

## GUNS, SPEECH, AND BREATHING SPACE

### A RESPONSE TO ANDREW JAY MCCLURG'S THE SECOND AMENDMENT RIGHT TO BE NEGLIGENT

*Allen Rostron*\*

The notion that people might have a constitutional right to be negligent may sound like a peculiar and dubious proposition. Even lawyers, judges, and scholars who have devoted considerable time to thinking about the intersection of constitutional law and tort law may initially be taken aback by the argument that such a right exists. But in *The Second Amendment Right to Be Negligent*,<sup>1</sup> Professor Andrew McClurg astutely observes that current law provides such a right in two important realms. He first notes that the Supreme Court has construed the freedom of expression protected by the First Amendment as including a right to be negligent in speaking about public officials, public figures, and issues of public interest.<sup>2</sup> Professor McClurg then argues that a constitutional right to be negligent has emerged under the Second Amendment as well, with courts and legislatures essentially creating a right to be negligent in the sale and storage of firearms.<sup>3</sup>

Professor McClurg condemns the creation of this right to be negligent with guns and his arguments are compelling. He observes that legislation, particularly federal laws like the Child Safety Lock Act<sup>4</sup> and the Protection of Lawful Commerce in Arms Act,<sup>5</sup> have given gun manufacturers, dealers, and owners special protection from tort liability.<sup>6</sup> Even when those statutes do not bar liability from being imposed, judges have often misapplied basic tort principles in cases involving guns, making it unduly difficult for plaintiffs to recover for harm resulting from negligent actions by gun owners or sellers.<sup>7</sup> As a result, gun owners' and sellers' incentives to act with reasonable care are reduced and the risks of

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\* Associate Dean for Students and the William R. Jacques Constitutional Law Scholar and Professor of Law, University of Missouri–Kansas City School of Law. B.A. 1991, University of Virginia; J.D. 1994, Yale Law School. Before becoming a law school teacher, Professor Rostron worked as a senior staff attorney for the Brady Center to Prevent Gun Violence. The views expressed in this article are strictly his own and do not represent the positions of any other person or entity.

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

2. *Id.* at 2–3.

3. *Id.* at 3–4.

4. 18 U.S.C. § 922(z)(1) (2012).

5. 15 U.S.C. §§ 7901–7903 (2012).

6. See McClurg, *supra* note 1, at 17–18, 31–32, 36–37.

7. See *id.* at 23–36.

harm from unauthorized use of firearms are increased.<sup>8</sup> The situation is “disheartening,” as Professor McClurg says.<sup>9</sup>

Professor McClurg’s focus is squarely on the Second Amendment right to be negligent, so his Article briefly mentions the parallel First Amendment right but does not discuss it in great detail. In this response to the Article, I will explore the relationship between the rights a bit further and offer a few thoughts on the relative merits of the First Amendment right to be negligent and its Second Amendment cousin.

The First Amendment right to be negligent interests me in part because I could imagine gun rights activists invoking it as an argument against Professor McClurg’s conclusions with respect to guns. In other words, I share Professor McClurg’s preference for stronger safety regulations and requirements for guns, but obviously gun control is a controversial issue on which many other people take the opposite view. I expect critics of Professor McClurg’s Article would make either of two basic arguments.

One would be to deny the existence of a Second Amendment right to be negligent with firearms. Professor McClurg’s critics might argue that when legislators and courts protect gun owners and sellers from being held liable, they are not really giving anyone a right to be negligent. Instead, they are merely providing protection against misguided accusations of negligence that do not really have legal merit. Thus, there is not really a Second Amendment right to be negligent, just a right not to be wrongly accused of negligence for reasonably exercising one’s constitutional right to keep and bear arms.

But I could also imagine Professor McClurg’s critics opting for a different line of attack. They might concede Professor McClurg’s initial point, that a blend of constitutional, statutory, and common law has essentially created a Second Amendment right to be negligent with firearms, but disagree with Professor McClurg’s conclusion that this is a bad thing. Perhaps people should have a right to be negligent with firearms. After all, if the First Amendment includes a right to be negligent, why shouldn’t the Second Amendment do so as well? In this response, I argue that a parallel Second Amendment right to be negligent is inappropriate.

Determining the viability of a Second Amendment right to be negligent requires a look back at the reasons why a right to be negligent exists under the First Amendment. As Professor McClurg notes, the First Amendment right to be negligent stems from cases like *New York Times Co. v. Sullivan*,<sup>10</sup> where the Supreme Court made it more difficult to

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8. *See id.* at 38–46.

9. *Id.* at 46.

