

# THE *SULLIVAN PRINCIPLES*: PROTECTING THE SECOND AMENDMENT FROM CIVIL ABUSE

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## I. Introduction

Abusive civil litigation can infringe upon the exercise of Constitutional rights. As a result, the Supreme Court, in *New York Times Co. v. Sullivan*, sharply curbed the availability of civil tort remedies for libel cases.<sup>1</sup> The press, the major "industry" which supplies products, such as newspapers and television broadcasts allowing for the exercise of First Amendment rights, was granted a special immunity from tort liability.

While many decisions from the Warren Court continue to provoke sharp disagreement, *New York Times Co. v. Sullivan* is not one of them. Although reaching out sharply to restrict a common law tort remedy that had existed for many centuries was certainly a radical step for the Court, few people today deny that *New York Times Co. v. Sullivan* was correctly decided. "The Sullivan Principles" is the name given to the principles which allow the Supreme Court and lower courts to impose restrictions on traditional torts to protect Constitutional rights.<sup>2</sup>

In this article, we argue that the Sullivan principles should apply to all Constitutional rights. In particular, we argue that the *Sullivan Principles* should be extended to the Second Amendment. In these authors' opinion, the right to keep and bear arms is, like the right to freedom of the press, entitled to judicial protection from abusive common law tort suits which threaten the exercise of our Second Amendment right.

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<sup>1</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>2</sup> The original *Sullivan Principles* were a code of ethical conduct for foreign businesses operating in South Africa. The principles set forth various rules of non-discrimination and fairness.

In Part Two of this article, we detail the precedents which suggest that Second Amendment rights are entitled to civil protections analogous to the protections given to First Amendment rights. In Part Three, we illustrate how the Second Amendment is under a concerted assault, designed to achieve through illegitimate litigation, what cannot be achieved democratically through legislation. We analyze the various legal rationales which have been offered to justify this litigation. In Part Four, we suggest that the harm currently being inflicted on the Second Amendment by lawsuits is as significant as the harm to the First Amendment which provoked the Court to take protective action in *New York Times Co. v. Sullivan*. Part Five provides the various remedies to protect Second Amendment rights.

Although the discussion in this article focusses on the Second Amendment, similar analysis can be applied to other Constitutional rights. For example, some abortion providers claim that they are the subject of repeated vexatious lawsuits, not grounded in sound legal doctrine, by anti-abortion attorneys.<sup>3</sup> In such cases, the same remedies discussed below for the Second Amendment should also be available for the Ninth/Fourteenth Amendment abortion right, or any other individual right guaranteed by the Constitution.

## II. *The First and Second Amendments*

Before attempting to extend the *Sullivan Principles* to the Second Amendment, it is first necessary to determine the parallels between the First and Second Amendments.

### A. *The Right to Arms*

The proponents of lawsuits aimed at driving gun manufacturers out of business generally deny that people have any right at all to keep and bear arms. They argue that the Second Amendment "right of the people to keep and bear arms" is a right which is "granted" solely to state government to maintain uniformed, select militias, not individuals. The argument is not seriously offered as a theory of what the Second Amendment *does* mean, but rather is a rhetorical objection to recognizing a Second Amendment right

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<sup>3</sup> Tamar Lewin, *Latest tactic against abortion: Accusing doctors of malpractice*, N.Y. TIMES, Apr. 9, 1995, at 2.

that belongs to people. If the "state's rights-only" argument of the Second Amendment were to be followed to its logical conclusion, then state governments have a right to maintain military organizations independent from the federal military, and to arm those organizations with nuclear weapons or whatever else the state may choose. Moreover, the Supreme Court decisions recognizing that the federal government has final authority over the deployment and use of the National Guard<sup>4</sup> must be incorrect.<sup>5</sup>

Fortunately, policy makers and courts need not worry about the disturbing implications of the right to keep and bear arms being a state's right rather than a human right. The Supreme Court and legal scholars appear to have spoken to the contrary.

To state the obvious, the Second Amendment refers to a right of "the people," just as the First Amendment right to assemble and the Fourth Amendment right to freedom from unreasonable searches also refer to "the people." In the 1990 case *United States v. Verdugo-Urquidez*, Chief Justice Rehnquist's majority opinion observed:

'The people' seems to have been a term of art employed in select parts of the Constitution. . . . The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to 'the people'. . . . While this textual exegesis is by no means conclusive, it suggests that 'the people' protected. . . . by the First and Second Amendments. . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.<sup>6</sup>

This decision of the Court reversed a split decision by the Ninth Circuit, thereby upholding the dissenting views of Circuit Judge Wallace, who stated:

The name of "the people" is specifically invoked in the first, sec-

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<sup>4</sup> *E.g.*, *Perpich v. Department of Defense*, 496 U.S. 334 (1990).

<sup>5</sup> Glenn Harlan Reynolds and Don B. Kates, *The Second Amendment and States' Rights: A Thought Experiment*, 36 WM. & MARY L. REV. (1995).

<sup>6</sup> 494 U.S. 259, 265 (1990). The *Verdugo* opinion concluded that a Mexican citizen in Mexico City could not complain he was unreasonably searched by American drug agents. Justice Brennan's dissent did not disagree that "the people" included all Americans; he would have read the Fourth Amendment more broadly to also control United States' government actions against foreign nationals in foreign countries. *Id.* at 382-84 (Brennan, J., dissenting).

ond, ninth, and tenth amendments. Presumably, "the people" identified in each amendment is coextensive with "the people" cited in the above amendments.<sup>7</sup>

Unless one is prepared to argue that the First Amendment "right of the people peaceably to assemble" protects only National Guard meetings, and the Fourth Amendment "right of the people" to freedom from unreasonable searches guarantees only the security of National Guard footlockers, it is impossible to coherently maintain that the Second Amendment "right of the people" belongs to the National Guard or the states, rather than to the people, as discussed by Justice Rehnquist and Justice Wallace.

In the 1992 *Planned Parenthood v. Casey* decision, the Court again recognized that individual Americans have a right to arms. In discussing the scope of the 14th Amendment's due process clause, which of course protects individuals, not states or National Guard unit, Justice O'Connor's majority opinion explained that the scope of the due process clause is not limited to "the precise terms of the *specific guarantees elsewhere provided in the Constitution*. . . [such as] the freedom of speech, press, and religion; *the right to keep and bear arms*. . . ."<sup>8</sup>

The most thorough analysis in the Supreme Court's rather limited set of Second Amendment cases is *United States v. Miller*. In that case, a bootlegger named Jack Miller had been caught in possession of a sawed-off shotgun, without having registered it or paid the required federal tax.<sup>9</sup> The district court dismissed the charges against Miller because the court found the registration and tax law to violate the Second Amendment.<sup>10</sup>

When the Supreme Court received the case, the Court should have dismissed Miller's Second Amendment claim for lack of standing if the state's rights/National Guard theory of the Second Amendment were shared by the Court. After all, Miller never claimed that he was a member of the National Guard. But instead, the Court considered Miller's claim, and remanded the case for further inquiry on whether the particular weapon was a militia-type weapon.<sup>11</sup>

What was the "well-regulated Militia" referred to in the Second

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<sup>7</sup> *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1239 (9th Cir. 1988).

<sup>8</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (emphasis added).

<sup>9</sup> National Firearms Act, 26 U.S.C. § 1132 (1989).

<sup>10</sup> *United States v. Miller*, 26 F. Supp. 1002, *rev'd*, 307 U.S. 174 (1939).

<sup>11</sup> *United States v. Miller*, 307 U.S. 174 (1939). Miller, meanwhile, had absconded pending appeal, and presented no argument to the Court. *Id.* at 175.

Amendment? According to the Court, "the Militia comprised all males physically capable of acting in concert for the common defense."<sup>12</sup> And were militia weapons owned by the government? To the contrary, "ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."<sup>13</sup>

The Supreme Court's jurisprudence on the subject is consistent with legal scholarship. While the legal academy may be divided in regard to the constitutionality of particular gun control, there are few subjects on which legal scholarship is as unanimous as the original intent of the Second Amendment. There is not a professor of law in the United States in the last twenty-five years who has signed his name to a law journal article asserting that the Second Amendment was *not* intended to recognize an individual right. The nearly unanimous conclusion of all scholarship is that the Second Amendment was intended to guarantee a right to arms of individual people.<sup>14</sup>

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<sup>12</sup> *Id.* at 179.

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., 4 *Encyclopedia of the American Constitution* 1639-40 (Karst & Levi eds., 1986); E. FONER AND J. GARRITY, *READER'S COMPANION TO AMERICAN HISTORY* 477-78 (N.Y.: Houghton Mifflin, 1991) (entry on "Guns and Gun Control"); STEPHEN HALBROOK, *A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES* (1989); LEONARD LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 341 (1988); JOYCE MALCOLM, *THE RIGHT TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (Cambridge: Harvard U. Press, 1994); OXFORD COMPANION TO THE UNITED STATES SUPREME COURT (Oxford U. Press, 1992) (entry on the Second Amendment); SENATE SUBCOMM. ON THE CONSTITUTION OF THE COMM. ON THE JUDICIARY, 97th CONG., 2D SESS., *THE RIGHT TO KEEP AND BEAR ARMS* (1982); Akhil Amar, *The Bill of Rights and Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1164 (1991); David Caplan, *The Right of the Individual to Bear Arms*, 1982 DET. COLL. L. REV. 789 (1982); Robert J. Cottrol & Raymond T. Diamond, *Public Safety and the Right to Bear Arms*, in D. Bodenhamer and J. Ely, *AFTER 200 YEARS: THE BILL OF RIGHTS IN MODERN AMERICA* (Ind. U. Press, 1993); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEORGETOWN L.J. 309 (1991); Robert Dowlut, *The Current Relevancy of Keeping and Bearing Arms*, 15 U. BALT. L. REV. 32 (1984); Robert Dowlut, *The Right to Arms*, 36 OKLA. L. REV. 65 (1983); Richard Gardiner, *To Preserve Liberty: A Look at the Right to Keep and Bear Arms*, 10 N. KY. L. REV. 63 (1982); Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militaries, and the Second Amendment*, 26 VAL. U. L. REV. 131 (1991); Stephen Halbrook, *Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment*, 15 DAYTON L. REV. 91 (1989); David Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & POL'Y 1 (1987); David Hardy, *Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment*, 9 HARV. J.L. & PUB. POL'Y 559 (1986); Don Kates, *The Second Amendment and the Ideology of Self-Protection*, 9 CONST. COMM. 87 (1992); Don Kates, *A Dialogue on the Right to Keep and*

Putting aside the Second Amendment of the United States Constitution, all but a few state Constitutions guarantee an individual right to keep and bear arms.<sup>15</sup> Thus, the right to keep and bear arms,

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*Bear Arms* 49 LAW & CONTEMP. PROBS. 143 (1986); Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 244-52 (1983); Nelson Lund, *The Second Amendment, Political Liberty and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); Levin, *Grass Roots Voices: Local Action and National Military Policy*, 40 BUFFALO L. REV. 321, 346-7 (1992); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L. J. 637 (1989); Joyce Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Perspective*, 10 HAST. CONST. L.Q. 285 (1983); William Marina, *Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective* in FIREARMS AND VIOLENCE: ISSUES OF PUBLIC POLICY (Don Kates, ed., 1984); Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 328 (1991); Glenn Harlan Reynolds, *The Right to Keep and Bear Arms Under the Tennessee Constitution*, 61 TENN. L. REV. 647 (1994) (extensively discussing the Second Amendment in relation to the Tennessee Constitution); Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and The Right to Bear Arms*, 139 U. PENN. L. REV. 1257 (1991); Robert Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125 (1986); Robert Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); David Vandercoy, *The History of the Second Amendment*, 28 VAL U. L. REV. 1006 (1994); Cottrol and Diamond, *"The Fifth Auxiliary Right,"* 104 YALE L.J. 995 (1994); Fussner, Essay Review, 3 CONSTITUTIONAL COMMENTARY 582 (1986); Malcolm, Essay Review, 54 GEO. WASH. U. L. REV. 582 (1986); Cantrell, *The Right to Bear Arms*, 53 WIS. BAR B. 21 (1980). Cf. Nicholas J. Johnson, *Beyond the Second Amendment: An Individual Right to Arms Viewed through the Ninth Amendment*, 24 RUTGERS L.J. 1 (1992); John Schoon Yoo, *"Our Declaratory Ninth Amendment,"* 42 EMORY L. J. 967 (1993).

