While this again reinforces the view that if the second amendment is accorded an equal status with the first, strict liability is inappropriate for the exercise of the right to keep and bear arms, the analogy ends at this point. Both *New York Times* and *Gertz* were concerned with libel, misuse of speech, against public and private persons respectively. Certainly no argument can be made that misuse of firearms is constitutionally protected, whether committed against public of private persons. But under the common law mere having of arms was no different from non-libelous speech in that those who exercised both rights were not tortfeasors in any way. Nor under any standard can manufacturers or distributors of handguns be held liable for misuse of those handguns any more than those who make and sell printing presses can be held liable for libel. [80]

This question remains whether keeping and bearing common firearms is a constitutionally protected right, and thus whether tort liability may be imposed for its exercise and the prerequisites of its exercise, manufacture and marketing. At the outset, it may be said that while the Supreme Court has given the first amendment much more attention, on the few occasions in which it has mentioned the second amendment it has accorded an equal status to the protections of both amendments.

In the *Dred Scott* decision,[81] Chief Justice Taney wrote that citizenship "would give to persons of the negro race . . . the full liberty of speech . . . and [the right] to keep and carry arms wherever they went."[82] Even though the fourteenth amendment was intended to confer citizenship upon blacks, in post-Reconstruction cases the Supreme Court continued to hold that the first and second amendments did not apply directly to the states.[83] And it did not decide

---

[79]*Id.* at 353-56, 361.

[80]This would be true of cheaper and smaller presses even if they were used more often by unscrupulous persons to commit malicious libel and character assassination that were expensive and larger presses. It could be that small and inexpensive handguns and presses are both used more whether properly or improperly because they are in greater circulation. Inexpensive tabloids are known to invade the privacy of celebrities and to publicize non-establishment political views.

[81]Scott v. Sanford, 60 U.S. 393 (1857).

[82]*Id.* at 417.

[83]Cruikshank v. United States, 92 U.S. 542, 552-53 (1876) (rights of freedmen to assemble and to carry arms not protected from private action by fourteenth amendment); Presser v. Illinois, 116 U.S. 252, 265 (1886) (rights of assembly and to keep and bear arms would not protect a parade of a private army in city streets without permit).

whether these rights were protected from state infringement through the fourteenth amendment.[84]

Near the turn of the century the United States Supreme Court accorded equal status to the rights of free speech and of having arms in these terms:

> The law is perfectly well settled that the first ten Amendments to the constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels . . .; the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons. . . .[85]

This formulation treats having arms as an individual right which may be protected from state action.[86] It would be ludicrous to speak of a concealed carry "exception" if the people's right to keep and bear arms implied only a state right to maintain a militia, which again was hardly a guarantee inherited from the English ancestors. For purposes of a tort analysis, the above analogy is not quite parallel because libel gives rise to a civil action while carrying concealed weapons without more does not since it directly damages no victim. But wrongful death stemming from a murder with a firearm invokes civil liability and completes the analogy.

It should be noted that the "exception" mentioned above approves prohibition of "the carrying of concealed weapons," but in no way suggests that the mere keeping of concealable weapons, or even bearing them openly, may be prohibited. Indeed, the Supreme Court has upheld the right to arm oneself with and to use handguns for self-defense. While the Court in these cases saw no need to rely on specific constitutional provisions, its language presumes the utility of handguns for self protection.

In an opinion written by Justice Harlan near the turn of the century, the slight defendant

---

[84]Miller v. Texas, 153 U.S. 535, 538 (1894) (convicted murderer not entitled to argue rights to bear arms and against unreasonable search incorporated in fourteenth amendment where issue not raised in trial court).

[85]Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897). However, carrying concealed weapons *per se* was not an offense at common law.

[86]Prohibition on carrying concealed weapons was the only exception to the right to keep and bear arms treated by nineteenth century courts. For analysis of these cases, see Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEO. MASON. L. REV. 1, 11-16, 40-41 (1981).

"drew a small bright pistol from his pocket, and he shot" his assailant, a heavy-set miner.[87] The Court held that if "the defendant had reasonable grounds to believe, and in fact believed, that the deceased intended to take his life, or to inflict upon him great bodily harm," then "the jury were not authorised to find him guilty of murder because of his having deliberately armed himself, provided he rightfully so armed himself for purposes simply of self-defense . . . ."[88] In a similar opinion, Justice Harlan wrote, "[the] deceased sprang at defendant, striking him with a knife and cutting him in two places on the face; that after deceased began cutting defendant the latter drew his pistol and fired. . . ."[89] The Court held:

