

## PISTOLS, CRIME, AND PUBLIC: SAFETY IN EARLY AMERICA

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There is a vigorous debate under way about the scope of the Second Amendment. What are the limits of that right? What “arms” does it protect? Does it protect an individual right to possess and perhaps to carry firearms? The District of Columbia, in its attempt to defend its 1976 gun control law, has argued that the widespread possession of handguns (“pistols”) represents an especially serious public safety hazard, and that even if *arguendo*, the Second Amendment protects an individual right, it would not extend to pistols, which the District of Columbia characterizes as “uniquely dangerous weapons” that present “unique dangers to innocent persons.”<sup>3</sup>

This paper examines what was likely the Framer’s original public meaning of the Bill of Rights provision that protects “the right of the people to keep and bear arms,” *with no apparent limitations concerning handguns*. We do so by examining what the history of pistols in early America tells us about foreseeable technological developments.

### I. GUNS, ARMS, FIRE-ARMS, PISTOLS: SOME DEFINITIONS

A few definitions are appropriate because there have been a few subtle changes in the meaning of some of the terms over the last two centuries. “Gun” had a more restricted meaning in the eighteenth century than it does today, referring in some contexts to privately owned cannon,<sup>4</sup> but most often to what today we call long guns:

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4. See J. HAMMOND TRUMBULL, PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 497 (Hartford, Conn., Brown & Parsons 1850) (describing “two great gunns” documented in “An Inventory of the Estate of Mr. William Whiting, deceased”).

weapons designed to be fired with two hands with either smoothbore or rifled barrels. The smoothbore weapons included fowling pieces, blunderbusses, and muskets, all of which could—and often did—fire either shot or lead balls. The only real distinction between a fowling piece and a musket was that muskets were of larger caliber and were intended for more powerful charges of gunpowder, thus being capable of firing a lead ball that would be deadly at a greater distance. Blunderbusses,<sup>5</sup> with their characteristic belled muzzles, were short-range antipersonnel weapons that put an enormous quantity of shot in a broad pattern—the “assault weapon” of their day in terms of lethality and the number of persons that they could kill or wound.



Eighteenth Century Blunderbuss<sup>6</sup>

That “gun” did not include “pistol”<sup>7</sup> is demonstrated by the number of statutes that include both “gun” and “pistol” on a list of arms. For example, Colonial statutes requiring churchgoers to be armed in South Carolina (1743)<sup>8</sup> and Georgia (1770)<sup>9</sup> distinguish between “a gun” and a pair of pistols. Perkin & Coutty of Philadelphia advertised in 1781 that they made firearms “in all its

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5. An eighteenth century “blunderbuss” is the equivalent of a twentieth century shotgun but often of very large bore diameter.

6. Photograph courtesy of the Idaho Historical Museum and the J. Earl Curtis Exhibition at the Old Idaho Penitentiary.

7. An eighteenth century “pistol” is the equivalent of a twentieth century handgun.

8. 7 DAVID J. MCCORD, STATUTES AT LARGE OF SOUTH CAROLINA 417–19 (A. S. Johnson 1840), available at <http://www.claytoncramer.com/primary/militia/SCStatAtLarge7-417.jpg>; <http://www.claytoncramer.com/primary/militia/SCStatAtLarge7-418.jpg>; <http://www.claytoncramer.com/primary/militia/SCStatAtLarge7-419.jpg>.

9. 19 ALLEN D. CANDLER, THE COLONIAL RECORDS OF THE STATE OF GEORGIA 137–40, (Chas. P. Byrd 1911), available at <http://www.claytoncramer.com/primary/militia/GA1770BringGunsToChurch.pdf>.

branches, where gentlemen may be supplied with *Guns and Pistols* of the neatest and best quality, on the shortest notice.”<sup>10</sup> Even as late as 1828 this distinction between guns and pistols appeared in a proclamation from Washington, D.C. Mayor Joseph Gales:

WHEREAS it has been too much the habit of idle and inconsiderate persons, on Christmas and New Year’s Day and Eve to indulge in firing off *guns, pistols, squibs, and crackers*, and burning of gun-powder in divers other ways, to the great annoyance of the peaceable inhabitants of this city, and to the manifest danger of their persons and property . . . .<sup>11</sup>

The term “fire-arm” was also more restricted in meaning than today. Even though there are no examples in the *Oxford English Dictionary*, we know from contemporary documents that, as early as 1775 and as late as 1806, the term “fire-arm” was restricted to muskets.<sup>12</sup> It did not include pistols, rifles<sup>13</sup> or blunderbusses. At the start of the Revolution, General Gage ordered the people of Boston to turn in their arms. As an incentive, General Gage offered passes to leave Boston to all who turned in their weapons, because no weapons or ammunition were allowed to leave Boston. On April 27th, “the people delivered to the selectman 1778 *fire-arms*, 634 *pistols*, 973 bayonets, and 38 *blunderbusses*.”<sup>14</sup> Additionally an 1806 congressional committee report used the phrase “*fire arms and rifles*,” suggesting that “fire arm” may have been used in the sense of “military musket,” rather than the broader definition in use today.<sup>15</sup>

As is the case today, “arms” was not limited to firearms in the Colonial and Revolutionary periods, although most “arms” that appear in official documents from those periods are firearms (in the modern sense of the word—something that uses rapidly burning

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10. PA. GAZETTE May 2, 1781 (emphasis added).

11. Joseph Gales, Jr., A Proclamation (Dec. 23, 1828), reprinted in AN AMERICAN TIME CAPSULE: THREE CENTURIES OF BROADSIDES AND OTHER PRINTED EPHEMERA (Library of Congress, Rare Book & Special Collections Div.), <http://hdl.loc.gov/loc.rbc/rbpe.19301000> (last visited May 5, 2008) (emphasis added).

12. An eighteenth century “musket” is a long gun with a smoothbore barrel capable of discharging a single lead ball of about three-quarter inch diameter with accuracy at moderate distances.

13. An eighteenth century “rifle” is a long gun with a rifled barrel capable of discharging a single lead ball of about one-half inch diameter with accuracy at longer distances

14. RICHARD FROTHINGHAM, HISTORY OF THE SIEGE OF BOSTON, AND OF THE BATTLES OF LEXINGTON, CONCORD, AND BUNKER HILL 94–95 (Little, Brown, & Co. 6th ed. 1903) (1849) (emphasis added).

15. 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS NO. 62 (William S. Hein & Co., Inc. 1998) (1832), available at <http://memory.loc.gov/llsp/016/0200/02040198.tif> (emphasis added).

gunpowder to generate gas to discharge projectiles). For example, Massachusetts purchased 948 small arms in the first months of the Revolution for which we have both a count and a price.<sup>16</sup> Of these, some are explicitly identified as firearms, while others are simply referred to as “arms” or “small arms.” Firearms (n = 341, standard deviation = 0.21841) had an average purchase price of 1.680 pounds sterling. Other arms (n = 607, standard deviation = 0.07642) had an average purchase price of 1.638 pounds sterling. At a ninety-five percent confidence interval, there is no overlap in pricing between the two groups. This suggests that while there might well have been some firearms in the “arms” or “small arms” category, it is unlikely that “arms” consisted entirely of firearms.<sup>17</sup>

While pistols were not included in the category of “guns,” they were certainly “arms,” along with a number of impact and edged weapons of the time. As Webster’s *A Dictionary of the American Language* (1828) defined arms, “In law, arms are any thing which a man takes in his hand in anger, to strike or assault another.”<sup>18</sup> The *Oxford English Dictionary* definitions for “arms” are more specific than Webster’s: “Instruments of offence used in war; weapons. *fire-arms*: those for which gunpowder is used, such as guns and pistols, as opposed to *swords, spears, or bows*. *small-arms*: those not requiring carriages, as opposed to *artillery*.” But all the examples cited in the *Oxford English Dictionary* of the usage of the word “arms,” from 1300 to 1870, conform to the definition given by Webster—those which can be taken in the hand.<sup>19</sup>