Cf. also David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991) (individual right was intended, but since state governments have neglected their duties to promote responsible gun use through drill in a "well-regulated militia," the right to arms is no longer valid); Donald L. Beschle, *Reconsidering the Second Amendment: Constitutional Protection for a Right of Security*, 9 HAMLINE L. REV. 69 (1986) (amendment was intended to guarantee an individual right of personal security, but the right can be protected by confiscating all guns).

But see Lawrence Cress, *An Armed Community: The Origins and Meaning of the right to Bear Arms*, 71 J. AM. HIS. 22 (1983); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?* 15 DAYTON L. REV. 5 (1989); Samuel Fields, *Guns, Crime and the Negligent Gun Owner*, 10 N. KY. L. REV. (1982); Dennis A. Henigan, *Arms, Anarchy and the Second Amendment*, 26 VAL. U.L. REV. 107 (1991). Warren Spannaus, *State Firearms Regulation and the Second Amendment*, 6 HAMLINE L. REV. 383 (1983).

We recognize, of course, that former Chief Justice Burger appears in advertisements for anti-gun organizations and claims that the Second Amendment is not an individual right, but sound-bites from retired judges are not legal authority. Supreme Court case law and legal scholarship are more important than angry soundbites.

<sup>15</sup> Forty-three state constitutions include their own right to bear arms provision. See generally, Robert Dowlut, *State Constitutional Rights to Bear Arms: Traditional Interpretation*

like the freedom of speech and the press, is an enumerated Constitutional right entitled to judicial protection.

B. *Applying First Amendment Principles to the Second Amendment*

Even if there is an individual right to arms, should it be entitled to the same kind of energetic judicial protection as the First Amendment? Arguably not, since some Supreme Court precedent grant the First Amendment a litigation privilege which is denied all other rights.<sup>16</sup>

On the other hand, of the entire Bill of Rights, only the First, Second, and Third Amendments guarantee particular substantive rights.<sup>17</sup> Amendments Four through Eight are due process requirements for the government to obey, while Amendments Nine and Ten are non-specific reservations of rights.

The Court has held that one Constitutional guarantee is not to be treated differently than another: "As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. . . To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution."<sup>18</sup> And, of course, all Constitutional rights must be broadly construed.<sup>19</sup>

The Supreme Court has repeatedly discussed the First and

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*and Public Housing*, 5 ST. THOMAS L. REV. 203 (1992); Robert Dowlut & Janet Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY L. REV. 177 (1982).

<sup>16</sup> *Flast v. Cohen*, 392 U.S. 83 (1968) (discussing taxpayer standing).

<sup>17</sup> Amendment I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

Amendment II: "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." U.S. CONST. amend. II.

Amendment III: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

<sup>18</sup> *Ullmann v. United States*, 350 U.S. 422, 428 (1956); *see also* *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 484 (1982): Each establishes a norm of conduct which the Federal Government is bound to honor—to no greater or less extent than any other inscribed in the Constitution. Moreover, we know of no principled basis on which to create a hierarchy of Constitutional values. . . ." *Valley Forge*, 350 U.S. at 428.

<sup>19</sup> *E.g.*, *Byars v. United States*, 273 U.S. 28, 32 (1927); *Fairbank v. United States*, 181 U.S. 283 (1901).

Second Amendments in terms suggesting similar principles apply to both. In the 19th century case *United States v. Cruikshank*, the Court opined that the right to assembly and the right to arms are found "wherever civilization exists."<sup>20</sup>

In *Konigsberg v. State Bar of California*, the Court rejected Justice

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<sup>20</sup> *United States v. Cruikshank*, 92 U.S. 542, 551-53 (1875). In the 1872 elections in Louisiana, two separate governments—one Unionist and one racist declared themselves the winner and the official government of the state. In the town of Colfax, armed Blacks occupied the courthouse and the surrounding district to assert the legitimacy of their side's control of the local government. A rioting band of white farmers attacked the courthouse, burned it to the ground, and murdered Blacks who tried to escape the flames. William Cruikshank and other leaders of the riot were tried in federal district court for violating federal civil rights ordinances. Under the federal Enforcement Acts, Cruikshank was found guilty of conspiring to deprive the Blacks of the rights they had been granted by the Constitution, including the right peaceably to assemble and the right to bear arms. GEORGE C. RABLE, *BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION* 125-29 (Athens: Univ. of Ga. Pr., 1984); 16 Stat. 140 § 6 (1870) (Enforcement Acts).

The *Cruikshank* case forced the United States Supreme Court to squarely address the issue of whether the enumerated provisions of the Bill of Rights, particularly the Second and Fourth Amendments, were made enforceable against the states by the Fourteenth Amendment and the Congressional laws enacted pursuant to the Amendment. In *United States v. Cruikshank*, a divided Supreme Court held the Enforcement Acts unconstitutional. The Fourteenth Amendment, the Court acknowledged, did give Congress the power to prevent State interference with rights granted by the Constitution. The right to assemble and the right to bear arms, however, were found not to be rights conferred by the Constitution. Those rights pre-dated the Constitution; the Constitution merely recognized the validity of those already existing natural human rights. Hence, the Fourteenth Amendment gave Congress no authority to prevent infringements of the right to assemble and the right to bear arms. The Court also ruled that the Fourteenth Amendment only allowed Congress to legislate against state interference "with fundamental rights, which belong to every citizen as a member of society" and with "equality of the rights of citizens. . . ." *Id.* at 555.

As a matter of interpreting the First and Second Amendments, the Court was plainly correct in recognizing that the authors of those amendments did believe the right peaceably to assemble and the right to bear arms to be pre-existing fundamental human rights. The Court's analysis of the Fourteenth Amendment, however, was a (perhaps deliberate) misinterpretation of what the authors of that amendment had intended. The Amendment was plainly intended to protect a core set of fundamental human rights (such as the right to bear arms, the right to assemble, the right to contract) most of which pre-dated the Constitution. Rights that were actually created by the Constitution (such as the right to interstate travel) were not the focus of the Fourteenth Amendment. Stephen P. Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms": Visions of the Framers and the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341 (1995). Robert Palmer suggests that "*United States v. Cruikshank* accomplished the nullification of the fourteenth amendment that scholars traditionally attribute to *Slaughter-House*." Palmer argues that Justice Waite's opinion in *Cruikshank* misread *Slaughter-House*, and wrongly assumed that state and federal privileges and immunities were absolutely distinct. Robert C. Palmer, *The Parameters of*



Black's absolutist approach to Constitutional interpretation. The Court noted that the First Amendment on its face was absolute, and the Second Amendment contained an "equally unqualified command." Nevertheless, both Amendments were subject to reasonable limitations.<sup>21</sup> As discussed above, in the 1990 *Verdugo-Urquidez* case and the 1992 *Casey* case the Court again observed the similarity of the First and Second Amendments. Further, freedom of speech and the press and the right to keep and bear arms must both be fundamental rights, since they are rights "explicitly or implicitly guaranteed by the Constitution."<sup>22</sup>

The commentators on whom the Court relied on in *New York Times Co. v. Sullivan* to protect the First Amendment from infringement by tort were also great friends of the Second Amendment. One such commentator was St. George Tucker, author of the widely-used American edition Blackstone. St. George Tucker was also law professor at William and Mary, a Justice of Virginia's highest court, and a federal district judge. In *Sullivan*, Justice Black's concurring opinion pointed out that for a quarter of a century, Tucker was the legal commentator most often cited by the United States Supreme Court.<sup>23</sup> Justice Black quoted Tucker's Blackstone at length:

But I doubt 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

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*Constitutional Reconstruction: Slaughter-House, Cruikshank, and the Fourteenth Amendment*, 1984 UNIV. OF ILL. L. REV. 739 (1984).

*Cruikshank* was overruled by implication by *DeJonge v. Oregon*, which held, contrary to *Cruikshank*, that the right peaceably to assemble was guaranteed by the Fourteenth Amendment. 299 U.S. 353 (1937). Because *Cruikshank* had applied identical reasoning to find that the First Amendment (assembly) and Second Amendment (arms) were not protected by the Fourteenth Amendment, there is no reason for *Cruikshank* to be considered good law today with regard to the Fourteenth Amendment's protection of the right to bear arms.

<sup>21</sup> 363 U.S. 36, 51 n. 24 (1961).

<sup>22</sup> *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973).

<sup>23</sup> *Sullivan*, 376 U.S. at 296-97 (Black, J., concurring).

those who may advise or execute it.<sup>24</sup>

In the St. George Tucker edition of Blackstone which Justice Black quoted, Tucker, just a few pages later, wrote:

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 or pretext whatsoever*, prohibited, liberty, if not already annihilated, is on the brink of destruction.<sup>25</sup>

Justice Louis Brandeis,<sup>26</sup> Professor Thomas Cooley,<sup>27</sup> Thomas Jefferson,<sup>28</sup> and James Madison,<sup>29</sup> were also cited as authority in the *Sullivan* opinion; they too had strong opinions about the moral importance of armed self-defense and the right to arms.<sup>30</sup>

<sup>24</sup> *Id.* at 297. (citing William Blackstone, Commentaries 297 (Tucker ed. 1803) (editor's appendix) (hereinafter *Tucker's Blackstone*)).

<sup>25</sup> *Tucker's Blackstone*, *supra* note 24, at 300 (emphasis added).

<sup>26</sup> 376 U.S. at 270 (Brandeis).

<sup>27</sup> *Id.* at 276.

<sup>28</sup> *Id.* at 274, 276.

<sup>29</sup> *Id.* at 271, 274-77, 282.

<sup>30</sup> Thomas Jefferson's model constitution for Virginia declared, "No freeman shall be debarred the use of arms in his own lands or tenements." Thomas Jefferson, *The Virginia Constitution, Third Draft*, THE PAPERS OF THOMAS JEFFERSON, VOL. I 1760-76 363 (Princeton: Princeton University Press, 1950).

James Madison spoke of "the advantage of being armed, which the Americans possess over the people of almost every other nation," and contrasted America with the kingdoms of Europe, whose "governments are afraid to trust the people with arms." Madison predicted that if the European peasantry were armed, and rebellious local governments (like American states) existed, "the throne of every tyranny in Europe would be speedily overturned." THE FEDERALIST, No. 46 (James Madison).

Justice Louis Brandeis wrote: "We shall have lost something vital and beyond price on the day when the state denies us the right to resort to force. . . ." A. LIEF, THE BRANDEIS GUIDE TO THE MODERN WORLD, 212.