> Under such circumstances, did the law require that the accused should stand still, and permit himself to be cut to pieces, under the penalty that if he met the unlawful attack upon him and saved his own life, by taking that of his assailant, he would be guilty of manslaughter? We think not.[90]

Justice Holmes also wrote opinions which upheld the utility of handguns for self-defense. In one opinion he referred to "weapons such as pistols that may be supposed to be needed occasionally for self-defense."[91] In another case, "in view of [decedent's] threats [defendant] had taken a pistol with him, and had laid it in his coat upon a dump," later to shoot his knife-wielding assailant.[92] The Court upheld the claim of self-defense under this reasoning: "Detached reflection cannot be demanded in the presence of an uplifted knife."[93]

In *United States v. Miller*,[94] the Supreme Court stated that "the Second Amendment guarantees the right to keep and bear" a weapon which "has some reasonable relationship to the preservation or efficiency of a well regulated militia."[95] Taken literally, *Miller* decided that private individuals had a right to keep and bear militia arms. While the Court could not take judicial notice that the short barrel shotgun possessed by the defendant was a militia arm, it adopted the historical view that the militia was the body of the people who provided their own

---

[87]Gurko v. United States, 153 U.S. 183, 187 (1894).

[88]*Id.* at 191.

[89]Row v. United States, 164 U.S. 546, 547-48 (1896).

[90]*Id.* at 555. *See* Smith v. United States, 161 U.S. 88 (1891) (self-defense with pistol).

[91]Patsone v. Pennsylvania, 232 U.S. 138, 143 (1914).

[92]Brown v. United States, 256 U.S. 335, 341 (1921).

[93]*Id.* at 343.

[94]307 U.S. 175 (1939).

[95]*Id.* at 178.

arms,[96] and approvingly cited state cases which found pistols to be protected arms.[97]

While it has not definitively done so with the second amendment, the Supreme Court has, to date, incorporated most other Bill of Rights freedoms into the fourteenth amendment. In a recent construction of that amendment's due process clause, the Court reiterated Justice Harlan's earlier description of "the specific guarantees elsewhere provided in the Constitution," including the freedom of speech, press, and religion; and the right to keep and bear arms.[98] In another case, the Court stated that "a legislature constitutionally may prohibit *a convicted felon* from engaging in activities far more fundamental than the possession of a firearm."[99] Under the *Miller* test,[100] possession of the firearm possessed in that case by a non-felon would have been constitutionally protected.

Even if the Supreme Court has not ruled explicitly on the extent to which the keeping and bearing of handguns may be protected by the second and fourteenth amendments, it has adopted a methodology of interpretation which provides the decisive answer to this query. "It is never to be forgotten that, in the construction of the language of the Constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed the instrument."[101] The Court has not hesitated to re-examine past decisions according the fourteenth amendment a less central role in the preservation of basic liberties that which was contemplated by its Framers when they added the Amendment to our constitutional scheme."[102] Whether the second and fourteenth amendments protect the possession of handguns, and impliedly the rights to

---

[96]*Id.* at 179-82.

[97]*Id.* at 183 n.3. Only three years after *Miller* was decided, the United States War Department distributed B. LEVY, GUERRILLA WARFARE (1942), which referred to "the kind of weapons which a guerilla in civilian clothes can carry without attracting attention . . . First among these is the pistol." *Id.* at 55. *Civilian Defense,* 39 TIME 54 (Mar. 16, 1942) commented: "Anyone who thinks this country might be invaded - which means anyone now alive - would do well to read 'Yank' Levy's *Guerrilla Warfare* for instruction on how to harass invaders." Jewish partisans in Warsaw stated, "our weapons consisted of revolvers." M. BARKAI, THE FIGHTING GHETTOS 30 (1962).

[98]Moore v. East Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion) (quoting Poe v. Ullman, 367 U.S. 497, 542-43 (1961)(Harlan, J., dissenting)).

[99]Lewis v. United States, 445 U.S. 55, 65 (1980).

[100]*Supra* notes 94-97 and accompanying text.

[101]*Ex Parte* Bain, 121 U.S. 1, 12 (1887) (trial on changed indictment void under fifth amendment.) See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), in which Chief Justice Marshall, speaking for the Court, stated that "great weight has always been attached, and very rightly so, to contemporaneous exposition." *Id.* at 418.

[102]Malloy v. Hogan, 378 U.S. 1, 5 (1964).

manufacture and to purchase them, is most appropriately answered by the Framers themselves.