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16. See AMERICAN ARCHIVES: FOURTH SERIES, CONTAINING A DOCUMENTARY HISTORY OF THE ENGLISH COLONIES IN NORTH AMERICA FROM THE KING’S MESSAGE TO PARLIAMENT OF MARCH 7, 1774 TO THE DECLARATION OF INDEPENDENCE OF THE UNITED STATES 1347, 1349, 1353, 1357–62, 1367 (Washington, M. St. Clair Clarke & Peter Force 1837) [hereinafter AMERICAN ARCHIVES]; PROVINCIAL CONGRESS OF MASS., THE JOURNALS OF EACH PROVINCIAL CONGRESS OF MASSACHUSETTS IN 1774 AND 1775, at 536–37, 584–93 (Boston, Dutton & Wentworth 1838).

17. See JOHN WINTHROP, WINTHROP’S JOURNAL: HISTORY OF NEW ENGLAND 1630–1649, at 191 (James Kendall Hosmer ed., Charles Scribner’s Sons 1908). In at least one early Colonial source, “armed” means “with armor,” because the soldiers under Indian attack are described as “some ten only (who had pieces which could reach them) shot” and yet later, “they shot only one of ours, and he was armed, all the rest being without arms.” *Id.* That some soldiers fired guns, while one was described as “armed” and rest were not, shows that “armed” meant “with armor.” This indicates that “arms” could include body armor as well as a variety of weapons.

18. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828) (emphasis added).

19. OXFORD ENGLISH DICTIONARY 634 (J.A. Simpson & E.S.C. Weiner, eds., Clarendon Press 1989).

## II. PISTOL REGULATIONS

There are almost no regulatory distinctions between pistols and long guns in statutes before 1791.<sup>20</sup> When Colonial statutes refer to pistols, it is usually as part of a list of other arms, with no indication that they were treated differently. As an example, in 1684 Virginia passed a law that sought to encourage private ownership of guns by exempting privately owned guns from being impressed for public service. To encourage the inhabitants to be “well and compleatly furnished when commanded to musters,” all “swords, muskets . . . pistolls, carbines, guns, and other armes and furniture, as the inhabitants of this country . . . shall provide and furnish themselves with, for their necessary use and service, shall from henceforth be free and exempted from being imprest or taken from him or them . . . .”<sup>21</sup> A statute adopted at the Massachusetts 1713–1714 legislative session complained, “Whereas by the indiscreet firing of guns laden with shot[t] and ball within the town and harbour of Boston, the lives and limbs of many persons have been lost, and others have been in great danger, as well as other damage [*sic*] has been sustained . . . .”<sup>22</sup> The legislature prohibited firing of any “gun or *pistol*” in Boston (“the islands thereto belonging excepted”).<sup>23</sup>

Measures that sought to disarm African-Americans also made no distinctions between categories of arms. Pennsylvania’s 1700 “Act for the Trial of Negroes” provided that “if any Negro shall presume to carry any guns, swords, *pistols*, fowling-pieces, clubs or other arms or weapons whatsoever, without his master’s special license for the same,” he would receive twenty-one lashes on his bare back.<sup>24</sup>

A 1743 South Carolina statute required “every white male inhabitant of this Province” under sixty years old, “who is or shall be liable to bear arms in the militia of this Province” and who attended “church or any other public place of divine worship,” to “carry with

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20. See generally CLAYTON E. CRAMER, *ARMED AMERICA: THE REMARKABLE STORY OF HOW AND WHY GUNS BECAME AS AMERICAN AS APPLE PIE* (2006).

21. 3 *THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619*, at 13 (William Waller Hening, ed., R. & W. & G. Bartow) (1823) (emphasis added).

22. 3 *ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY: TO WHICH ARE PREFIXED THE CHARTERS OF THE PROVINCE WITH HISTORICAL AND EXPLANATORY NOTES* 305 (Boston, Albert J. Wright 1878).

23. *Id.* (emphasis added).