10. 376 U.S. 254 (1964).

impose liability for defamation.<sup>11</sup> In that case, an elected official who supervised the police department in the city of Montgomery, Alabama, sued the *New York Times* over an advertisement placed in the newspaper by a civil rights group seeking to raise funds for their cause.<sup>12</sup> The advertisement criticized the Montgomery police department and contained several factual misstatements concerning civil rights protests in Montgomery and the police response to them.<sup>13</sup> The trial judge in the case instructed the jury that the advertisement was libelous per se, so falsity and malice were presumed, and the jury merely needed to determine whether the advertisement was published by the defendant and referred to the plaintiff.<sup>14</sup> The jury found the *New York Times* liable for \$500,000 in damages.<sup>15</sup>

Unanimously overturning the verdict, the U.S. Supreme Court held that the plaintiff should have been required to prove that the *New York Times* acted with actual malice.<sup>16</sup> That meant the newspaper would be liable if it knowingly or recklessly printed material that was false and defamatory, but not if it was merely negligent in doing so.<sup>17</sup> In that case and subsequent ones, the Court drew an important line between speech about public and private matters. The First Amendment right to be negligent (or in other words the requirement that a plaintiff in a defamation case must prove more than mere negligence) applies only to a person talking about public officials, public figures, or issues of public concern.<sup>18</sup> Where the speech is about private individuals and private matters, liability for negligence can be imposed.<sup>19</sup>

One might wonder why the Supreme Court would want to protect those who negligently say false things. It was not because the Court wanted to encourage newspapers or anyone else to be negligent and misstate facts. The Court realized that freedom of speech needs “breathing space” in order to survive.<sup>20</sup> The First Amendment’s central purpose is to ensure that Americans can vigorously discuss and debate important political and public policy issues.<sup>21</sup> The expression of views about such matters “should be uninhibited, robust, and wide-open” and

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11. *Id.* at 292.

12. *Id.* at 256–57.

13. *Id.* at 258–59.

14. *Id.* at 262.

15. *Id.* at 256.

16. *Id.* at 292.

17. *Id.* at 279–80.

18. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1098–1106 (5th ed. 2015).

19. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

20. *New York Times Co.*, 376 U.S. at 272 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

21. *Id.* at 269–70.

“it may well include vehement, caustic, and sometimes unpleasantly sharp attacks.”<sup>22</sup> In that sort of vibrant exchange of strongly held views, erroneous statements will inevitably be made.<sup>23</sup> While ideally tort law might serve to improve the quality of debate, by encouraging speakers who would otherwise be negligent to instead use reasonable care, the Supreme Court realized that the effects of potential liability for defamation would inevitably be broader than intended.<sup>24</sup> The risk of being found negligent, or even the risk of just being accused of negligence, would create a “pall of fear and timidity” that would unduly chill people’s willingness to speak their minds.<sup>25</sup> The Supreme Court thus recognized a First Amendment right to be negligent in talking about important, controversial public issues because the Court feared that potential liability for negligent speech would cause people to stop talking about hot-button topics rather than merely causing them to exercise reasonable care in deciding what to say.

Is there a plausible need for a similar right to be negligent under the Second Amendment? Does the right to keep and bear arms need breathing space to survive? While it is often interesting to compare and contrast the rights provided by the First and Second Amendments, the important differences between speech rights and gun rights must be kept in mind. The type of harm that typically would flow from the exercise of these rights is markedly different. Careless words can damage reputations, mislead audiences, and cause significant emotional distress to those about whom negative things are said. These types of harm can be very real and important. But the harm that can result from carelessness with firearms is obviously of a different kind, with more tangible and grave consequences. Negligence with a gun can literally be a matter of life and death in ways that negligent expression typically cannot.

The Supreme Court has also recognized that even without the potential for tort liability, mechanisms exist for reducing the potential adverse impact of careless political speech. In the proverbial marketplace of ideas, good speech is a cure for bad speech.<sup>26</sup> If some speakers carelessly misstate facts, other speakers can point out the errors. The need

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22. *Id.* at 270.

23. *Id.* at 271–72.

24. *Id.* at 279.

25. *Id.* at 278.

26. *See, e.g.,* *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”), *overruled in part by* *Brandenburg v. Ohio*, 89 S. Ct. 1827 (1969); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”).

for tort liability is diminished if “counterargument and education” provide remedies.<sup>27</sup>

No similar mechanism exists to ameliorate the risks of negligence with guns. For example, if a small portion of a town’s population is careless with firearms and makes it easy for them to be stolen by criminals, that problem may persist even when other people in the town denounce the negligent practices and exercise great care with firearms. The reasonable behavior of the majority will not extinguish the negligence of the careless few in the way that accurate and persuasive speech will override and nullify the effects of speech that is careless and erroneous.