B. The Framer's Intentions that Handgun Ownership and Use be Protected by the Second and Fourteenth Amendments

The right of the populace to have and use firearms for self-protection is a fundamental theme of the English tradition which the colonists transported to America. Keeping handguns for self-defense went unquestioned in England, even by the monarchist Thomas Hobbes. The individual's right to self-preservation is the sum of the law of nature, and thus "when taking a journey, he arms himselfe . . . and this when he knows there bee Laws, and publike Officers, armed, to revenge all injuries shall bee done him . . ."[103] Hobbes no doubt had pistols in mind, due to their convenience over heavy muskets for travel.

The right to have handguns for self-defense was upheld by the King's Bench in 1686 in the case of Sir John Knight, who was charged under the Statute of Northampton[104] after having gone about in public armed with pistols. Sir Edward Coke had explained that the statute was aimed at random deeds of knights, but that "*Armaque in Armatos sumere jura sinunt* [and the laws permit the taking up of arms against armed persons]."[105] The court held that "where the crime shall appear to be *malo animo* [with an evil mind], it will come within the Act (tho' now there be a general connivance to gentlemen to ride armed for their security) . . . ."[106] The defendant was not guilty because he did not go armed with the specific intent "to terrify the King's subjects."[107] While riding armed to commit murder or robbery was felonious,[108] William Hawkins later pointed out "that persons of quality are in no danger of offending against this statute by wearing common weapons . . . ."[109]

While the King's Bench recognized Sir John Knight's right to have pistols for security, his prosecution came about at a time when England's last absolute monarch was seizing firearms

---

[103]T. HOBBES, LEVIATHAN Part 1, ch. 13 at 85 (1651) (F. Randell ed. 1964).

[104]2 Edw. III, ch. 3 (1328).

[105]E. COKE, THIRD INSTITUTE OF THE LAWS OF ENGLAND 160-62 (6th ed. 1680).

[106]Rex v. Knight, 90 Eng. Rep. 330 (K.B. 1686).

[107]Sir John Knight's Case, 87 Eng. Rep. 75, 76 (K.B. 1686). *See* Chune v. Piott, 80 Eng. Rep. 1161, 1162 (K.B. 1616) (Statute of Northampton prohibits carrying weapons "in terrorem populi Regis"); Rex v. Smith, 2 Ir. Rep. 190, 204 (K.B. 1914) (carrying revolver on the highway not under the statute, which requires that the going armed was "in affray of the peace").

[108]H. CARE, ENGLISH LIBERTIES 42 (1680).

[109]1 W. HAWKINS, PLEASE OF THE CROWN ch. 28, § 9 (8th ed. 1824). "[E]very private person seems to be authorized by law to arm himself . . . ." *Id.* at ch. 10, § 14.

of all kinds from the populace in order to consolidate his power.[110] Two years later, at the time of the Glorious Revolution, it appears from their denunciations of James II that members of the House of Commons had had similar experiences. Mr. Boscawen complained: "Imprisoning without reason; disarming. – Himself disarmed."[111] Mr. Sachverel brooded: "No man knows what he can call his own . . . . Disarmed and imprisoned without cause."[112]

The English Parliament proceeded to adopt a Deceleration of Rights which charged that James II subverted the Laws and Liberties of the Kingdom in part "by causing several good Subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and employed, contrary to Law."[113] Thirteen ancient and indubitable rights were then declared, including the following: "that the Subjects which are Protestants, may have Arms for their Defense suitable to their Condition, and as are allowed by Law."[114] To vindicate their absolute rights, Blackstone later wrote, Englishmen were thus entitled to justice in the courts, to petition the king, "and, lastly, to the right of having and using firearms for self-preservation and

---

[110]J. MALCOLM, DISARMED: THE LOSS OF THE RIGHT TO BEAR ARMS IN RESTORATION ENGLAND (1980). *See* City of London Militia Act, 13 & 14 Car. II ch. 3 (1662) (allowed search and seizure of firearms); Act for Better Preservation of Game, 22 Car. II ch. 25 (1670) (property qualification for possession of firearms).

[111]2 MISCELLANEOUS STATE PAPERS FROM 1501-1726 AT 416 (Phillip, Earl of Hardwicke compl. 1778).

[112]*Id.* at 418. Similar comments may be found at 407, 416, and 417.

[113]An Act Declaring the Rights and Liberties of the Subject, 1 W. & M., Sess. 2, ch.2 (1689). The disarming of the Protestants, the overwhelming majority, was the complaint in the Commons draft, while the Lords added the grievance that the Papists were armed as "a further Aggravation fit to be added to this Clause." H. C. JOUR. Dec. 26, 1688-Oct. 26, 1693, at 25 (1742).