24. 2 *STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801*, at 77–79 (Pennsylvania, Clarence M. Busch 1896) (emphasis added).

him a gun or a *pair of horse-pistols* . . . with at least six charges of gun-powder and ball.” Those who failed to do so would be fined twenty shillings—a week’s wages for many colonists.<sup>25</sup> (Georgia adopted a very similar statute in 1770.)<sup>26</sup>

The only examples of laws that treat pistols differently from other arms suggest that pistols were regarded as either *less* dangerous than long guns, or perhaps, that they enjoyed some protected status as weapons of self-defense. In January of 1776, the Maryland Revolutionary government ordered those not prepared to associate with the Revolutionary cause to turn over their firearms for the use of the militia—with one notable exception. The counties were told to order all freemen to “deliver up to the committee of observation for this county, all fire-arms, if he hath any, *except pistols*.”<sup>27</sup> Even with all the concerns about Loyalists who might take advantage of the arrival of British troops to cause mischief, there was apparently no need to disarm them of their pistols.<sup>28</sup> A similar exception—allowing those not entirely trusted with long guns to nevertheless possess pistols—occurred in Maryland as late as 1781.<sup>29</sup>

Arlan K. Gilbert’s examination of post-Revolutionary gunpowder manufacturing mentions an incident that suggests that the carrying of handguns was not particularly restricted in Maryland.

An earlier explosion occurred on October 17, 1783, in the yard of a Mrs. Clement in Baltimore, where some gunpowder had been placed to dry. Three boys, two of them Negroes, went into the yard to clean their pistols. One of them carelessly fired his pistol near the powder, causing it to blow up. One boy was killed and the other two seriously injured.<sup>30</sup>

A Boston ordinance from 1786 that prohibited *storing* a variety of loaded weapons in buildings makes no apparent distinctions between different categories of weapons. The ordinance prohibited

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25. MCCORD, *supra* note 8, at 417–19 (emphasis added).

26. CANDLER, *supra* note 9, at 137–40.

27. 78 ARCHIVES OF MARYLAND 75, 110 (Baltimore, James Lucas & E. K. Deaver and Annapolis, Jonas Green), available at <http://aomol.net/megafile/msa/speccol/sc2900/sc2908/000001/000078/pdf/am78--75.pdf>; <http://aomol.net/megafile/msa/speccol/sc2900/sc2908/000001/000078/pdf/am78--110.pdf>.

28. *Id.*

29. 203 ARCHIVES OF MARYLAND 278 (Baltimore, James Lucas & E. K. Deaver and Annapolis, Jonas Green), available at <http://aomol.net/megafile/msa/speccol/sc2900/sc2908/000001/000203/pdf/am203--278.pdf>.

30. Arlan K. Gilbert, *Gunpowder Production in Post-Revolutionary Maryland*, MD. HISTORICAL MAGAZINE, Sept. 1957, at 188 n. 7.

keeping *loaded* “fire-arms, or any bomb, granade, or other shell . . . in any house, outhouse, barn, stable, store, ware-house, shop, or other building.”<sup>31</sup> Other sections apply this prohibition to “cannon, swivels, mortars” and other military ordnance.<sup>32</sup>

Saul Cornell has pointed to this law as evidence that there was no individual right to keep and bear arms at the time:

This is a law that effectively makes it illegal in the city of Boston to have a loaded firearm. To have a loaded firearm in the city of Boston in the 1780s is against the law. The founding fathers were willing to ban loaded guns in the city of Boston.<sup>33</sup>

One would think that if there were other laws or ordinances regulating the possession of loaded firearms, Cornell would not have been silent about it. The absence of other examples suggests that Boston’s ordinance was somewhat remarkable.