University of Michigan Professor Thomas Cooley, the leading authority on Constitutional law in the late 19th century, explained the Second Amendment in his Constitutional law treatise:

The right declared was meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation.

The Right is General—It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. . . But the law may make provision for the enrollment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check.

*New York Times Co. v. Sullivan* drew a parallel between an existing government immunity and the citizen immunity which the Court was creating. Public officials enjoy broad civil and criminal immunity from lawsuits for statements they make in the course of their official duties. Citizens who criticize government officials should likewise enjoy broad immunity.<sup>31</sup> Accordingly, reference to governmental immunity is supportive of applying tort protection to the Second Amendment.

Governments are immune from suit for failure, even grossly negligent or deliberate failure, to protect citizens from crime.<sup>32</sup> Govern-

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The meaning of the provision is undoubtedly that the people from whom the militia must be taken, shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose. . . .

THOMAS COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 281-82 (2d ed. 1891).

<sup>31</sup> *Sullivan*, 376 U.S. at 281-83. The concurring opinion of Justice Goldberg and Justice Douglas made the same point. *Id.* at 303-04.

<sup>32</sup> See, e.g., *Bowers v. DeVito* 686 F.2d 616 (7th Cir. 1982) (no federal Constitutional requirement that police provide protection); *Calogrides v. Mobile*, 475 So. 2d 560 (Ala. 1985); Cal. Govt. Code §§ 845 (no liability for failure to provide police protection) and 846 (no liability for failure to arrest or to retain arrested person in custody); *Davidson v. Westminster*, 32 Cal.3d 197, 185 Cal. Rptr. 252; 649 P.2d 894 (1982); *Stone v. State* 106 Cal. App.3d 924, 165 Cal. Rptr. 339 (1980); *Morgan v. District of Columbia*, 468 A.2d 1306 (D.C. App. 1983); *Warren v. District of Columbia*, 444 A.2d 1 (D.C. App. 1981); *Sapp v. Tallahassee*, 348 So.2d 363 (Fla. Dist. Ct. App.), cert. denied 354 So.2d 985 (Fla. 1977); *Ill. Rev. Stat.* 4-102; *Keane v. Chicago*, 98 Ill. App.2d 460, 240 N.E.2d 321 (1st Dist. 1968); *Jamison v. Chicago*, 48 Ill. App. 3d 567 (1st Dist. 1977); *Simpson's Food Fair v. Evansville*, 272 N.E.2d 871 (Ind. App.); *Silver v. Minneapolis* 170 N.W.2d 206 (Minn. 1969); N.J. STAT. ANN. §§ 59:2-1, 59:5-4 (1972); *Wuetrich v. Delia*, 155 N.J. Super. 324, 326, 382 A.2d 929, 930, cert. denied, 77 N.J. 486, 391 A.2d 500 (1978), aff'g 134 N.J. Super. 400, 341 A.2d 365 (N.J. Super. Ct., Law Div., 1975); *Chapman v. Philadelphia*, 290 Pa. Super. 281, 434 A.2d 753 (Penn. 1981); *Morris v. Musser*, 84 Pa. Commw. 170, 478 A.2d 937 (1984).

The law in New York remains as decided by the Court of Appeals the 1959 case *Riss v. New York*: the government is not liable even for a grossly negligent failure to protect a crime victim. In the *Riss* case, a young woman telephoned the police and begged for help because her ex-boyfriend had repeatedly threatened "If I can't have you, no one else will have you, and when I get through with you, no-one else will want you." The day after she had pleaded for police protection, the ex-boyfriend threw lye in her face, blinding her in one eye, severely damaging the other, and permanently scarring her features. "What makes the City's position particularly difficult to understand," wrote a dissenting opinion, "is that, in conformity to the dictates of the law, Linda did not carry any weapon for self-defense. Thus, by a rather bitter irony she was required to rely for protection on the City of New York which now denies all responsibility to her." *Riss v. New York*, 22 N.Y.2d 579, 293 N.Y.S.2d 897, 240 N.E.2d 806 (1958).

Ruth Brunell called the police on 20 different occasions to beg for protection from her husband. He was arrested only one time. One evening Mr. Brunell tele-

ments are similarly immune from suit by victims who were injured by criminals who were given early release on parole.<sup>33</sup> Accordingly, it would be highly inappropriate for the government, through the courts, to make it economically impossible for persons to own handguns for self-defense because, supposedly, ordinary Americans are too stupid and clumsy to use them effectively. If the Judiciary will not question the government's civil immunity for failure to protect people, the government's courts certainly should not let themselves become a vehicle that deprives people of the tools with which to protect themselves.

Civil liability doctrine related to the First and Second Amendments has already developed along parallel tracks, in that strict liability is highly disfavored in both cases. *Gertz v. Welch* established that strict liability for libel was impermissible, even when the plaintiff was not a public figure.<sup>34</sup> And as Andrew McClurg observes in an article for this symposium, strict liability for firearms has been almost universally rejected by courts.<sup>35</sup>

A final doctrinal reason that *Sullivan Principles* should include the Second Amendment, as well as the First Amendment, is that the lawsuits targeted at Second Amendment rights often endanger First Amendment rights as well. As will be detailed below, some lawsuits against gun manufacturers aim to impose liability for non-deceptive advertising, or for communication with government.<sup>36</sup>

An objection to treating the First and Second Amendment alike could be raised on grounds that speech is different from firearms. Speech does not harm people, whereas firearms do.

But words do harm. The holocaust ended with gas chambers, but began with words, the words of hatmongers like Hitler, as well as the words of German philosophers who told their nation that true morality required the negation of individualism and submission to the col-

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phoned his wife and told he was coming over to kill her. When she called the police, they refused her request that they come to protect her. They told her to call back when he got there. Mr. Brunell stabbed his wife to death before she could call the police. The court held that the San Jose police were not liable for ignoring Mrs. Brunell's pleas for help. *Hartzler v. City of San Jose*, 46 Cal. App. 3d 6 (1st Dist. 1975).

<sup>33</sup> Dennis Hevesi, *New York is not Liable for Murders*, N.Y. TIMES, July 10, 1987.

<sup>34</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>35</sup> See Andrew J. McClurg, *The Tortious Marketing of Handguns: Strict Liability is Dead, Long Live Negligence*, 19 SETON HALL LEGIS. J. 777 (1995).

<sup>36</sup> See *infra* notes 92-95 and accompanying text.

lective.<sup>37</sup> In *Only Words*, Catherine MacKinnon reminds us that words, by shaping attitudes, can promote violence.<sup>38</sup> Even so, Nazi speech, not to mention dangerous philosophy, is protected under the Constitution,<sup>39</sup> as is sexually oriented speech which promotes sexism and rape.<sup>40</sup>

## II. *Intellectual Foundations of the Suits against Gun Manufacturers*

If the Supreme Court in *New York Times Co. v. Sullivan* had thought that the libel suit against the *New York Times* had resulted in an appropriate recovery by a public servant who had been deliberately libeled, the Court might not have used the case to grant the press a broad immunity from civil suit. In deciding whether to extend *Sullivan Principles'* protections to Second Amendment cases, it is therefore appropriate to examine the doctrinal bases for suits against gun manufacturers and dealers. We will not attempt to repeat Timothy Bumann's careful analysis of the antigun suits in the context of tort case law, which appears elsewhere in this issue.<sup>41</sup> Rather, we will survey several policy issues which are raised by the suits.

### A. *Judicial Legislation*

The foremost reason why courts should refuse to entertain antigun lawsuits<sup>42</sup> is that the suits patently seek a remedy which is appropriately dispensed by the legislature, not the judiciary.

In the last two decades, groups or attorneys opposed to widespread citizen ownership of firearms (or certain types of firearms)

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<sup>37</sup> LEONARD PELIKOFF, *THE OMINOUS PARALLELS*.

<sup>38</sup> CATHERINE MACKINNON, *ONLY WORDS* (1994).

<sup>39</sup> *Village v. Skokie*, National Socialist Party of America, 373 NE. 2d 21 (Ill. 1978).

<sup>40</sup> See *American Booksellers Assoc. v. Hudnut*, 771 F. 2d 323, 329-30 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

[W]e accept the premises of this legislation [against sexualized depictions of woman as subordinate]. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turns leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets . . . Yet all is protected as speech, however insidious.

*Id.*

<sup>41</sup> Timothy A. Bumann, *A Products Liability Response to Gun Control Litigation*, 19 SETON HALL LEGIS. J. 715 (1995).

<sup>42</sup> By "antigun lawsuits," we mean suits which claim that the manufacture or sale of a firearm which does not have some genuine defect, such as a faulty trigger, should give rise to liability.

have brought a vast number of product liability suits against gun companies and gun retailers.<sup>43</sup> Often, the avowed purpose of the litigation was to make the manufacture and sale of firearms so costly that the industry would give up. Those cases purportedly were an extension of traditional products liability theories, applied to handguns.<sup>44</sup> But, as explained by United States District Court Judge Buchmeyer, "the plaintiff's attorney's simply want to eliminate handguns."<sup>45</sup>

With one exception,<sup>46</sup> the cases were all dismissed as they began to recognize that the plaintiffs were really seeking judicial legislation of the very type the legislative bodies had declined to enact.<sup>47</sup> The courts were correct in recognizing that the legislatures do not want courts to usurp legislative prerogative. In the lone case in which a court actually did impose liability, the ruling

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<sup>43</sup> *Armijo v. Ex Cam Inc.*, 843 F.2d 406 (10th Cir. 1988); *Moore v. R.G. Indus., Inc.*, 789 F.2d 1326 (9th Cir. 1986); *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532 (11th Cir. 1986); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985); *Martin v. Harrington and Richardson, Inc.*, 743 F.2d 1200 (7th Cir. 1984); *Caveny v. Raven Arms Co.*, 665 F. Supp. 530 (S.D. Ohio 1987); *Patterson v. Gesellschaft*, 608 F. Supp. 1206 (N.D. Tex. 1985); *Mavilia v. Stoeger Indus.*, 574 F. Supp. 107 (D. Mass. 1983); *Bennet v. Cincinnati Checker Cab, Inc.*, 353 F. Supp. 1206 (E.D. Ky. 1973); *Delahanty v. Hinckley*, 564 A.2d 758 (D.C. 1989); *Rhodes v. R.G. Industries*, 325 S.E.2d 465 (Ga. App. 1984); *Coulson v. DeAngelo*, 493 So.2d 98 (Fla. Dist. Ct. App. 1986); *Riordan v. International Armament Corp.*, 132 Ill. App.3d 642 (1985); *Linton v. Smith & Wesson*, No. 82-L14029 (Cook Cty. Cir. Ct. 1983); *Addison v. Williams*, 546 So.2d 220 (La. Ct. App. 1989); *Strickland v. Fowler*, 499 So. 2d 199 (La. Ct. App. 1986); *Kelley v. R.G. Indus., Inc.*, 304 Md. A.2d 1143 (Md. Ct. App. 1985); *King v. R.G. Indus., Inc.*, 451 N.W.2d 874 (1990); *Richardson v. Holland*, 741 S.W.2d 751 (Mo. Ct. App. 1987); *Francis v. Diamond Int'l Corp.*, Nos. CV 82-11-1279 & CV 83-02-0215 (Ohio C.P. Butler Co. Mar. 22, 1983); *Burkett v. Freedom Arms, Inc.* 704 P.2d 118 (Or. 1985); *Fiella v. Bangor Punta*, No. 756 of 1984 (Pa. C.P. Beaver Co. Feb. 7, 1985); *Diggles v. Horwitz*, 765 S.W. 2d 839 (Tex. Ct. App. 1989); *Ellsworth v. Bishop Jewelry & Loan Co.*, 742 S.W.2d 533 (Tex. Ct. App. 1987); *Clancy v. Zale Corp.*, 705 S.W.2d 820 (Tex. Ct. App. 1986); *Robertson v. Grogan Invest. Co.*, 710 S.W.2d 678 (Tex. Ct. App. 1986); *Keophumihae v. Brewer*, 6 Va. Cir. Ct. Op. (1983).