[114]An Act Declaring the Rights and Liberties of the Subject, *supra* note 113. The Lords rejected a proposal that the term "common" precede "Defence," clarifying that the right extended to individual and common defense. H. C. JOUR., *supra* note 113.

While Englishmen could have arms "as are allowed by [Common] Law," the qualification "suitable to their condition" allowed game laws which imposed property qualifications on using arms to hunt. 1 BLACKSTONE, *supra* note 74, at 144 n.40. The right to use arms in the United States Constitution exists "without any qualification as to their condition or degree, as in the case of the British government." Even so, the qualification in the English Bill of Rights did not restrict having firearms for self-defense. "But are arms suitable to the condition of people in the ordinary class of life, and are they allowed by law? A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is travelling or going to the ordinary purposes of business." Rex v. Dewhurst, 1 State Trials, New Ser. 529, 601-02 (Eng. Trial Ct. 1820) (Bayley, J., Landcaster, instructions to jury).

defence."[115]

When almost a century later the Americans in Boston began to arm for defense against the government's forces, they did so, in the words of a publication widely distributed in the colonies, as "British subjects, to whom the *privilege* of possessing arms is expressly recognized by the Bill of Rights . . . ."[116] The same publication averred: "It is a natural right which the people have reserved to themselves, confirmed by the Bill of Rights, to keep arms for their own defence; and as Mr. Blackstone observed, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression."[117] Pocket pistols were common weapons of travellers and urban dwellers,[118] and when General Gage held the townspeople of Boston hostage in 1775 and allowed passage from the city only on delivery of arms, on a single day the people delivered to the selectman 1778 muskets, 634 pistols, 973 bayonets, and 38 blunderbussees.[119] Newspapers at the time of the American Revolution were filled with reports of British seizures of pistols and of pistols being sought out to fight the British and for sale to civilians.[120] Pistol manufacture was encouraged by the patriot assemblies.[121]

When the Constitution was proposed in 1787, not a single proponent questioned the

---

[115]1 BLACKSTONE, *supra* note 74, at 144.

> Of the thirteen articles of the Bill of Rights only two contain stipulations that are expressed in the form of the rights of the [individual] subject . . . . The right to address petitions to the kings (5), and the right of Protestant subjects to carry arms for their own defense suitable to their condition (7).

G. JELLINEK, THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS 49 (M. Farrand transl. 1901).

The common law right to keep guns for defense of self and home was upheld in Rex v. Gardner, 87 Eng. Rep. 1240 (K.B. 1739); Wingfield v. Stratford, 95 Eng. Rep. 637 (K.B. 1752).

[116]BOSTON UNDER MILITARY RULE 61 (O. Dickerson ed. 1936).

[117]*Id.* at 79.

[118]G. NEUMANN, HISTORY OF WEAPONS OF THE AMERICAN REVOLUTION 150-51 (1967).

[119]R. FROTHINGHAM, HISTORY OF THE SEIGE OF BOSTON 95 (6th ed. 1903).

[120]*See* 2 L. CAPPON & S. DUFF, VIRGINIA GAZETTE INDEX 1736-80 (1950) (references under "Arms" and "Pistols").

[121]*See, e.g., Bill for Establishing a Manufactory of Arms (1779),* 3 JEFFERSON PAPERS 131-35 (J. Boyd ed. 1951). By 1800, John Adams could state: "Those who recollect the distress and danger to this country in former periods from the want of arms, must exult in the assurance from their representatives, that we shall soon rival foreign countries, not only in the number, but in the quality of arms, completed from our own manufactories." 9 J. ADAMS, WORKS 149 (C. Adams ed. 1854).

individual character of the right to keep and bear arms. John Adams referred to the right of "arms in the hands of citizens, to be used at individual discretion . . . in private self-defence . . . ."[122] In *The Federalist,* James Madison referred to "the advantage of being armed, which the Americans possess over the people of almost every other nation," in contrast with the European kingdoms, where "the governments are afraid to trust the people with arms."[123]

Insisting on a bill of rights, the Constitution's opponents observed that "to preserve liberty, it is essential that the whole body of the people always possess arms."[124] Patrick Henry stated, "The great object is, that every man be armed."[125] Samuel Adams proposed an amendment "that the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United Sates, who are peaceable citizens, form keeping their own arms. . . ."[126]

The result was the proposal by James Madison in 1789 of a bill of rights, including what is now the second amendment. This amendment was incisively espoused ten days after its proposal by Tench Coxe: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms."[127]

From the very beginning the manufacture and sale of pistols and other firearms were as unquestioned as the keeping and bearing thereof. As Jefferson wrote in 1793, "Our citizens have always been free to make, vend and export arms. It is the constant occupations and livelihood of some of them."[128] As President, Jefferson supported the arming of the whole people,[129] and

---

[122]3 J. ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 475 (1787-88).