A careful reading of the ordinance, however, reveals that its purpose was not Cornell’s general ban on guns in Boston, but on the act of leaving them loaded *and* unattended: “[w]hereas the depositing of loaded arms in the houses of the town of Boston, is dangerous to the lives of those who are disposed to exert themselves when a fire happens to break out in the said town . . . .”<sup>34</sup>

The ordinance did not prohibit *carrying* loaded firearms within the city of Boston—only leaving them unattended in a building—and as the preamble makes clear, this law was for the protection of those fighting fires. These were all *black powder* arms that are susceptible to explosive ignition from external heat sources as well as prone to accidental discharge because of their exposed firing mechanisms. Unloading a flintlock firearm (except by firing it) was a tedious task, and it is easy to see why the city felt that it was appropriate to require guns not be kept loaded and unattended. That Boston felt the need for such a law, however, suggests that gun ownership was also common, as was having loaded firearms in one’s home or business. Further, fires were more common at that time than today. But if only ten

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31. An Act in Addition to the Several Acts Already Made for the Prudent Storage of Gun-Powder Within the Town of Boston, Massachusetts Session Laws (1786) (on file with author) [hereinafter “Boston Law”].

32. *Id.*

33. Saul Cornell, Assoc. Professor, Ohio State Univ., Address at the Center to Prevent Handgun Violence Second Amendment Symposium: After the *Emerson* Decision, Setting the Record Straight on the Second Amendment 64 (Feb. 16, 2000) (transcript available at <http://www.gunlawsuits.org/pdf/defend/second/symposium.pdf>).

34. Boston Law, *supra* note 31.

percent of homes had a gun, and only ten percent of those homes had a *loaded* gun, the intersection of houses on fire and houses with loaded guns in them would have been very small indeed. The law also clearly considered the possession of firearms, cannon, and grenades to be unremarkable, and the carrying of loaded firearms a sufficiently common practice as to need no separate regulation—and no prohibition while walking the streets of Boston.<sup>35</sup>

There also remains the question of whether *pistols* were included among “fire-arms” in this Boston ordinance. They certainly were not explicitly listed, and previous usage (such as the inventory of weapons turned over to General Gage) would arguably suggest that pistols were not included.

### III. WHY WERE PISTOLS TREATED SO CAVALIERLY?

There are a number of possible explanations for why the Colonial and Revolutionary periods treated pistols like other firearms. One possibility is that pistols were relatively scarce and therefore might not have attracted particular regulatory attention. The evidence is very clear, however, that pistols were *not* scarce in the Colonial period, during the Revolution, or into the early Republic. Seventeenth century Colonial probate inventories reveal that while pistols were not as commonly owned as long guns, they were also not particularly rare. One analysis of all Plymouth Colony probate inventories through the 1670s found that, of 339 listed firearms, 13%<sup>36</sup> were pistols, and 54.5% of lead projectiles recovered from Plymouth Colony digs were pistol ammunition.<sup>37</sup>

Ads offering pistols for sale appear throughout the Colonial period, although less commonly than ads for long guns. At least one ad offering guns for sale, including pistols, appears among the surviving issues of the *Boston Gazette* published in 1720.<sup>38</sup> Sampling *Boston Gazette* ads from the 1741–1742 period reveals at least two different merchants offering pistols for sale. One of the merchants, Samuel Miller, identified himself as a gunsmith.<sup>39</sup>

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35. *Id.*

36. 44 pistols out of 339 firearms.

37. Plymouth Archaeological Rediscovery Project, *Firearms in Plymouth Colony*, Tbls. 2 & 4 (2002), <http://plymoutharch.tripod.com/id73.html>.

38. BOSTON GAZETTE, May 30, 1720.

39. See BOSTON GAZETTE, Nov. 17, 1741; BOSTON GAZETTE, Dec. 8, 1741; BOSTON GAZETTE, Feb. 2, 1742; BOSTON GAZETTE, May 11, 1742; BOSTON GAZETTE, May 18, 1742;

Similarly, merchants offered pistols for sale in the *South Carolina Gazette* on occasion.<sup>40</sup> Ads specifically for pistol-powder (finer grained so that it would burn more rapidly in a shorter barrel) appeared as well.<sup>41</sup> Also, at least one gunsmith, who identified himself as working on pistols, advertised in the *South Carolina Gazette*: “John Scott Gun Maker from London who performs all sorts of Gun or Pistol Work for ready Money only.”<sup>42</sup>