<sup>44</sup> See Windly Turley, *Manufacturers and Suppliers Liability to Handgun Victims*, 10 N. Ky. L. Rev. 41 (1983).

<sup>45</sup> *Patterson*, 608 F. Supp. at 1212. Judge Buchmeyer closed with the statement: "As an individual, I believe, very strongly, that handguns should be banned and that there should be stringent, effective control of other firearms. However, as a judge, I know full well that the question of whether handguns can be sold is a political one, not an issue of products liability law - - and that this is a matter for the legislatures, not the courts. *Id.* at 1216.

<sup>46</sup> *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143 (Md. Ct. App. 1985).

<sup>47</sup> See, e.g., *Patterson*, 608 F. Supp. at 1215-16.

was overturned by the legislature.<sup>48</sup>

The most forthright proponents of such cases have admitted that the reason for the appeal to the courts is that the ideas have been and continue to be rejected in legislatures. Editorializing in favor of strict liability for gun companies, the *Chicago Tribune* asked, "Why should a court take this step? Why not a legislature? Because it's so highly unlikely."<sup>49</sup>

Unlikely or not, banning products is a legislative, not a judicial responsibility. The fact that advocates fail to obtain the results they seek in the proper forum does not entitle them to press their claim in an inappropriate forum.

In the few situations where strict or absolute liability has been imposed on lawful products, as in hazardous substances<sup>50</sup> or hazardous wastes,<sup>51</sup> such liability was imposed by the legislature, and not by judicial fiat. Even then, strict/absolute liability does not at-

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<sup>48</sup> In overturning the Maryland Court of Appeals' imposition of strict liability on manufacturers of so-called "Saturday Night Specials," the legislature set up a commission which could ban the future sale of "Saturday Night Specials." MD. ANN. CODE art. 27 § 36-1(h).

The court in the *Kelly* case was unable to cite any case law or statutory basis for its ruling, and was only able to find a common law basis by inventing new common law.

<sup>49</sup> *Courts Must Lead Fight Against Guns*, CHI. TRIB., May 3, 1994; cf. *Gun Control the Wrong Way*, CHI. TRIB., Oct. 7, 1985 ("[i]t is up to Congress or the state legislatures to pass laws establishing controls on guns. Just because the legislatures have done a poor job of setting gun control policy, that doesn't mean the courts ought to move in to correct this policy failure.").

See also Bruce Rosen, *Gun-control Weapon: Product Liability Suit*, RECORD (Bergen Cty. N.J.), Feb. 17, 1985 ("antigun activists around the country, backed by a cadre of lawyers who specialize in such suits, have been trying to do in courts what they haven't been able to do in the state legislatures"); David Lauter, *Suits Target Handgun Makers*, NATL. L. J., Nov. 29, 1982, at 12 ("Gun control advocates, who have organized a research program to assist the plaintiffs' attorneys, are hoping that plaintiffs' victories in court would force handgun manufacturers to adopt controls that nearly all legislatures have so far been unwilling to mandate.").

Another lawsuit proponent suggested the plaintiffs "bring the great power of our civil courts to bear on a problem that our legislatures . . . have not been able to solve." Speiser, *Disarming the Handgun Problem by Directly Suing Arms Makers*, NATL. L. J., June 8, 1981, at 29, col. 1. The phrasing of the proposition presumes that handguns are "a problem" which people could "solve" by getting rid of them all, a step which legislatures "have not been able" to take. To the contrary, legislatures in every state in the union have consistently rejected the idea that handgun ownership *per se* is a problem at all, and have likewise rejected the idea that driving handgun companies out of business is a solution to anything.

<sup>50</sup> Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq.

<sup>51</sup> Resource Conservation and Recovery Act, 42 U.S.C. § 6921 et seq. (1988).

tach for the mere creation of a particular substance or waste, but only when such substance or waste is released into the environment.

### B. *Proximity*

Suppose that instead of suing the *New York Times*, Mr. Sullivan had sued the manufacturer of the printing press that the *New York Times* used to publish the false statements about him. The case never would have reached the Supreme Court, since the trial court in Alabama would have dismissed the suit in a flash.

Suits against gun makers because of what a criminal did with a gun are equivalent to suits against printing press and word processing software manufacturers because of what a libeling reporter did with a word processor and a printing press. The chain of causation is simply too remote. One might as well hold liable the mining company which supplied the ore that was eventually used in the gun and in the printing press.

Issues of proximity are also raised in efforts to hold firearms manufacturers liable under the doctrine of ultrahazardous activity. The ultrahazardous activity doctrine allows liability without fault for injuries resulting from a narrow class of activities. A classic example is use of dynamite: a construction contractor using dynamite is liable for any resulting injury, even if all reasonable precautions were taken.<sup>52</sup> By analogy, it could be argued that firing a gun in an urban area could be considered an ultrahazardous activity.<sup>53</sup>

But no one has ever suggested that ultrahazardous liability ought to be applied to the *manufacturers* of dynamite, even though the manufacturers know full well the ways in which dynamite will be used. Manufacturing and selling dynamite, like manufacturing and selling guns, does not in itself create a danger;<sup>54</sup> it is the *use* of firearms or dynamite that can be dangerous.

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<sup>52</sup> E.g., *Opal v. Material Serv. Corp.*, 133 N.E.2d 733, 742-47 (Ill. App. 1956). See generally, 56 A.L.R.3d 1017 (1974).

<sup>53</sup> Such an argument, if pushed too far, would result in allowing lawsuits against people engaged in lawful self-defense; self-defense is, separate from the right to arms, specifically guaranteed in many state constitutions, and considered an essential common law right. E.g., COLO. CONST., art. II, § 3; *United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982) ("the right to defend oneself from deadly attack is fundamental.")

<sup>54</sup> See RESTATEMENT (SECOND) OF TORTS § 519 cmt. d (1965).



Proponents of strict and/or ultrahazardous liability for gun companies analogize their argument to dram shop acts, which hold bartenders or taverns liable for the damages caused by intoxicated patrons. Dram shop laws, however, do not allow lawsuits against distillers, brewers or wholesalers—even if the product advertising encourages inebriation.<sup>55</sup>

### C. *Non-Defective Products*

Can a firearm be defective when it does not malfunction, but does exactly what it is built to do: to fire a bullet downrange? Tort doctrine is well-settled that such claims are untenable. The Second Restatement of Torts recognizes that some products “cannot possibly be made entirely safe.”<sup>56</sup> As Dean Prosser explained, “Knives and axes would be quite useless if they did not cut.”<sup>57</sup> Likewise, as a federal district court noted, “Although a knife qualifies as an obviously dangerous instrumentality, a manufacturer need not guard against the danger it presents.”<sup>58</sup>

Knives are mostly used for non-aggressive purposes, such as cooking, but literally hundreds of thousands of violent crimes every year are perpetrated with knives.<sup>59</sup> Some knives appear to have little cooking utility, but instead seem designed for antipersonnel purposes, a purpose which may be good or ill depending on the motives of the person using the knife. Knives are sold with very little regulation, including no-questions-asked retail sales and mail order. If knives, in general, or “combat knives,” in particular, are not inherently defective because they can be and frequently are used to perpetrate crimes, it cannot be consistently maintained that firearms or particular types of firearms are inherently defective.

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<sup>55</sup> In one of the few cases holding an alcohol manufacturer liable, a tequila producer was found liable for not warning about the dangers of a tequila overdose. Gabriella Stern, *Brown-Forman Held Partly Liable for Death by Alcohol Poisoning*, WALL. ST. J., Sept. 30, 1992. It cannot be seriously contended that firearms users are not aware of the potential lethality of firearms.

<sup>56</sup> RESTATEMENT (SECOND) OF TORTS § 402A comment I (1965).

<sup>57</sup> WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS § 99.

<sup>58</sup> *Dorsey v. Yoder Co.*, 331 F. Supp. 753, 759 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d. Cir. 1973).

<sup>59</sup> Knives were used in 14.5% of homicides in 1992. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1993 366 (1994). Knives were used in 21.1% of all violent crimes in the United States in 1992, including 30.8% of robberies. *Id.* at 294.

Conversely, if plaintiffs do ever succeed in creating new legal doctrine that holds gun manufacturers liable, it is likely that similar liability would soon be applied to knife manufacturers and to automobile manufacturers. Like firearms and knife manufacturers, automobile manufacturers are aware that a small percentage of their products will be misused by criminals or drunks, and knives and automobiles cannot currently be designed to prevent such misuse.<sup>60</sup>

#### D. *Utility Tests*

Whether framed as strict liability, ultrahazardous activity or simple negligence, the core of almost all antigun lawsuits involves a utility test. Ordinary product liability law sometimes imposes a utility cost/benefit analysis on product features; for example, would a reduction in the number of injuries outweigh the inconvenience and cost of implementing a particular safety device? The liability theory as, attempted to be applied to handguns, and now, so-called "assault weapons," takes the test in a completely novel direction, by claiming that the utility of the product itself is outweighed by its harm.

Of course there are also ordinary product liability cases brought against gun manufacturers based on gun malfunctions. These cases can include utility tests, such as the gun should have a safety; or the gun's firing pin was too likely to activate if the gun was dropped. This article does not proffer any objections to such utility tests in an ordinary product liability context. Rather, our focus is on suits, often orchestrated by groups and others hostile to the Second Amendment, which claim that certain firearms are somehow defective because they do exactly what they are designed to do.

Antigun litigators assert that firearms are unique. Unlike knives or automobiles, firearms, and firearms alone, impose risks

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<sup>60</sup> See Donald E. Santarelli & Nicholas E. Calio, *Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit*, 14 ST. MARYS L.J. 471, 502 (1983).

Theoretically, automobile manufacturers would be required to hook up breathalyzers to every automobile ignition (to reduce drunk driving), and also to insert biometric fingerprint or retina scan devices in ignition systems (to reduce use of stolen cars for drive-by shootings and other crimes). Thus far, courts have not required manufacturers to make their products even more costly by including such expensive safety devices.

that outweigh their utility. Putting aside the most important fact—that decisions to ban products because of their alleged disutility are decisions for legislative bodies, rather than courts—the utility argument is factually vacuous. Plaintiffs can only make their utility calculus work by ignoring the fact that firearms (disproportionately handguns) are used for lawful self-defense. The most in-depth research suggests that guns are involved in over two million annual defensive uses.<sup>61</sup>

In addition, handguns and so-called “assault weapons” are used for competitive target shooting, for hunting, for “plinking,” and for collecting. While such uses may be of no interest to gun owners and people who hate guns, the utility test depends on the persons who enjoy using and owning the product, not on persons who think that the product is *per se* immoral.

The claim that handguns or “assault weapons” have no self-defense or sporting utility, and hence are manufactured for criminals, is patently absurd. Guns have always been sold, among other places, in states which require background checks to ascertain that the buyer is *not* a criminal. Only a small percentage of any model of handgun or “assault weapon” is ever traced to a criminal investigation.<sup>62</sup> For small, inexpensive handguns (pejoratively labeled “Saturday Night Specials”), which are claimed to be the criminal weapon of choice, only about one to two percent are ever involved in a violent crime.<sup>63</sup>

It is true that, statistically speaking, it may be inevitable that a small percentage of firearms will be misused; but the same may be said of many other products, including automobiles. In a given year, the percentage of handguns which are used in a crime is no higher than the percentage of automobiles involved in crashes.