[123]THE FEDERALIST No. 46, at 321-122 (J. Madison) (J. Cooke ed. 1961).

[124]R. LEE, ADDITIONAL LETTERS FROM THE FEDERAL FRAMER 170 (1788).

[125]3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 386 (1836).

[126]2 B. SCHWARTZ, THE BILL OF RIGHTS 681 (1971).

[127]"A Pennsylvanian," *Remarks on the First Part of the Amendments,* Philadelphia Federal Gazette, June 18, 1789, at 2, col. 1. This article was widely distributed, and its influence was praised by Madison. 12 MADISON PAPERS 257 (Rutland ed. 1979). *See* Halbrook, *To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791,* 10 N. KY. L. REV. 13 (1982).

[128]6 T. JEFFERSON, WRITINGS 252-53 (P. Ford ed. 1895). *See* S. DYKE, THOUGHTS ON THE AMERICAN FLINTLOCK PISTOL 7 (1974).

[129]See, e.g., THE JEFFERSON CYCLOPEDIA 551, 553 (1900); Letter from Coxe to Jefferson (Jan. 1807) and Letter from Jefferson to Coxe (Mar. 17, 1807) (available in United

seemed as intent on their obtaining "pairs of pistols" as on their obtaining rifles. This policy was executed by his Purveyor of Public Supplies, Tench Coxe, who also served in Madison's presidency.[130] In the meantime, antebellum judicial opinions upheld the right to keep and bear pistols under the second amendment.[131] "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of the republic; since it offers a strong moral check against usurpation and arbitrary powers of rulers," opined Justice Story.[132]

There came a time when the growing movement of abolitionists, inspired by the Bill of Right's guarantees to "the people," insisted upon a literal interpretation of that term. Representative John A. Bingham, the draftsman of the fourteenth amendment, was highly influenced by Lysander Spooner's argument: [133]

> This right of a man "to keep and bear arms," is a right palpably inconsistent with the idea of his being a slave . . . .
>
> Under this provision any man has a right either to give or sell arms to those persons whom the States call slaves; and there is not *constitutional* power, in either the national or State governments, that can punish him for so doing; or that can take those arms from the slaves . . . .[134]

While Frederick Douglass noted reports that Blacks were purchasing pistols and revolvers to resist a return to slavery,[135] Republican Party founder Cassius M. Clay averred that " 'the pistol and the Bowie knife' are as sacred as the gown and the pulpit."[136]

At the end of the Civil War, the southern states re-enacted the black codes to prohibit possession of firearms by the freedmen. Harper's Weekly reported of Mississippi: "The militia of this country have seized every gun and pistol found in the hands of the (so called) freedmen of

---

States Library of Congress).

[130]The first directive under a new militia plan in 1807 mandated the purchase of 2000 rifles and 1000 *pairs* of pistols. Coxe, *To the Public*, Philadelphia Democratic Press, Jan 19, 1811, at 2, cols. 2-4. *See id.* Feb. 2, 1811, at 2 (significance of pistols as militia arms).

[131]*E.g.*, Cockrum v. State, 24 Tex 394, 401 (1859); State v. Chandler, 5 La. Ann. 489, 490 (1850); Nunn v. State, 1 Ga. 243, 250 (1846).

[132]3 J. STORY, COMMENTARIES ON THE CONSTITUTION 746 (1833).

[133]J. TENBROEK, EQUAL UNDER LAW 110-13, 126, 146 (1965) (enlarged edition of J. TENBROEK, ANTISLAVERY ORIGINS OF FOURTEENTH AMENDMENT (1951), a work cited with approval in Lynch v. Household Finance Corp., 405 U.S. 538, 544 (1972)).

[134]L. SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY 98 (1860).

[135]2 F. DOUGLASS, LIFE AND WRITINGS 420 (P. Foner ed. 1950).

[136]THE WRITINGS OF CASSIUS MARCELLUS CLAY 257 (1848).

this section of the country."[137] Representative Sidney Clarke decried this situation as follows:

> Sir, I find in the Constitution of the United States an Article which declares that "the right of the people to keep and bear arms shall not be infringed." For myself, I shall insist that the reconstructed rebels of Mississippi respect the Constitution in their local laws . . . .[138]

After repeated reports of the disarming and murder of freemdmen, and assertions that freedmen were entitled to have arms and to other civil rights,[139] Congress proposed the fourteenth amendment. In introducing the amendment to the Senate, Senator Jacob M. Howard referred to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms . . . ."[140] The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[141] These words were widely printed throughout the United States.[142]

That the fourteenth amendment protects the individual right to have firearms was repeatedly clarified in debates over the Civil Rights Act of 1871, today's 42 U.S.C. § 1983. The draftsman of that amendment, Representative John. A Bingham, after reciting the first eight amendments, stated: "These eight articles I have shown never were limitations upon the power of

---

[137]Harper's Weekly, Jan. 13, 1866, at 3, col. 2.