The *Pennsylvania Gazette* showed a number of pistols for sale in the eighteenth century. Philadelphia merchants advertised pistols for sale repeatedly from 1744 onward.<sup>43</sup> Robert Towers offered, as part of his selection, “rifle double barrel and smooth bore guns, *pistols*, flints, bullet and shot molds.”<sup>44</sup> Specifically, pocket pistols were offered for sale as well in 1750, showing that concealable handguns were known, lawful, and likely carried concealed.<sup>45</sup> In 1772 and 1773, Heinrich Diebenberger advertised in Pennsylvania newspapers that he sold pistols,<sup>46</sup> as did Henry Deabarear, who sold “*pistols* for holsters and the pocket.”<sup>47</sup> Ads offering gunpowder specifically for pistols also appear in the *Pennsylvania Gazette*.<sup>48</sup> In 1748 in New York City, Edward Annely advertised his services as a gunsmith and dealer in

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BOSTON GAZETTE, May 25, 1742; BOSTON GAZETTE, July 13, 1742; BOSTON GAZETTE, Aug. 10, 1742; BOSTON GAZETTE, Aug. 24, 1742; BOSTON GAZETTE, Aug. 31, 1742.

40. See S.C. GAZETTE, Oct. 25, 1735; S.C. GAZETTE, Sept. 18, 1736; S.C. GAZETTE, Feb. 26, 1741; S.C. GAZETTE, Mar. 5, 1741; S.C. GAZETTE, Sept. 5, 1741; S.C. GAZETTE, Sept. 12, 1741; S.C. GAZETTE, Oct. 10, 1741; S.C. GAZETTE, Dec. 19, 1741.

41. See S.C. GAZETTE, Jan. 13, 1733; S.C. GAZETTE, Sept. 14, 1734; S.C. GAZETTE, July 28, 1733; S.C. GAZETTE, May 24, 1735; S.C. GAZETTE, Mar. 8, 1740.

42. S.C. GAZETTE, Mar. 8, 1740.

43. See PA. GAZETTE, Nov. 1, 1744; PA. GAZETTE, Sept. 26, 1745; PA. GAZETTE, Oct. 3, 1745; PA. GAZETTE, Oct. 17, 1745; PA. GAZETTE, Feb. 11, 1746; PA. GAZETTE, July 17, 1746; PA. GAZETTE, July 30, 1747; PA. GAZETTE, May 5, 1748; PA. GAZETTE, May 12, 1748; PA. GAZETTE, Sept. 15, 1748; PA. GAZETTE, Oct. 25, 1750; PA. GAZETTE, Nov. 27, 1755; PA. GAZETTE, Aug. 2, 1759; PA. GAZETTE, Feb. 11, 1762; PA. GAZETTE, Apr. 14, 1763; PA. GAZETTE, May 19, 1763; PA. GAZETTE, Apr. 12, 1764; PA. GAZETTE, Apr. 19, 1764; PA. GAZETTE, May 28, 1772; PA. GAZETTE, Feb. 17, 1773.

44. PA. GAZETTE, Sept. 6, 1764 (emphasis added).

45. See PA. GAZETTE, June 21, 1750; PA. GAZETTE, Sept. 27, 1750.

46. WOCHTENLICHTER PENNSYLVANISCHE STAATSBOTE, Sept. 4, 1772 and Sept. 14, 1773, translated and quoted in JAMES WHISKER, THE GUNSMITH'S TRADE 159–60 (1992).

47. PA. GAZETTE, Aug. 16, 1770; PA. GAZETTE, Sept. 15, 1773; PA. GAZETTE, Dec. 24, 1778.

48. See PA. GAZETTE, Aug. 25, 1748; PA. GAZETTE, May 5, 1748; PA. GAZETTE, Nov. 10, 1748; PA. GAZETTE, Nov. 16, 1749; PA. GAZETTE, Mar. 6, 1750; PA. GAZETTE, May 24, 1750; PA. GAZETTE, June 14, 1750; PA. GAZETTE, Nov. 1, 1750.

