PERMISSIBLE NEGLIGENCE AND CAMPAIGNS TO SUPPRESS RIGHTS

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Professor Andrew McClurg has written interestingly about what he calls the "Second Amendment right to be negligent," under which, he says, gun owners, sellers, and manufacturers escape liability for guns that, through theft and other means, fall into the hands of criminals, chiefly thanks to a federal statute, the Protection of Lawful Commerce in Arms Act.[1] In passing, Professor McClurg notes that only one other item in the Bill of Rights, press freedom under the Supreme Court's decision in *New York Times v. Sullivan*,[2] enjoys a similar "right to be negligent."[3] He is right that other Bill of Rights provisions enjoy no such additional protection (though one might argue that under the Fourth and Fifth Amendments the *government* enjoys a "right to be negligent" via the doctrine of good-faith immunity).

But Professor McClurg's article understandably does not digress into the interesting question of why, exactly, the First and Second Amendments provide protection against tort claims in a way that other constitutional rights have not. In this brief response, I will look at that question, and will also touch, briefly, on the to-me interesting aspect that the protection enjoyed by publishers under the First Amendment was created by judicial action, while that enjoyed under the Second Amendment was instead the product of legislation. But, in short, the common explanation for these "rights to be negligent" lies in the fact that both First and Second Amendment rights were, at different times, targeted by litigation campaigns involving cooperation ("collusion" might be too pejorative a word) between private litigants and government actors, where the litigation was focused more on limiting the extent of the rights than on compensating discrete injuries. I will also touch upon the separation-of-powers argument for statutory rights to be negligent in, at least, the Second Amendment context.

NEW YORK TIMES V. SULLIVAN AND THE FIRST AMENDMENT

Most readers, of course, will know that the *Sullivan* opinion grew out of a campaign by Southern interests to limit and punish negative reporting on racial issues by Northern newspapers.[4] Subject to trial before juries

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1. Andrew Jay McClurg, *The Second Amendment Right to Be Negligent*, 68 FLA. L. REV. 1 (2016).

2. New York Times v. Sullivan, 376 U.S. 254 (1964).

3. *See* McClurg, *supra* note 1, at 2–3.

4. *Cf.* Roy S. Gutterman, *The Landmark Libel Case,* Times v. Sullivan*, Still Resonates 50*

(and often judges) hostile to racial integration, these Northern newspapers risked substantial losses if their reporting offended interests in the South.[5] The Montgomery-based suit against the *New York Times* that gave rise to the *Sullivan* decision is just one such.

The Court recognized this reality. In his *Sullivan* concurrence, Justice Hugo Black called these libel suits a "technique for harassing and punishing a free press."[6] Justice Black explained:

> There is no reason to believe that there are not more such huge verdicts lurking just around the corner for the Times or any other newspaper or broadcaster which might dare to criticize public officials. In fact, briefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the Times seeking $5,600,000, and five such suits against the Columbia Broadcasting System seeking $1,700,000. Moreover, this technique for harassing and punishing a free press . . . can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers.[7]

By 1964, when the *Sullivan* case came before the Supreme Court, "government officials had filed at least $300 million in libel actions against newspapers, news magazines, television networks and civil rights leaders."[8]

These lawsuits were intended to chill or banish negative coverage. As Anthony Lewis wrote, the libel campaign was a "state political weapon to intimidate the press. The aim was to discourage not false but true accounts of life under a system of white supremacy . . . . It was to scare the national press—newspapers, magazines, the television networks—off the civil rights story."[9] A private communication between Birmingham Commissioner J.T. Waggoner, a plaintiff in another libel suit, and his attorney, James A. Simpson, "casts some doubt on whether Waggoner felt defamed personally."[10] Reportedly, Simpson advised Waggoner the

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Years Later, FORBES (Mar. 5, 2014), http://www.forbes.com/sites/realspin/2014/03/05/the-landmark-libel-case-times-v-sullivan-still-resonates-50-years-later/#5ed2578c7eb7 (noting that the case "emerged from the battles of the 1950s and 60s" and the advertorial at issue in the case "highlight[ed] crimes and harassment perpetrated by, or with support or tacit approval of, some government officials against blacks and civil rights leaders in the segregated south").