[138]CONG. GLOBE, 39th Cong., 1st Sess. 1838 (Apr. 7, 1866). Clark also criticized an 1866 Alabama law which provided that "it shall not be lawful for any freedman, mulatto, or free person of color in this State, to own firearms, or carry about his person a pistol or other deadly weapon." *Id.*

[139]For a detailed summary, see Halbrook, *The Fourteenth Amendment and The Right to Keep and Bear Arms: The Intent of the Framers, in* THE RIGHT TO KEEP AND BEAR ARMS: REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION TO THE SENATE COMMITTEE ON THE JUDICIARY, U.S. SENATE, 97TH CONG., 2D SESS. 68-82 (1982).

[140]CONG. GLOBE, 39th Cong., 1st Sess. 2765 (May 23, 1866). These words are cited as approved authority in Duncan v. Louisiana, 391 U.S. 145, 166-67 (1968) (Black, J., concurring).

[141]CONG. GLOBE, 39th Cong., 1st Sess. 2766 (May 23, 1866). *See* H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 80, 94-96 (1908) (fourteenth amendment intended to make Bill of Rights, including bearing arms, applicable to States). These pages of Flack's article are cited as authority in Lynch v. Household Finance Corp., 405 U.S. 538, 544 (1972).

[142]New York Times, May 24, 1866, at 1, col. 6; New York Herald, May 24, 1866, at 1, col. 3; National Intelligencer (Washington, D.C.), May 24, 1866, at 3, col. 2; Philadelphia Inquirer, May 24, 1866, at 8 col. 2.

the States, until made so by the fourteenth amendment." [143] Representative John Coburn declared: "How much more oppressive is the passage of a law that they shall not bear arms than practical seizure of all arms from the hands of the colored men?"[144] Representative Henry L. Dawes rejoined that the fourteenth amendment "has secured to [the American citizen, including freedmen] the right to keep and bear arms in his defense . . . ."[145] An opponent of the bill, Representative Washington C. Whitthorne warned that "if a police officer of the city of Richmond or New York should find a drunken negro or white man upon the streets with a loaded pistol flourishing it, [et cetera], and by virtue of any ordinance, law, or usage, either of city or State, he takes it away, the officer may be sued, because the right to bear arms is secured by the Constitution . . . ."[146]

None of these explanations were disputed,[147] and each of these above quoted speeches have recently been cited by the Supreme Court as authoritative.[148]

It is clear that the framers of the fourteenth amendment and subsequent enforcement legislation intended that the right of the freedmen, and of all citizens, to keep and bear arms could not longer be infringed by the states. It is further clear that the arms which the southern states and Klansmen were seizing from freedmen included both long guns and pistols.[149] Thus, insofar as the intent of the framers of a constitutional amendment is controlling, the history of the fourteenth amendment would seem to imply that the states may not infringe on a citizen's keeping of a handgun. Should its intended meaning be followed, the fourteenth amendment would appear to invalidate a handgun ban based on adoption by a state of strict tort liability for handgun ownership, distribution, or manufacture.

---

[143]CONG. GLOBE, 42nd Cong., 1st Sess. app. 84 (Mar. 31, 1871).

[144]*Id.* at 459 (Apr. 4, 1871).

[145]*Id.* at 475-76 (Apr. 5, 1871).

[146]*Id.* at 337 (Mar. 29, 1871). Of course, the intent was to protect keeping and bearing, not brandishing, of pistols and long guns.

[147]Lack of any dispute to Bingham's explanations was a controlling circumstance in Jones v. Mayer, 392 U.S. 409, 424 n.31 (1968): "When Congressman Bingham of Ohio spoke of the Civil Rights Act, he charged . . . that it would extend the territorial reach of that bill throughout the United States . . . . [N]obody who rose to answer the Congressman disputed his basic premise . . . ."

[148]Patsy v. Board of Regents, 457 U.S. 496 (1982) (quoting Bingham, Coburn, Dawes, Whitthorne); Monell v. Dept. of Social Services, 436 U.S. 658, 665 (1978) (quoting Bingham).