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<sup>61</sup> The most thorough summary of all existing research regarding the frequency of defensive firearms' uses is Gary Kleck and Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 85 J. CRIM. L. & CRIMINOLOGY (forthcoming, 1995).

<sup>62</sup> The Intratec Tec-9 pistol often appears on lists of guns most often seized by the police. Yet the percentage of Tec-9s which are ever used by criminals is small; in a given year, only about 1% of the extant stock of Tec-9s is traced in connection with a criminal investigation. KEITH BEA, “ASSAULT WEAPONS”: MILITARY STYLE SEMIAUTOMATIC FIREARMS 79 (Wash.: Cong. Res. Svc., June 14, 1992).

<sup>63</sup> GARY KLECK, *POINT BLANK: GUNS AND VIOLENCE IN AMERICA* 83 (1991). *Point Blank* was awarded the highest honor which the American Society of Criminology can bestow on a book: the Hindelang Prize for the most significant contribution to criminology in a three-year period.

The illogic of regarding guns, and only guns, as some kind of monstrous product was illustrated by a speech given by Samuel Fields, the then-Executive Director of the Foundation for Handgun Education, the coordinating group for efforts to drive handgun manufacturers out of business. At a product liability seminar for antigun plaintiffs' attorneys, Mr. Fields stated that handguns should be outlawed through tort law because they are a product "every tenth one of which rolls off the assembly line in this country will inflict injury. There is no product in this country remotely like it." In the same speech, Mr. Fields observed that "in the case of automobiles, twenty percent that roll off the assembly line will be involved in some kind of accident before their useful life expires."<sup>64</sup> Rationally, handguns are no more built for the purpose of crime than automobiles are built for purpose of causing crashes.<sup>65</sup>

The vast majority of all models of handguns or "assault weapons" are owned by persons who never do anything illegal with them. Even the antigun lobby implicitly concedes this point when they push for laws banning the future manufacture of certain guns, but allowing current owners to keep the guns if they are registered.<sup>66</sup>

It is true that a tiny percentage of people who acquire guns (by legal or illegal means) abuse the exercise of their rights. But the fact that a minority of people abuse constitutionally-related products, including guns and printing presses, is no reason to allow tort law to deprive the law-abiding majority of products with which to exercise their rights. In *New York Times Co. v. Sullivan*, the Court noted: "As Madison said, 'Some degree of abuse is inseparable from the proper use of every thing. . . .'"<sup>67</sup>

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<sup>64</sup> *Transcript: Firearms Litigation in the Eighties*, Nov. 6, 1982.

<sup>65</sup> Liability law requires automobiles to be designed not to immunize passengers from all types of crashes, but to include reasonable features to minimize injury in case of a crash, such as padded dashboards. If similar devices existed for firearms, devices which could impair criminal use without impairing lawful defensive use—an argument could be made for the use of such devices. Unfortunately, there are no such devices. Guns which can read the palmprint of their owner, and thus not be fired by a criminal, are only a theory, and would be extremely expensive if ever actually produced. Just as product liability standards do not require every imaginable expensive safety device on a car, highly expensive accessories cannot be required on a gun. Moreover, the utility of a gun which can only be fired by one user is greatly reduced if the gun is intended for two or more authorized users, such as members of a family.

<sup>66</sup> *E.g.*, 18 U.S.C. § 922(v).

<sup>67</sup> *Sullivan*, 376 U.S. at 721.

Essentially the same point was made by the Seventh Circuit, in a frequently-cited patent law case.<sup>68z</sup> Discussing "utility," for patent law purposes, the Court explained how the occasional misuse of a product does not negate its utility. To begin with, the court noted that the existence of a patent grant was "prima facie proof of utility."<sup>69</sup> The court then asked whether evidence that the patented device "has been used for pernicious purposes" could prove that the device "is incapable of serving any beneficial end?"<sup>70</sup> To answer the question, the court adopted Mr. Walker's conclusion<sup>71</sup>, which the court then quoted at length:

An important question, relevant to utility in this aspect, may hereafter arise and call for judicial decision. It is perhaps true, for example, that the invention of the Colt's revolver was injurious to the morals, and injurious to the health, and injurious to the good order of society. That instrument of death may have been injurious to morals, in tending to tempt and to promote the gratification of private revenge. It may have been injurious to health, in that it is very liable to accidental discharge, and thereby to cause wounds, and even homicide. It may also have been injurious to good order, especially in the newer parts of the country, because it facilitates and increases private warfare among frontiersmen. On the other hand, the revolver, by furnishing a ready means of self-defense, may sometimes have promoted morals and health and good order.<sup>72</sup> By what test,

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<sup>68</sup> *Fuller v. Berger*, 120 F. 274 (7th Cir. 1903), *cert. denied* 193 U.S. 668 (cited *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 426 (1908); *Crown Die & Tool Co. v. Nye Tool & Machine Works*, 261 U.S. 24, 34 (1923)).

<sup>69</sup> *Fuller*, 120 F. at 275.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* Walker's patent treatise was and remains (with updates) one of the leading patent treatises.

<sup>72</sup> Walker was setting forth hypothetical claims about the Colt's revolver, pro and con, rather than writing as firearms' historian. He overlooked the most immediate historical impact of the revolver. Colonel Samuel Colt's introduction of a mass-market revolver in the 1840s changed the face of combat. Almost all guns invented before the revolver needed to be reloaded after every shot; the few guns that could hold three or more rounds (such as the "pepperbox") were eccentric and unreliable. With the mass production of Colt's revolving handguns, American whites gained massive firepower superiority over the Indians.

The first major application of Colt technology was in Texas; there, Indians on horseback could launch arrows at a higher rate than settlers could fire and reload single-shot rifles. Moreover, a rifle was heavy, and difficult to discharge from horseback. With Colt's revolvers, Texans could exceed the Indians' rate of fire, and could shoot while mounted. The leap in technology from single-shot guns to the revolver was of far greater significance than subsequent refinements of multishot weapons.

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 adopted 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 the 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 it would be fatal to patents for steam engines, dynamos, electric railroads, and indeed many of the noblest inventions of the nineteenth century. The first hypothesis cannot stand, because if it could, it would make the validity of patents to depend on a question of fact to which it would often 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.<sup>73</sup>

The Seventh Circuit then added its own further analysis:

We deem the additions to the second hypothesis necessary to complete statement of the acceptable test, for, to continue with Colt's revolver as an example, if at the time of the suit for infringement the defendant should prove that the only uses to which "that instrument of death" has been put were vicious, the patent should not be held void for want of utility, if the court for itself should see, or be convinced by experts, that the instrument was susceptible to good uses, though in fact never put to such a use before the suit was begun. And, if utility is found, the cases seem to be uniform that courts will not set up a measure of utility which must be filled.<sup>74</sup>

Of course, patent law is not binding in product liability cases. Once they have been settled by the patent office, there is a unique need not to revisit questions of utility because to do so would undermine the certainty of patents, and thereby undermine the purpose of patent law in encouraging commercial exploitation of patents.

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According to historian Carl Russell, the "Colt is strongly in evidence as the arm which marked the turning point in Indian warfare in the Far West by giving the white man superiority." CARL P. RUSSELL, *GUNS ON THE EARLY FRONTIERS*, 95-96, 194 (Lincoln: University of Nebraska Press, 1957). See also WALTER PRESCOTT WEBB, *THE GREAT PLAINS* 167-79 (Ginn: Boston, 1931); Walter Prescott Webb, *The American Revolver and the West*, SCRIBNER'S, Feb. 1927, 171-78.

<sup>73</sup> FULLER, 120 F. at 275076 (quoting Walker Section 82, 3d Ed.)

<sup>74</sup> *Id.* at 276.

Nevertheless, the Seventh Circuit's observations about utility are consistent with common sense. The fact that an object can be misused is no proof that the object lacks any utility. Moreover, courts confronting "utility" arguments about firearms can easily follow the same common-sense approach as did the Seventh Circuit. In the real world, handguns are above the *Fuller* court's hypothetical, since not all uses of handguns or so-called "assault weapons" or any given model of firearm are "vicious." Most uses are harmless, such as target shooting, hunting<sup>75</sup> or collecting. Some uses are beneficial, for example, the use of firearms for lawful defense. And some uses are harmful, ie: the misuse of firearms. Plainly there are utilities and disutilities to firearms, as there are with almost any product.

#### E. Social Costs

Another argument in favor of liability for gun manufacturers has been that companies who make firearms are "subsidized" by not having to pay for the costs of persons who are injured by firearms. Similarly, newspapers, it could be said, are "subsidized" by not being required to pay for the harm caused by advertisements which harm innocent third parties. One could argue that auto manufacturers are also "subsidized" by not having to pay for the costs of automobile injuries. But the Courts of the United States do not automatically impose liability whenever someone is injured by a product; liability only exists when a product is in some way defective. Guns are not defective simply because they fire bullets.

Interestingly, it may be that the gun manufacturers and gun buyers are failing to recoup the costs for the benefit which they confer on society at large, even on members of antigun organizations. While the United States has much more violent crime than other nations, including crimes such as rape, which rarely involve guns, the United States anomalously has *less* burglary.<sup>76</sup> In terms of burglaries perpetrated against occupied residences, the American advantage is even greater.

In Canada, for example, a Toronto study found that forty-

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<sup>75</sup> Hunting is harmful to the animal, but such harm is not one which courts have chosen to take into account, for the obvious reason that hunting is a state-sanctioned, regulated, licensed activity, whose utility has already been determined by the legislature. The same point is applicable to gun ownership itself.

<sup>76</sup> Carol Kalish, *International Crime Rates*, Bureau of Justice Statistics Special Report (Washington: Department of Justice, May 1988).

eighty percent of burglaries were against occupied homes, and twenty-one percent involved a confrontation with the victim; only thirteen percent of United States' residential burglaries are attempted against occupied homes. Similarly, most Canadian residential burglaries occur in the nighttime, while American burglars are known to prefer daytime entry to reduce the risk of an armed confrontation.<sup>77</sup> After the implementation of Canada's 1977 gun controls prohibiting handgun possession for protection,<sup>78</sup> the breaking and entering rate rose twenty-five percent surpassing the American rate.<sup>79</sup> A 1982 British survey found fifty-nine percent of attempted burglaries involved occupied homes, compared to just thirteen percent in the United States.<sup>80</sup>

Why should American criminals, who have proven that they engage in murder, rape, and robbery at such a higher rate than

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<sup>77</sup> NORMAN OKIHIRO, *BURGLARY: THE VICTIM AND THE POLICE* 31 (1978) (1978 Toronto study); U.S. Bureau of Justice Statistics, *Household Burglary* 4, (Jan. 1985); Gary Kleck, *Crime Control Though the Private Use of Armed Force*, 35 SOC. PROBS. 1, 16 (1988). For American burglars and daytime entry, see GEORGE RENGERT & JOHN WASILCHICK, *SUBURBAN BURGLARY: A TIME AND A PLACE FOR EVERYTHING* 30, 62 (1985); J. CONKLIN, *ROBBERY AND THE CRIMINAL JUSTICE SYSTEM* 85 (1972).