The Supreme Court rightly worried that the deterrent effects of potential liability for defamation could be too strong. Rather than just encouraging reasonable care, potential liability for negligence might make some people reluctant to speak about controversial matters at all.<sup>28</sup> Some valuable perspectives on important public issues might be lost.<sup>29</sup> By contrast, the right to keep and bear arms is so robust in America today that it is hard to imagine it being unduly diminished by holding gun owners and sellers to the same basic principles of tort law that generally apply throughout society. People who own guns typically have very strong feelings about the subject. As Professor McClurg observes, there may be no other group in America who is more dedicated to their issue than advocates for gun rights.<sup>30</sup> Likewise, the National Rifle Association is one of the most powerful lobbying groups in the nation,<sup>31</sup> and the manufacture and sale of guns is a multi-billion dollar industry.<sup>32</sup> To the extent that laws require those who make, sell, and own guns to exercise reasonable care in doing so, the likely result will be simply to cause some reduction of negligence. People who own guns will have a greater incentive to be more careful with them, but they will not abandon gun ownership. Companies that sell guns will be motivated to ensure that their practices are reasonably safe, but they will not flee the gun business. The need for constitutional breathing space around guns and the Second

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27. *New York Times Co.*, 376 U.S. at 304 (Goldberg, J., concurring in result).

28. *See supra* text accompanying notes 24–25.

29. *See New York Times Co.*, 376 U.S. at 277 (stating the “fear of damage awards” could significantly inhibit speech).

30. *See McClurg, supra* note 1, at 42.

31. Brian Palmer, *Why Is the NRA So Powerful?*, SLATE (June 29, 2012), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2012/06/eric\\_holder\\_charged\\_with\\_contempt\\_how\\_did\\_the\\_nra\\_swing\\_the\\_votes\\_of\\_so\\_many\\_democrats\\_.html](http://www.slate.com/articles/news_and_politics/explainer/2012/06/eric_holder_charged_with_contempt_how_did_the_nra_swing_the_votes_of_so_many_democrats_.html).

32. MAKSIM SOSHKIN, IBISWORLD, INDUSTRY REPORT 33299A: GUNS & AMMUNITION MANUFACTURING IN THE US 4 (Aug. 2016), <http://clients1.ibisworld.com/reports/us/industry/ataglance.aspx?entid=662> (estimating that revenues for gun and ammunition manufacturing in the United States in 2016 would exceed \$16 billion).

Amendment is substantially less than it is for speech and the First Amendment.

The arguments against a Second Amendment right to be negligent surely draw some support from the constitutional text as well, for the Second Amendment explicitly states that the primary reason for having a right to keep and bear arms is to ensure the maintenance of a well-regulated militia.<sup>33</sup> One can fully embrace everything that the Supreme Court has said about this provision in recent years, accepting that the Second Amendment broadly protects gun rights for private individuals rather than merely protecting state-organized forces like the National Guard,<sup>34</sup> and still recognize that the Second Amendment's prefatory language about a well-regulated militia should have some bearing on how the Amendment gets interpreted and applied. Justice Antonin Scalia emphasized the importance of firearms as a means of protecting the hearth and home against criminal invaders.<sup>35</sup> The Second Amendment also serves to deter tyranny by ensuring that the government does not have a monopoly on possession of weapons and the American people would have a means of resistance against oppression if necessary.<sup>36</sup> Under either rationale for the right, tolerating negligence with guns runs counter to the goal of having a well-regulated militia composed of Americans who are knowledgeable about and experienced with guns, who understand and respect what these weapons can do, and who take seriously their exercise of this right and the responsibilities that accompany it.

The Supreme Court acted in a very deliberate, thoughtful, and precise way when it created the First Amendment right to be negligent. The Court narrowly restricted the right to apply only where there was the greatest need for it, limiting it to situations involving public officials or figures or issues of great public importance.<sup>37</sup> The Second Amendment right to be negligent has emerged in a more haphazard, unbounded, and uncoordinated manner. It is a "de facto" right, as Professor McClurg calls it,<sup>38</sup> resulting from a combination of both action and inaction by legislatures and courts over the years. America has drifted toward having a Second Amendment right to be negligent, without ever making a clear and reasoned decision as to why such a right should exist. Professor

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33. U.S. CONST. amend. II.

34. *See* *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

35. *See Heller*, 554 U.S. at 635 (claiming that the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home").

36. *Id.* at 598 (arguing that "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny").

37. *See supra* text accompanying note 2.

38. McClurg, *supra* note 1, at 3.

McClurg's Article makes a valuable contribution by calling attention to the emergence of this right and its unfortunate consequences. While freedom of speech may need the breathing space afforded by a right to be negligent, a persuasive case for the recognition of a right to be negligent with guns has yet to be made.