[149]9 REPORT OF THE JOINT SELECT COMMITTEE ON THE CONDITION OF AFFAIRS IN THE LATE INSURRECTIONARY STATES, 42d CONG. 2D SESS. 1233 (Feb. 19, 1872).

CONCLUSION: UTILITARIAN CONSIDERATIONS

No court of record in the United States has ever held anyone liable for the mere manufacture, sale, or ownership of a handgun used by a third part to injure another. While an owner or dealer may be negligent in entrusting or selling a handgun to a known minor or violent felon where injury may be reasonably foreseen, liability has never been imposed absent such special circumstances. A manufacturer may be held strictly liable for a defective handgun which causes injury through accidental discharge, but no such liability can stem from a handgun that is without defect. The purpose of existing tort law is to enable members of the general public to enjoy the use of safe and reliable handguns, not to deprive them of that use.

Further, the proposed theory that principles of strict liability or negligence per se shall be applied in the contrary to constitutional limitations on tort law. Like the first amendment, the second amendment (both in conjunction with the fourteenth), according to the ruling of the United States Supreme Court and the intent of the respective framers, protects from infringement the right to have handguns. Adoption of a rule of tort law which would make it financially impossible to manufacture, sell, or own handguns would create an environment in which the constitutional right could not survive.

A constitutionally protected right has social utility as a matter of law,[150] and the utility of a handgun owned by a common citizen is no more of a jury question than is the utility of the doctrines of atheists or Jehovah's Witnesses. Legal considerations aside, the handgun is nothing more than a product of evolving technology prompted by man's natural quest for those tools known as arms. While all other animals are born with defensive weapons which they cannot remove, humans are born with the capacity for reason and the physical ability to make tools, enabling them to produce more versatile arms to protect themselves.[151]

---

[150]This is as applicable to the products liability area as to any other. "*Public policy* at a given time *finds expression in the Constitution,* the statutory law and in judicial decisions." Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 384, 161 A.2d 69, 95 (1960) (emphasis added). Unlike handguns, high-lift loaders may not be constitutionally protected, and thus Barker v. Lull Eng'g Co., 20 CA. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) may not be applicable to the firearms issue. Also, the *Barker* test of whether "the benefits of the challenged design do not outweigh the risk of danger inherent in such design," if applicable, would relate only to "alternative designs" of handguns. *Id.* at 417, 573 P.2d at 457, 143 Cal. Rptr. At 239. The issue would be, for instance, whether single action revolvers should have a transfer bar to prevent misfires, not whether all handguns are *per se* defectively designed. There is no design defect where a product will "safely do the jobs for which it was built." Greenman v. Yuba Power Prods., Inc., 59 Ca. 2d 578, 59, 377 P.2d 897, 899, 27 Cal. Rptr. 597, 599 (1962).

[151]ARISTOTLE, PARTS OF ANIMALS 373 (A. Peck transl. 1961), states: "All the other animals . . . can never take off this defensive equipment of theirs, nor can they change their weapon, whatever it may be. For man, on the other hand, many means of defence are available, . . . and above all he can choose what weapon he will have and where." *See also* 1 GALEN, ON THE USEFULNESS OF THE PARTS OF THE BODY 68-69 (M. May transl. 1968): "But a

The invention of a wheel lock device conceived of by Leonardo da Vinci almost exactly five hundred years ago rendered obsolete the need to ignite firearms by slow burning matches. For the first time concealable firearms became practical, for they could be loaded and primed, then placed in drawers, pockets, or saddlebags, ready for instant use in battle, against robbers, or while hunting. Ever since the invention of the wheel lock, members of the general public have expressed their perception of the utility of handguns by continuing to purchase and keep them.[152]

Attacking handguns on utilitarian grounds is by no means new. Beccaria, the father of penal reform, undoubtedly had flintlock pocket pistols in mind when in 1764 he responded to such critics in one of Jefferson's favorite passages:[153]

> False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes . . . . Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man.[154]

The strategy of banning handguns, particularly their possession by the poorer classes, by

---

man's weapons are effective at a distance as well as near by, javelins and darts excelling horns, and rocks and clubs excelling hoof. . . . Such is the hand of man as an instrument of defense." *Accord,* 1 H. GROTIUS, ON THE LAW OF WAR AND PEACE 32-37, 198-99 (1625) (W. Whewell transl. 1853).

It is more likely that an animal will injure itself with its own weapon than use it for defense against a predator, resistance to which increases likelihood of harm? Do their ready accessibility for instant use make an animal's weapons unreasonably likely to injure its owner by accident or suicide, its mate in a domestic quarrel, or fellow pack members? Would it be more humane to limit possession of horns, claws, and teeth to a small number of each species which would disinterestedly protect the inferior members? The new theory would perhaps inspire an additional chapter for Orwell's Animal Farm.