A study of an unnamed "northern city" in Ontario for the years 1965-70 also appears to show a relatively high level of burglary against occupied residences. The study reported that 12.2% of burglaries were daytime, 69.5% were nighttime, and 18.3% were unknown. It is certain that no person was home for the "unknown burglaries" since if someone had been home, the time of entry would be known. A large percentage of the nighttime burglaries may have involved a person at home, since most people are at home at night. Peter Chimbros, *A Study of Breaking and Entering Offenses in "Northern City" Ontario*, in *CRIME IN CANADIAN SOCIETY* 325-26 (Robert A. Silverman & James J. Teevan Jr., 1975).

<sup>78</sup> R.S.C. 1985, § 109(3) (Can.) (Criminal Code).

<sup>79</sup> The post-1977 burglary increase was part of a general crime escalation. Hence, it might be that the 1977 gun restrictions had nothing to do with the burglary surge. The pattern of burglary against occupied residences in Canada had been established long before the 1977 gun law went into effect. The high burglary rate (if it has any relation at all to gun issues) may be attributed less to the particulars of Canadian law than to Canadian gun culture, which has never emphasized the ownership of guns for armed home defense. By Canadian's choice, Canadian homes have always been protected by loaded guns less often than American homes.

<sup>80</sup> PAT MAYHEW, *RESIDENTIAL BURGLARY: A COMPARISON OF THE UNITED STATES, CANADA AND ENGLAND AND WALES* (Nat'l Inst. of Just., Wash., D.C., 1987) (citing 1982 British Crime Survey). In the Republic of Ireland, where gun control is also severe, burglars have little reluctance about attacking an occupied residence. Claire Nee and Maxwell Taylor, *Residential Burglary in the Republic of Ireland: Some Support of the Situational Approach*, *WHOSE LAW AND ORDER? ASPECTS OF CRIME AND SOCIAL CONTROL IN IRISH SOCIETY* 143 (Mike Tomlinson, Tony Varley, and Ciaran McCullagh eds., Belfast: Soc. Ass'n of Ireland, 1988).



their counterparts in other nations, display such a curious reluctance to perpetrate burglaries, particularly against occupied residences? Could the answer be that they are afraid of getting shot? When an American burglar strikes at an occupied residence, his chance of being shot is equal to his chance of being sent to jail.<sup>81</sup> Accordingly, a significant reduction in the number of Americans keeping loaded handguns in the home could lead to a sharp increase in the burglary rate, and to many more burglaries perpetrated while families are present in the home.<sup>82</sup>

Most home-defense guns in the United States are handguns. Burglars do not know whether a particular home is armed, and thus, many burglars choose to avoid all occupied homes rather than risk entering a home that may have an armed victim present. By making handguns available to the public at a reasonable price, handgun manufacturers "subsidize" all persons who do not own guns, by making it possible for them to enjoy free rider home safety benefits, despite their failure to threaten burglars.

The theory of strict liability illustrates that manufacturers are in the best position to recoup losses caused by their products, since they make the profits from making those products. As a general principle, this may be true, since manufacturers are generally able to charge consumers for the entire benefit which their products confer. For example, if a person purchases an automobile, only the purchaser or persons authorized by the purchaser can use the automobile. Thus, the manufacturer and dealer can charge a price that comes close to the total benefit which the consumer will derive; if an auto confers \$15,000 of utility, then the car can be sold for close to \$15,000. Firearms, in contrast, have an enormous free rider problem. The automobiles in my neighbors' driveways do me

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<sup>81</sup> The risk of either outcome for a burglar is about 1-2%. JAMES D. WRIGHT, PETER ROSSI, AND KATHLEEN DALY, *UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA* 139-40 (1983). In a survey of felony convicts in state prisons, 74 % of the convicts agreed "one reason burglars avoid houses when people are at home is that they fear being shot." JAMES D. WRIGHT & PETER ROSSI, *ARMED AND DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS* 146 (1986).

<sup>82</sup> Shotguns and rifles can also be used for home defense, but their greater length makes them harder to maneuver in confined settings, and easier for an attacker to take away. Some rifle rounds also create a serious risk of overpenetration — of entering and exiting the target burglar's body, and continuing forward to pass through a wall, and perhaps kill someone in the next room.

no good, but the guns in their homes help protect me from burglary.

Yet, gun manufacturers cannot charge consumers based on the full public safety benefit that firearms confer. Firearm purchasers are only willing to pay for the benefit conferred on themselves and their families. This substantial public safety benefit enjoyed by the free riders cannot be recouped by firearms manufacturers.<sup>83</sup>

#### F. *Just Another Consumer Product*

Legislative lobbyists for antigun organizations often claim that they only want firearms to be regulated like any other consumer product. "Treating guns like cars" is a common formulation. Yet the tax-exempt, litigation arms of these organizations then orchestrate suits contending that guns should not be treated like other consumer products, including cars. Instead, the antigun claim that gun manufacturers should be subjected to special liability standards applicable to no other consumer product manufacturer. Should the courts allow the lobby to have it both ways?

Actually, guns are not quite like other consumer products. However, the ways in which they are different do not militate for subjecting firearms to special liability rules. Unlike most consumer products, the ownership of a gun is Constitutionally protected, and thereby implicitly encouraged.<sup>84</sup> Guns are also legislatively regulated more heavily than most consumer products, suggesting that legislatures can and do impose what they perceive to be appropriate regulation, without the need for the Judiciary to invent its own regulations.

Handguns are the only consumer product which an American consumer is forbidden to purchase outside his state of residence.<sup>85</sup> They are the only mass consumer product for which retailers, wholesalers, and manufacturers all require federal licenses.<sup>86</sup> They are among a tiny handful of consumer products for which the federal government regulates simple possession, and further regulates the terms of retail transactions, going so far as to require (for

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<sup>83</sup> For more on the free rider problem of people who are protected by the decision of third parties to purchase firearms see Gary Kleck, *Crime Control Through the Private Use of Armed Force*, 35 SOC. PROBS. 1 (1988).

<sup>84</sup> See *supra* note 14 and accompanying text.

<sup>85</sup> 18 U.S.C. § 922(a)(1) (1994).

<sup>86</sup> *Id.* § 923(a).

handguns) that police be notified and given an opportunity to disapprove the sale before being allowed to consummate the transaction.<sup>87</sup>

Every new model of firearm is submitted in prototype to the Bureau of Alcohol, Tobacco and Firearms ("BATF"), and is not marketed until BATF confirms that the firearm complies with federal design standards.<sup>88</sup> Just as patent holders are entitled to rely on patents, and not be subject to after-the-fact litigative attacks on the "utility" of their product, the firearms industry is at least as entitled to rely on government regulatory approval of its product and sales.

If the law were to treat guns like any other consumer product, such as cars or knives, the scope of gun legislation would diminish drastically. To begin with, no government permission would be required to possess and use the product on one's own property. Licensing and registration would only come into play if the product were taken into public areas.

One theory of some of the newest wave of suits against gun manufacturers involves claims of negligence for failing to ensure that gun dealers go beyond legal requirements in screening gun buyers. In contrast to gun dealers, automobile and knife dealers make no effort at all to ensure that the buyer is not a criminal. Nor do automobile manufacturers require their dealers take even minimal steps to check if a prospective automobile purchaser has recent convictions for drunk or reckless driving, or even for vehicular homicide.<sup>89</sup>

Automobile manufacturers have much more ability than gun manufacturers to control dealer behavior, since most automobile manufacturers have exclusive, direct relationships with dealers. In contrast, the majority of gun dealers purchase inventory from wholesalers. Thus, despite some plaintiffs' claims that the gun companies should force gun dealers to go beyond legal requirements in checking out gun buyers, gun manufacturers have a minimal, practical ability to impose such requirements.

In short, Judge Buchmeyer stated it best: "[T]he unconven-

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<sup>87</sup> *Id.* § 922(s) (the "Brady Act").

<sup>88</sup> *Id.* § 923(a)(1). For example, the statute dictates that a firearm not being easily convertible to automatic fire, by requiring a barrel of a particular length.

<sup>89</sup> Santarelli & Calio, *supra* note 60, at 503.

tional theories advanced in this case (and others) are totally without merit, a misuse of products liability laws."<sup>90</sup>

#### IV. *How Much Harm is Necessary?*

In Part Three, we noted that with a single exception (later overturned by the legislature), no gun manufacturer has ever been held liable under the "unconventional" theories propounded by the antigun litigators.<sup>91</sup> So, if gun manufacturers are not being subjected to monetary judgments, should courts find that Second Amendment rights are so endangered so that judicial action against abusive lawsuits is required? This question will be answered in part by comparing the current situation of antigun suits with the suit which provoked the Court to revise liability rules in *New York Times Co. v. Sullivan*.

In one respect, suits against gun manufacturers have already proceeded far beyond the point for which lawsuits against newspapers were deemed to have infringed on Constitutional territory. Libel lawsuits are suits against persons who misuse the freedom of speech or press and inflict harm on another. The analogy for the right to bear arms would be persons who misuse firearms to injure other persons. Just as people who use words to harm other people are subject to civil, or even criminal, libel prosecution, people who use firearms to harm others are subject to civil and criminal prosecution.

Lawsuits against gun manufacturers, however, go much further than libel suits. Suing a gun manufacturer because of what the criminal did with the gun is equivalent to suing a printing press manufacturer because of what somebody published with the printing press. The manufacturer of the equipment has no genuine connection with the intervening unlawful use by a particular purchaser of a particular item of equipment.

##### A. *Frivolous Suits*

Besides enunciating Constitutional limitations on tort law, the Supreme Court in the *Sullivan* case, in the interests of judicial economy, also disposed of Mr. Sullivan's lawsuit on the merits. The Court made it clear that the facts did not come remotely close

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<sup>90</sup> *Patterson v. Gesellschaft*, 1206 F. Supp. 1206, 1216 (N.D. Tex. 1985).

<sup>91</sup> See *supra* notes 42-51 and accompanying text.

to allowing a judgment against the *New York Times*.<sup>92</sup>

In *New York Times Co. v. Sullivan*, an advertisement printed in the *New York Times* was found by the jury to have falsely claimed, that the Montgomery police led by Mr. Sullivan had bombed the home of Dr. Martin Luther King, Jr., put a "ring" of police around a college campus to suppress a student protest, and repeatedly ordered Dr. King arrested in an effort to harass him. It was uncontroverted that all the statements were false. It was further uncontroverted that if the *New York Times* had undertaken even a minimal "background check" of the advertisement, the *New York Times* would have discovered that the false statements in the advertisement were disproven by the *New York Times*' stories regarding the events in question, and that many of the "signatories" of the advertisement had never consented to the use of their name. When Mr. Sullivan asked the *New York Times* to print a retraction, the newspaper demurred, contending that statements in the advertisement about the Montgomery police did not necessarily reflect on him, the highest official in charge of the Montgomery police.<sup>93</sup>

If Mr. Sullivan's case, viewed through the lens of the First Amendment, was nearly frivolous, what can be said about the following cases viewed through the lens of the Second Amendment?

A Texas plaintiff's attorney sued the Boy Scouts of America, claiming that the Boy Scouts magazine *Boys' Life* had enticed a twelve-year-old boy into fatal play with a .22 caliber rifle, because the magazine had run a sixteen page advertising supplement involving firearms.<sup>94</sup> The suit against *Boy's Life* for accepting an advertisement containing truthful statements about a lawful product which has been enjoyed by youths for over a century, illustrates how suits against the exercise of Second Amendment rights can inflict collateral damage on First Amendment rights; it is well-settled that truthful advertising is solidly within the scope of the First Amendment.<sup>95</sup>

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<sup>92</sup> *Sullivan*, 376 U.S. at 284-92.