5. *See id.* (stating that Sullivan won a jury trial, earning $500,000.00 in damages).

6. *Sullivan*, 376 U.S. at 295 (Black, J., concurring).

7. *Id.* at 294–95.

8. Aimee Edmondson, In Sullivan's Shadow: The Use and Abuse of Libel Law During the Civil Rights Movement 43–44 (Dec. 2008) (Ph.D. dissertation, University of Missouri) (citing HARRISON E. SALISBURY, WITHOUT FEAR OR Favor 388 (1982)).

9. ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 35 (2d ed. 1992).

10. Edmondson, *supra* note 8, at 50.

suit would dissuade newspapers like the *Times* "from committing ruthless attacks on [their] region and its people."[11] Furthermore, Simpson stated he was positive that this deterrence was the chief reason Waggoner had determined to engage in tumultuous litigation.[12]

Until the *Sullivan* opinion was handed down, the deterrence worked. As Harrison Salisbury wrote, news media outlets had to "think twice about reporting the facts, harsh and raw as they often were."[13] The *Montgomery Advertiser* called the libel suits a "formidable club to swing at out-of-state press,"[14] and observed that "the recent checkmating of the *Times* in Alabama will impose a restraint on other publications."[15] Lawyers for the *Times* even encouraged reporters to avoid Alabama, to avoid creating more libel suits or running the risk of being served with a subpoena.[16] Stories were even killed for fear of lawsuits:

> On the advice of their lawyers, *Times* editors killed a Sunday story Sitton wrote in late 1962 about a change in the Birmingham city government that might "depose Commissioner Eugene (Bull) Connor, whom Negroes regard as one of the South's toughest police bosses." *Times* lawyer Tom Daly advised editors that the story "might indicate malice" in the pending *Sullivan* suit before the Supreme Court. It did indeed appear that "public officials had achieved their objective. Jim Crow could return to its good old days, operating with virtually no scrutiny."[17]

Set against this background of a concerted effort to burden or impair First Amendment rights through strategic litigation—litigation aimed not at compensating a discrete injury, but at affecting the behavior of the news industry—the Supreme Court created what Professor McClurg calls a "right to be negligent," by limiting libel claims against public officials and public figures to cases where the plaintiff could show "actual malice."[18] Otherwise, the Court concluded, the tort system might be used by powerful interests to undermine an important part of the Bill of Rights.[19]

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11. *Id.* (internal quotations omitted).
12. *Id.*
13. SALISBURY, *supra* note 8, at 384.
14. Edmondson, *supra* note 8, at 52 (quoting Grover Hall, *Checkmate*, MONTGOMERY ADVERTISER, May 22, 1960, at 15).
15. *Id.*
16. *Id.*
17. *Id.* (emphasis added).
18. *See* New York Times v. Sullivan, 376 U.S. 254, 283 (1964).
19. *Id.* at 292.

THE SECOND AMENDMENT'S RIGHT TO BE NEGLIGENT

Professor McClurg's analysis of "rights to be negligent" in the context of the Second Amendment is the main focus of his article, of course, and he roots these rights in the Protection of Lawful Commerce in Arms Act,[20] and the Child Safety Lock Act of 2005.[21] These acts were passed in response to what might fairly be called an effort by powerful interests to use the tort system to undermine an important part of the Bill of Rights.

As David Kopel and Richard Gardner write, in an article that explicitly makes the *Sullivan* analogy:

> In the last [four] decades, groups or attorneys opposed to widespread citizen ownership of firearms (or certain types of firearms) have brought a vast number of product liability suits against gun companies and gun retailers. Often the avowed purpose of that litigation was to make the manufacture and sale of firearms so costly that the industry would give up.[22]

They continue:

> The hypothetical situation described for free speech in Alabama in the 1960s is where we [were] 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 . . . . [T]he legal assault on the exercise of Second Amendment rights . . . is far more consciously developed and carefully planned than the assault on First Amendment rights was in the 1960s.[23]

And, as with the Civil Rights Era libel suits, it was a case of what might be termed a public-private partnership: "The gun suits are, after all, public policy litigation at heart; the key plaintiffs in the recent wave of litigation were not individuals or class representatives but government entities seeking regulatory reform through injunctive relief and the threat of damages."[24]

But, as with the earlier public policy lawsuits against the tobacco

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20. 15 U.S.C. §§ 7901-7903 (2012).