[152] On the invention, evolution, and possession by the public of handguns, see I. HART, THE WORLD OF LEONARDO DA VINCI 291-92 (1961); I. HOGG, FIREARMS 14-17 (1978); R. HELD, THE AGE OF FIREARMS 47-55, 90-97 (1957); F. MYATT, PISTOLS AND REVOLVERS 27, 45 (1980).

[153]Jefferson copied the passage in full in his book COMMON PLACE BOOK 316 (G. Chinard ed. 1926).

[154]C. BECCARIA, ON CRIMES AND PUNISHMENT ch. 38 at 87-88 (1764) (H. Paolucci transl. 1963). *See* 2 C. MONTESQUIEU, THE SPIRIT OF THE LAWS XXVI:24 79-80 (1748) (T. Nugent transl. 1899). Beccaria's influence on the second and eighth amendments is clear.

making them too expensive to own is not new. Today's proposal that the tort law be used to effect this purpose parallels a similar strategy urged by Virginia's most prestigious law review in 1909:

> There would be a very decided falling off of killings "in the heat of passion" if a prohibitive tax were laid on the privilege of handling and disposing of revolvers and other small arms . . . . Let a negro board a railroad train with a quart of mean whiskey and pistol in his grip and the chances are that there will be a murder, or at least a row, before he alights.[155]

Given the utter impossibility of expecting a police force with a monopoly on legal handguns to protect every citizen at all times and places from attack,[156] members of the general public will continue to own handguns.[157] Pistols and revolvers are part and parcel of the many useful tools which characterize modern technological development.[158] The recent "discovery"

---

[155] Editorial, *Carrying Concealed Weapons*, 15 VA. L. REG. 391 (1909). The editor was perhaps a prohibitionist in more than one respect, adding, "we all know that the section of the Byrd law forbidding drinking on railroad trains is so far a dead letter, that it would hardly prevent this aforesaid son of Ham from consuming most of the quart even on the cars in this state." *Id.* at 392.

[156] Indeed, the police have a duty to protect only the holistic "public at large," not any specific person. Warren v. District of Columbia, 444 A.2d 1, 2-3 (D.C. App. 1981) (negligent police not liable to women "held captive, raped, robbed, beaten, forced to commit sexual acts . . . ." *Id.*). However, negligent failure to issue handgun permit may create liability. *See* Nunn v. State of California, 137 Cal. App. 3d 790, 187 Cal. Rptr. 315 (1982).

[157] At most strict liability would create an underground industry and market which would be controlled by organized crime and leave no recourse for the truly defective firearms which would be produced. Moreover owners could be expected to carry their handguns at all times rather than risk burglary and subsequent liability.

[158] The utilitarian-technological status of the handgun was well stated in Fuller v. Berger, 120 F. 274, 275-76 (7th Cir. 1903), *cert. denied.* 193 U.S. 668-69 (1904) (quoting at length A. WALKER, TEXT-BOOK OF THE PATENT LAWS § 82 (3d ed. 1904)). The material quoted by the *Fuller* court was reprinted recently in *In Re* Anthony, 414 F.2d 1383, 1396 n.12 (C.C.P.A. 1969) (emphasis and bracketed material added by the *Anthony* court):

> [T]he revolver, by furnishing a ready means of self-defense, may sometimes have promoted morals and health and good order. By what test, therefore, is utility to be determined in such cases? Is it to be done by balancing the good functions with the evil functions? *Or is everything useful within the meaning of the law, if it is used (or is designed and adapted to be used) to accomplish a good result, though in fact it is oftener used (or is as well or even better adapted to be used) to accomplish a bad one?* Or is utility negatived by the mere fact that the thing in question is sometimes injurious to morals, or to health, or to good order? The third hypothesis cannot stand, because if it

that this tool, used by the public for the last half millennium, has an unreasonably dangerous design and should not be entrusted to common citizens appears to be a far belated form of Luddism.[159]

---

could, it would be fatal to patents for steam engines, dynamos, electric railroads, and indeed many of the noblest inventions of the nineteenth century. [And what of such things as automobiles, airplanes, tires, power tools, explosives, lawn mowers, and drugs in the twentieth century?] The first hypothesis cannot stand, because if it could, it would make the validity of the patents depend on a question of fact to which it would be impossible to give a reliable answer. *The second hypothesis is the only one which is consistent with the reason of the case, and with the practical construction which the courts have given to the statutory requirement of utility.*

[159] The Luddites were a group of British workmen who, fearing progress, attempted to prevent the use of labor-saving machinery by destroying it.