<sup>93</sup> *Id.* 376 U.S. at 256-62.

<sup>94</sup> The trial court threw out the suit against the Boy Scouts, but allowed the suit against the advertisers to proceed. *Way v. Boy Scouts of America*, no. 90-12265-I, discussed in *Boy Scout Gun Suit Rejected*, ABA JOURNAL, Jan. 1992, at 21.

<sup>95</sup> See, e.g., *Ibanez v. Florida Dept. of Business & Professional Regulation*, 114 S.Ct. 2084, 2088 (1994) (truthful advertising related to lawful activities entitled to First Amendment protections; State must show restriction directly and materially advances substantial state interest in manner no more extensive than necessary to serve that

In the eastern district of New York, in *Hamilton v. Accu-Tek*, a lawyer representing several shooting victims or their estates has sued forty-eight firearm manufacturers, accessory manufacturers, distributors, and importers, for \$2.6 billion, asserting that even companies with products never used to injure the plaintiffs are guilty of a "conspiracy" with other handgun companies. As part of the "conspiracy," the handgun manufacturers supposedly marketed their products to persons under the age of twenty-one.<sup>96</sup> This alleged conspiracy took place even though it has been illegal as a matter of federal law since 1968 for any gun retailer to sell a handgun to a person under twenty-one, and every handgun retailer is required to ascertain that the buyer is over twenty-one before consummating the sale.<sup>97</sup> Since 1911, New York State has also required that all handgun purchasers receive approval from the local police.<sup>98</sup> With a potential handgun market of tens of millions of adult men and women, the handgun manufacturers would have to be remarkably stupid to "conspire" to market their product to a group that is forbidden by state and federal law to purchase the product; the "conspiracy" would have to be even stupider to be aimed at potential illegal consumers in a state with one of the longest-standing, strictest set of purchase controls, designed to weed out precisely such illegal consumers.

The *Hamilton* case is another example of antigun lawsuits turning into antispeech suits. The case is, *inter alia*, a SLAPP (Strategic Lawsuit Against Public Participation), since the claim is that gun companies are liable in tort for having "conspired" to "mislead" legislative bodies into not enacting more restrictive firearms laws.<sup>99</sup> The claim ignores well established precedent that testimony and other communications with legislatures are generally privileged under the First Amendment.<sup>100</sup> The claim of a conspiracy to mis-

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interest); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Sullivan* 376 U.S. at 266.

<sup>96</sup> *Hamilton v. Accu-Tek*, no. CV 95 0049 (E.D.N.Y., Jan. 5, 1995, Weinstein, J.); *More Victim Lawsuits Filed as Antis Seek Biggest Bucks*, *Gun Week*, Mar. 3, 1995, at 3.

<sup>97</sup> Gun Control Act of 1968, 18 U.S.C. § 922(b)(1) (1968). Typically, the dealer ascertains the age of the buyer by checking the birth date on a state issued driver's license. *Id.*

<sup>98</sup> *Sullivan Law*, N.Y. PENAL CODE § 400.00 et seq. As part of the licensing process, the New York police verify the applicant's eligibility to purchase a handgun, including his or her age. *Id.*

<sup>99</sup> *Hamilton*, no CV 95 at 34-35.

<sup>100</sup> See, e.g., *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*,

lead the legislature is particularly ludicrous in the case of gun control. First of all, until the formation of the American Shooting Sports Council in 1989, gun manufacturers had been remarkably passive and disengaged from legislative activity. The firearms business generally left lobbying to consumer groups such as the National Rifle Association, the Citizens Committee for the Right to Keep and Bear Arms, and Gun Owners of America.<sup>101</sup>

Moreover, most of the discussion about gun control, pro and con, before legislative bodies involves philosophical theories (not usually considered "false" within the meaning of conspiracy statutes), analysis of criminological information supplied by the government (the FBI's Uniform Crime Reports and the Census Bureau's National Crime Victimization Survey), and interpretation of court cases and historical documents regarding the meaning of the right to keep and bear arms. Gun proponents and gun opponents typically draw different conclusions from the data on which they both rely, but legitimate differences of opinion are hardly evidence of a "conspiracy" to mislead.

A California case, growing out of a 1993 shooting at a San Francisco law firm, further highlights the connection between the First and Second Amendments. In that case, a gun manufacturer's

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Inc., 113 S.Ct. 1920 (1993), which affirmed the "Noerr-Pennington doctrine" that "Those who petition government for redress are generally immune from antitrust liability." The "Noerr-Pennington doctrine" was established in *Eastern R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 669 (1965).

<sup>101</sup> Despite the rhetorical claims of gun control lobbyists, the NRA does not represent the firearms industry, and in fact has repeatedly clashed with it. The NRA has strongly opposed, while the National Association of Stocking Gun Dealers has enthusiastically supported, legislation to legalize the operation of small firearm dealerships in their homes as a second business. The NRA has opposed regulations to outlaw or severely restrict use of lead shot in bird hunting. Adoption of such regulations would lead to a massive increase in shotgun sales to the great benefit of shotgun manufacturers, since bird hunters would be forced to replace their shotguns which fire lead shot with shotguns which can fire steel shot. The American firearms industry quietly supported President Bush's ban on the import of foreign "assault weapons," while the NRA and other consumer groups vigorously opposed the ban and accused the domestic gun industry of pandering to protectionism. The gun consumer and gun industry's conflict over the import of semiautomatic firearms was a repeat of the major gun control battle of the 1960s, regarding the import of World War II military surplus rifles and inexpensive handguns from Europe. The American gun industry led the charge in demanding an import ban, while the NRA led the opposition. In September 1993, the American Shooting Sports Council endorsed the Brady Bill, while the NRA remained adamant in its opposition.

claim that its product is effective for protection ("as tough as your toughest customer") is alleged as a basis for strict liability and negligence lawsuits against the manufacturer.

In sum, if the anti-newspaper litigation in *New York Times Co. v. Sullivan* should not have been allowed to progress beyond the first motion to dismiss, the anti-gun litigation is equally without merit, as reflected not only by the vast body of reported cases which have been rejected,<sup>102</sup> but also by the quality of the current cases against the firearms business.

### B. *Companies Driven Out of Business*

The Supreme Court did not wait to issue a decision to protect the First Amendment from civil harm until a publisher had actually been destroyed by vexatious litigation. If a publisher had been destroyed, and the publisher had been the worst newspaper in the country, rather than the *New York Times*, the Supreme Court would not have hesitated one second to point out that the protection offered speech is not dependent on its quality.

With regards to the Second Amendment, litigation has already driven companies out of business. In Maryland, the state Court of Appeals (the highest Court in Maryland) imposed strict liability on manufacturers of so-called "Saturday Night Specials."<sup>103</sup> While the court's decision was later overturned by the state legislature, the gun manufacturer that was the target of the suit went out of business in the interim. That result was cheered as a model by gun prohibition strategists.<sup>104</sup>

More recently, another company was driven out of business not by a judgment against it, but by the cost of litigation. The company was not exactly the *New York Times* of the gun business. Rather, it was a company in Olathe, Colorado that made a trigger

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<sup>102</sup> See *supra* note 43.

<sup>103</sup> Putting aside the merits of the decision, the court's guidelines for what constituted a "Saturday Night Special" were criticized for their opacity.

<sup>104</sup> Judith Cohen Dollins and Katherine Kaufer Christoffel, *Reducing Violent Injuries: Priorities for Pediatric Advocacy*, 94 PEDIATRICS 638, 647 (1994). When the Maryland legislature overturned the court's decision three years later, the legislature set up a state board to create a list of specific firearms which would be banned from future sale as "Saturday Night Specials." Whatever the merits of banning inexpensive handguns, which are most commonly purchased by poor people for protection, accomplishing the ban through legislative rather than judicial action at least had the virtue of letting manufacturers know what was permissible and what was not. *Id.*



attachment dubbed the "Hell-fire Device." It would be fair to accuse the name of pandering to Walter Mittyism. The trigger attachment did the equivalent of selling the sizzle without the steak. The over-named "Hell-Fire Device" offered its Mittyish owners the "feel" of automatic weapons fire without actually making the gun fire automatically. If the trigger attachment had actually made the gun fire like an automatic, it would have been subject to the same stringent federal regulations that are applicable to machine guns.<sup>105</sup> Other than giving gun users some additional finger vibration, the Hell-fire device sampled by the Bureau of Alcohol, Tobacco and Firearms, did "not work in any respect."<sup>106</sup> Although the federal Bureau of Alcohol, Tobacco and Firearms has not regulated the "Hell-Fire Device," California has outlawed it.

After being sued in a lawsuit orchestrated by the Center to Prevent Handgun Violence, the litigation arm of Handgun Control, Inc. ("HCI"), Hellfire Systems, Inc. declared bankruptcy. Lester Menica, the Company's President stated that "since we cannot afford the huge legal fees required to defend this ridiculous claim, and since a successful defense would still put us out of business, we are left with no alternative other than closing the doors."<sup>107</sup>

Now there are probably some Hell-fire customers who might want to bring an action against the company whose advertising at least implied much more than the product could deliver. And state legislatures could choose to outlaw the product, as one state legislature chose to do, and forty-nine have not. But it is not appropriate for the determination of the continued manufacture and sale of a product to be made by a few attorneys who, merely by training their legal guns on a small company, can drive it out of business without ever needing to prove a single fact. In effect, through the bankrupting power of litigation, the legal department at HCI achieved a national ban which HCI had not been able to win in Congress or in forty-nine state legislatures.

Considerations of the proper role of the legislature have led courts to refuse requests to impose a judicial ban on handguns.

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<sup>105</sup> *National Firearms Act*, *supra* note 19.

<sup>106</sup> Jack Killorin, Bureau of Alcohol, Tobacco and Firearms, letter to David B. Kopel, Colorado Attorney General's office, Mar. 6, 1991; Edward M. Owen, Bureau of Alcohol, Tobacco and Firearms, letter of Apr. 10, 1990 (on file with the *Seton Hall Legislative Journal*).

<sup>107</sup> *Suit Causes Hellfire Bankruptcy*, FIREARMS BUS., Nov. 1, 1994, at 5.

Similar deference to the role of the legislature should make courts refuse to permit themselves to be used for the *de facto* banning of products through expensive litigation.

In *New York Times Co. v. Sullivan*, Mr. Sullivan was awarded \$500,000 by the jury. In 1960, a one-half million dollar verdict is not small change, but there was no evidence that the amount of the verdict significantly affected the profitability of the *New York Times*,<sup>108</sup> or that the *New York Times* or any other newspaper had been even slightly less aggressive in the exercise of First Amendment rights. Instead, the Court wrote that "the pall of fear and timidity. . . is an atmosphere in which First Amendment freedoms cannot survive," and without finding any evidence of fear or timidity, fashioned a Constitutional remedy.<sup>109</sup> If plausible speculation about the potential for a chilling effect demands a Constitutional remedy for the First Amendment, then certainly evidence of companies being driven out of business is sufficient to compel a Constitutional remedy for the Second Amendment.<sup>110</sup>

### C. *The Slippery Slope*

The slippery slope, always a consideration in First Amendment cases, is visible in Second Amendment cases as well. One of the enduring political tactics of the antigun movement has been to pick off gun owners in small bunches, rather than trying to outlaw firearms entirely in one fell sweep. Antigun groups work hard to assure the majority of America's seventy million gun owners that they are only interested in somebody else's guns—in banning only "Saturday Night Specials," or only handguns, or only "assault weapons." Yet the proposed statutory definitions of products to be banned are often quite extensive; New Jersey's "assault weapon"

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<sup>108</sup> Collectively, the American First Amendment industry (newspapers, television, film) is much larger and wealthier than the Second Amendment industry (gun manufacturers and dealers). Combined into a single firm, the gun manufacturers of America still would not constitute a Fortune 500 company.