21. 18 U.S.C. § 922(z)(l) (2012).

22. David B. Kopel & Richard E. Gardner, *The Sullivan Principles: Protecting the Second Amendment from Civil Abuse*, 19 SETON HALL LEGIS. J. 737, 749–50 (1995) (internal citations omitted).

23. *Id.* at 772.

24. Howard M. Erichson, *Private Lawyers, Public Lawsuits: Plaintiffs' Attorneys in Municipal Gun Litigation*, *in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 129, 130 (Timothy D. Lytton ed., The U. of Mich. Press 2005).

industry, these suits were filed by private attorneys.[25] The filing of many of these suits was a project of the Castano Group, originally named for a man who died of lung cancer,[26] and whose death provided the impetus for a mass tort campaign against tobacco companies.[27] As the prospects for nationwide tobacco litigation faded, the emphasis shifted to guns.[28] Castano gave rise to the Castano Safe Gun Litigation Group, which filed gun lawsuits on behalf of the cities of Atlanta, Cleveland, Cincinnati, Newark, and Wilmington.[29] As in the organized Civil Rights Era libel suits, mayors and other public officials were central figures in the suits.[30]

In the libel suits, pro-segregation officials waged a sort of asymmetric warfare. They were weak in the news media sphere, but strong in local courts, allowing them to use local litigation to weaken national media. In the gun rights suits, it was a different sort of asymmetric warfare, using the courts to offset legislative weakness:

> For many big city mayors and gun control advocates, filing lawsuits against the firearms industry represents a way to pursue gun control policies that they have failed to achieve through the political process. . . . So they have turned to the courts, asking judges to impose gun controls that they believe would otherwise be passed by an uncorrupted legislative process.[31]

Or as one attorney put it plainly: "You don't need a legislative majority to file a lawsuit."[32]

Congress' response paralleled that of the Supreme Court in *Sullivan*. Faced with what it saw as an abuse of the tort system to limit the scope of a constitutional right, Congress passed laws limiting the ability of plaintiffs to file such suits. As Professor McClurg notes, the Protection of Lawful Commerce in Arms Act provides extensive tort immunity to gun manufacturers and gun dealers in both state and federal court.[33] The Child Safety Lock Act limits liability of individuals for negligence in securing firearms.[34] Similar to the effect of *Sullivan* on the libel campaign, this legislation largely ended the anti-gun tort litigation campaign. In doing

25. *See id.* at 129–30.
26. *See id.* at 129.
27. *See id.* at 136.
28. *See id.*
29. *See id.* at 129.
30. *See id.* at 139.
31. Timothy D. Lytton, *The NRA, the Brady Campaign, and the Politics of Gun Litigation*, *in* SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 152, 152 (Timothy D. Lytton ed., The U. of Mich. Press 2005).
32. *Id.* at 154.
33. *See* McClurg, *supra* note 1, at 5.
34. *See id.*

so, as Professor McClurg notes, Congress specifically noted that the Second Amendment is involved.[35]

CONCLUSION

The parallels between the Supreme Court's treatment of libel suits being used as political weapons and Congress' treatment of gun-based tort actions being used in the same way are pretty substantial. But that leaves us with two questions. First, why such protection for these two rights, press freedom and the right to arms? And second, why is one such protection offered by the Court, and the other by Congress?