<sup>109</sup> *Sullivan*, 376 U.S. at 725.

<sup>110</sup> Recognition of the potential for a chilling effect also suggests that decisions about which firearms should be allowed should be decided with clarity by a legislature, rather than in the amorphous context of a product liability case. In the single case where strict liability against gun manufacturers was upheld, the Maryland Court of Appeals applied strict liability to manufacturers of so-called "Saturday Night Specials" (small, inexpensive handguns).

ban even applies to BB guns.<sup>111</sup>

Currently, antigun litigation groups are focusing their fire on so-called "assault weapons" and handguns. Yet once established, manufacturer and dealer liability will have no practical limit, and neither will plaintiffs' attorneys. Lawsuits have already been brought against BB gun manufacturers,<sup>112</sup> and even slingshot dealers.<sup>113</sup> Once it is established, in the context of firearms, that product manufacturers are responsible for "socializing" the cost of criminal product misuse, then it may be hard to avoid the slippery slope of making automobile dealers liable for drunk drivers, axe makers liable for Lizzie Borden, and Black and Decker liable for the Texas Chainsaw Massacre.

#### D. *Concerted Action to Destroy Rights*

During the early 1960s in Alabama, there was no formal organization of plaintiffs to bring lawsuits to interfere with the First Amendment. But as Justice Black's concurring opinion in *Sullivan* pointed out, Mr. Sullivan's libel suit was one of several that had been brought against the *New York Times* and CBS News in Alabama. The readiness of juries to return verdicts for the full amount asked by plaintiffs was an indication that the white people of Alabama were using libel suits to intimidate "outside agitators" who questioned segregation.<sup>114</sup>

Although there was no evidence that Mr. Sullivan himself was anything other than a plaintiff who honestly felt that he had been tortiously injured, and who decided on his own to seek legal redress, Justice Black surely would have been even more concerned if Mr. Sullivan's lawsuit had been assisted by law student volunteers at the University of Alabama Law School "Media Victims Clinic." Jus-

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<sup>111</sup> N.J. STAT. ANN. §§ 2C:39-5(f), 9(g) (19XX). The section of the law relating to BB guns was declared void by a federal court, relying on a federal statute which forbids state or local prohibition of air guns. *Coalition of New Jersey Sportsmen v. Florio*, 744 F.Supp. 602 (D.N.J. 1990); 15 U.S.C. § 5001(g) (ii).

<sup>112</sup> *Koepke v. Crossman Arms Co*, 582 N.E.2d 1000 (Ohio Ct. App., 1989); *Youth Sues Manufacturer of Pellet Rifle in Shooting*, THE ODESSA AM., Jan. 19, 1984, at 7B (plaintiff's attorney stating, "I don't know what legitimate purpose they could possibly have.").

<sup>113</sup> *Bojorquez v. House of Toys, Inc.*, 133 Cal. Rptr. 483, 484 (Cal. Ct. App. 1976) (plaintiffs "ask us to ban the sale of toy slingshots by judicial fiat. Such a limitation is within the purview of the Legislature, not the judiciary.")

<sup>114</sup> *Sullivan*, 376 U.S. at 294-95 (Black, J., concurring).

tice Black would have been further outraged if Mr. Sullivan's suit had been coordinated by the segregationist legal organization called the "Southern Patriotism Law Center." Surely the evidence of a concerted, rather than a random, attack on free speech in Alabama would have made Justice Black all the more determined to erect legal barriers to prevent tort cases from harming the First Amendment.

The hypothetical situation described for free speech in Alabama in the 1960s is where we are in the argument for the right to arms in the 1990s. Ever since the early 1980s, product liability suits against gun manufacturers have been solicited and orchestrated by the legal arms of anti-gun organizations, such as the Center to Prevent Handgun Violence. As a result of a gift from well-known financier Robert Brennan, antigun student law clinics are being set up at Seton Hall University School of Law and Catholic University Law School. Just as libel suits were brought in plaintiff-friendly, speech-hostile venues such as Montgomery, Alabama, antigun suits are being brought in jurisdictions such as San Francisco and New York City which are notorious for their antipathy to Second Amendment rights.

Antigun organizations and attorneys have every right to promote lawsuits which they believe are meritorious, to work with law school clinics, and to bring suits in venues where they think the chances of success are highest. Organizations and attorneys which favored segregation in the 1960s had the same right. Plaintiffs and their attorneys in the libel cases and the gun cases sincerely believe that they were helping society, and believe that their cases do not interfere with constitutional rights, as they interpret them.

We are not claiming that there is necessarily a moral equivalence between supporters of libel suits in the 1960s and gun suits in the 1990s. We are asserting that the legal assault on the exercise of Second Amendment rights in the 1990s is far more consciously developed and carefully planned than the assault on First Amendment rights was in the 1960s. If the facts of the 1960s were sufficient to necessitate the Supreme Court to take action in *New York Times Co. v. Sullivan* to protect the First Amendment, the facts of the 1990s are more than sufficient to mandate judicial action in the 1990s to protect the Second Amendment.

## V. *Remedying Litigative Abuse of the Second Amendment*

Attempting to destroy gun companies by tagging them for the costs of deliberate criminal misuse of their products is bad enough as a matter of tort law, but it much worse as a matter of Constitutional law. If firearm manufacturers and dealers are driven out of business, or are fearful of manufacturing and selling their product because of the possibility of litigation, their customers cannot obtain the very products which they have a Constitutional right to have.<sup>115</sup> Just as a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions. . . leads to a comparable 'self-censorship,'" <sup>116</sup> a rule which makes manufacturers and sellers liable for criminal misuse of their products may cause them to diminish their activities in the marketplace, thereby depriving buyers of the opportunity to acquire firearms.

As *Sullivan* established, for the government, including the judicial branch, to allow common law torts to infringe on Constitutional rights amounts to unlawful state action that is barred by the Fourteenth Amendment. The judiciary has an affirmative obligation to prevent such infringement.<sup>117</sup>

To protect the Second Amendment and its state analogues against such litigative infringement, we propose a variety of mechanisms. As we noted in the Introduction, these remedies are developed with a view to protecting the right to keep and bear arms, but they could just as well be applied to other Constitutional rights, including the right to abortion.

Before offering our solutions, we want to re-emphasize that the determination that gun manufacturers should not be liable for the unintended criminal misuse of their products is not to grant manufacturers complete tort immunity. If a gun is actually defective, *i.e.*, the gun goes off when it is dropped or the barrel explodes and injures a bystander, ordinary rules of product liability should

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<sup>115</sup> "The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair." *Andrews v. State*, 50 Tenn. 165, 178, 8 Am. Rep. 8, 13 (1871). The right to keep and bear arms protects the manufacture and sale of firearms. *Martin v. Harrington & Richardson, Inc.*, 743 Fed. 2d 1200, 1204 (7th Cir., 1984); *Hilberg v. F.W. Woolworth Co.*, 761 P.2d 236, 240 (Colo. Ct. App., 1988); *Rhodes v. R.G. Indus., Inc.*, 325 S.E.2d 465, 466 (Ga. Ct. App. 1985).

<sup>116</sup> *Sullivan*, 376 U.S. at 725.

<sup>117</sup> *Id.* at 265.

continue to apply. Of course ordinary tort reforms, such as barring recovery by a party for injuries caused by contributory negligence should also apply to firearms cases.<sup>118</sup>

In employing the remedies suggested below, courts need not concern themselves with the precise boundaries of which arms are covered by the Second Amendment or by state constitutional rights to arms. False statements in general, and libel in particular, are not part of the freedom of speech.<sup>119</sup> Nevertheless, libel cases may still not be brought on a strict liability standard.<sup>120</sup> By analogy, harassment lawsuits against gun manufacturers, gun component manufacturers, and gun sellers will risk chilling the exercise of Second Amendment rights, whether or not a particular firearm or accessory is protected by the right to arms.

The Constitutional rule adopted by the Supreme Court in *Sullivan*:

prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.<sup>121</sup>

The analogy for the Second Amendment would prohibit a person injured through the criminal use of a firearm from recovering damages against the non-criminal manufacturer and seller, unless he proved that the firearm was transferred by the defendant with knowledge or reckless disregard that the firearm was to be used criminally.

A second step would be to create an absolute rule barring persons who use a firearm in a criminal manner, and persons who steal firearms, from any right to sue a person or manufacturer in the gun's lawful chain of title.<sup>122</sup> Thus, if someone steals a gun and then gets shot with it, neither the lawful owner of the gun, nor the store that sold it, nor the company that made it should have to spend a minute

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<sup>118</sup> For example, persons who intentionally alter firearms or ammunition should be prohibited from suing for injuries caused by their intentional alteration of the product. See, e.g., *Suing Our Way to Safety*, FIELD & STREAM, Mar. 1992, at 21, 24 (putting dangerous amount of extra gunpowder into ammunition; using live rather than dummy ammunition while performing a particular procedure).

<sup>119</sup> E.g., *Sullivan*, 376 U.S. at 268.

<sup>120</sup> *Gertz v. Welch*, 418 U.S. 323 (1974).

<sup>121</sup> *Sullivan*, 376 U.S. at 726.

<sup>122</sup> See *Robber Sues Policeman*, S.D. UNION, Aug. 31, 1984, at B-3 (robber shot by off-duty policeman; court refused to dismiss suit).

in court defending themselves.<sup>123</sup> Likewise, the doctrine of assumption of risk should absolutely prohibit a criminal who is lawfully shot from suing anyone, from the crime victim to the gun manufacturer; indeed, criminals who sue victims or suppliers of self-defense equipment to victims should be required to pay the legal expenses of the defendants.<sup>124</sup> Similarly, persons who use guns to attempt suicide should not be able to sue gun makers and gun stores, any more than they should be able to sue pharmaceutical manufacturers, bridge construction companies, or manufacturers of garages and automobiles.<sup>125</sup>

Some, but not all, of the antigun lawsuits plainly violate well-established precedent. It is appropriate for Rule 11<sup>126</sup> sanctions to be imposed against attorneys who bring such vexatious, frivolous suits. Even though Rule 11 is mostly a dead letter these days, it at least ought to be employed in cases where suits without merit infringe Constitutional rights.

## VI. Conclusion

While some persons may object to the Second Amendment on policy grounds, as long as it remains in the Constitution, it deserves as much protection as any other Constitutional guarantee. It is therefore the judiciary's duty to defend the Second Amendment against lawsuits aimed at chilling or destroying the exercise of Constitutional rights.

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<sup>123</sup> See *Dead Boy's Mom Sues Truck Owner*, BILLINGS GAZ., May 13, 1993 (eleven-year-old was killed with gun he stole; his mother sued the theft victim).

<sup>124</sup> For a step in this direction, see COLO. REV. STAT. § 13-80-109 (barring recovery by felon who is injured by lawful use of force to prevent his escape; awarding attorneys fees in such cases).

<sup>125</sup> Exceptions should exist in cases when a gun is sold to an obviously suicidal person.

<sup>126</sup> FED. R. CIV. P. 11.