With regard to the first question, one possible answer is that, as Kopel and Gardner note, only the first three amendments in the Bill of Rights offer substantive, as opposed to procedural, protections.[36] Given the general lack of interest in the Third Amendment, this may be taken as evidence that a "right to be negligent" is a normal accompaniment of substantive protections under the Bill of Rights. Perhaps it's even possible that, should people's right not to quarter troops in their homes except in wartime under congressional direction be threatened by mass litigation, either the Court or Congress would step in. But I wouldn't hold my breath on that one materializing.[37]

It may also tell us something regarding views, both judicial and legislative, about appropriate limits to the tort system. While tort litigation may, naturally enough, bring about large-scale changes over time, use of the tort system to wage battles that are fundamentally political and not about remedying discrete injuries may seem excessive, at least where such uses threaten to limit substantive constitutional rights. Where that happens, special legal protections—Professor McClurg's "right to be negligent"—are necessary to put an end to it.

Which raises a final question: If the "right to be negligent" is a sort of penumbral aspect of First and Second Amendment rights, why is it enforced in the one case by the Supreme Court and in the other by Congress? There are a couple of possible explanations here, too. The first is simply timing. The Supreme Court decided *Sullivan* because the case got there in the normal course of litigation and the First Amendment right to a free press was already well-established. When Congress passed its

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35. *See id.* at 8.

36. Kopel & Gardner, *supra* note 22, at 743 ("[O]f the entire Bill of Rights, only the First, Second, and Third Amendments guarantee particular substantive rights. Amendments Four through Eight are due process requirements for the government to obey, while Amendments Nine and Ten are non-specific reservations of rights.") (internal citations omitted).

37. *See generally* Glenn Harlan Reynolds, *Third Amendment Penumbras: Some Preliminary Observations*, 82 TENN. L. REV. 557 (2015) (discussing possible penumbras, if any, of the Third Amendment); Symposium, *Exploring The Forgotten Third Amendment*, 82 TENN. L. REV. 491 (2015).

own "right to be negligent" statutes, on the other hand, the Supreme Court had not yet decided *District of Columbia v. Heller*,[38] leaving the extent (or even existence) of Second Amendment protections in the judicial branch unclear. Thus it fell to Congress, in this case, to offer Second Amendment protections.

The other possible explanation is a bit more troubling. One might argue that the difference here is evidence of a class divide. It's not hard for the justices of the Supreme Court to identify with the legal plight of Timesmen faced with abusive libel suits. The judiciary is, naturally enough, the most academic branch of government, and, being made up entirely of attorneys, the one most likely to be sympathetic to the problems of the chattering upper-middle classes. Congress, on the other hand, is likely to be more sympathetic to the large number of less-elite Americans who hunt and shoot—and, perhaps, less sympathetic to litigation efforts explicitly aimed at bypassing the normal political/legislative process.

In a sense, Congress was defending not only the Second Amendment rights of Americans here, but also standing up for itself in terms of separation of powers, by keeping legislative powers within the legislative sphere. While judicial decisions, by their nature, can have regulatory effects in a common law system, a public-private litigation partnership aimed at end-running legislative majorities is something different, and a threat to the role of the legislature itself. As such, it should not be surprising that the legislature might take steps to defend its role against encroachment.

Which one of these explanations, if either, is correct is beyond the scope of this brief response. But looking at the First Amendment and Second Amendment varieties of "permissible negligence," and how they arrived, leaves me feeling more sanguine about both than Professor McClurg seems to be. There are, of course, costs involved in protecting constitutional rights. Protections for criminal defendants mean that some guilty parties go free, but we accept those as the price of living in a free country. Protections for media statements about public figures mean that some libel goes unpunished. Barriers to weaponized tort litigation mean that some incentives for safety are taken off the table.

These are (a few of) the constitutional tradeoffs we make. Whether they are worth making is open for debate, and there are strong voices to be found in favor of, or against, all of them.

The tragedy of life, my father used to say, is that not all values can be realized. Certainly not simultaneously. In these "right to be negligent" cases, both the Supreme Court and Congress have chosen the Constitution over competing values. Given that their oaths are, primarily,

38. 544 U.S. 570 (2008).

to the Constitution, that seems fitting enough.