imported guns. “He likewise makes guns and *pistols* as any gentleman shall like . . . .”<sup>49</sup>

Pocket pistols also appear to have been carried by those out exploring the natural wonders of America. A 1772 account of a natural bridge in Virginia includes the following description of the echo characteristics of the area: “after this I fired a Pocket *Pistol* under the Arch, the Report of which was louder than a Swivel [a type of small mounted artillery used on ships].”<sup>50</sup>

Although pistols were usually imported before the Revolution (typically from Britain), they were also made in America. Medad Hills made a pair of pistols for William Smith in 1771.<sup>51</sup> Surviving pistols that were apparently made in Colonial America also include a pistol owned by Peter Grubb, who made gun barrels for the Lancaster Committee of Safety during the Revolution. The lock is apparently English-made, but the rest of the pistol appears to have been made in Pennsylvania—perhaps by I. Perkins of Philadelphia or by Grubb himself.<sup>52</sup> While the makers of other pistols are uncertain, William Antes is clearly the maker of one surviving Colonial period American-made pistol. Antes signed both the barrel and the lock, suggesting that he made the entire pistol.<sup>53</sup> Another surviving signed pistol of the Colonial period was made by Matthew Sadd of Hartford, Connecticut “in the middle 1700s.”<sup>54</sup> Other surviving examples include a pistol made by Cornelius Atherton in New England; surviving pistols by Henry Mauger of Berks County, Pennsylvania and by William Shenner of Reading, Pennsylvania;<sup>55</sup> and pistols by Nathan Bailey (made for Connecticut).<sup>56</sup>

The previously mentioned count of firearms surrendered to General Gage by the citizens of Boston also indicates that pistols

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49. HENRY J. KAUFFMAN, *EARLY AMERICAN GUNSMITHS: 1650–1850*, at 4 (1952) (quoting *NEW-YORK GAZETTE REVIVED IN THE WEEKLY POST-BOY*, Aug. 1, 1748) (emphasis added).

50. *PA. GAZETTE*, Nov. 25, 1772 (emphasis added).

51. George A. Stickels, *The William Smith Pistols Made by Medad Hills*, *THE GUN REPORT*, Sept. 1979, at 10–12.

52. FRANK KLAY, *THE SAMUEL E. DYKE COLLECTION OF KENTUCKY PISTOLS 4–9* (1972).

53. *Id.*

54. MERRILL LINDSAY, *THE NEW ENGLAND GUN: THE FIRST TWO HUNDRED YEARS* 64 (1975).

55. See KLAY, *supra* note 52, at 10–15; MICHAEL H. LEWIS, *THE GUNSMITHS OF MANHATTAN 1625–1900: A CHECKLIST OF TRADESMEN* 6 (1991).

56. LINDSAY, *supra* note 54, at 52, 54, 56, 61, 64.

were fairly common. They comprised nearly one-fifth (18.5%) of the 3,423 firearms surrendered.<sup>57</sup>

On May 30, 1775, the New York Provincial Congress recommended “to the Inhabitants of this Colony in general, immediately to furnish themselves with necessary Arms & Ammunition.”<sup>58</sup> On August 22, 1775, it ordered cavalrymen to provide themselves with a horse, saddle, “a case of *pistols* . . . one pound of gunpowder and 3 lbs. of sizeable bullets, . . . and a carbine.” Like the infantry, cavalrymen were to “be provided . . . with 1 lb of pow[d]er and 3 lbs of bullets.” While not explicit as to who would provide the gunpowder and bullets, it is clear that every man aged sixteen to fifty was to “furnish himself” with either a long gun or “a case of pistols.”<sup>59</sup>

On May 2, 1787, the Continental Congress ordered the public auction of a collection of military odds and ends: “413 old militia Arms . . . 365 old militia gun barrels . . . 985 old gun locks . . . 2000 damaged muskets . . . 700 *pistols* . . . 1194 damaged muskets . . . 1066 damaged carbines . . . 4446 damaged musket barrels,” and a bit more than thirteen tons of damaged powder.<sup>60</sup> Pretty clearly, the government believed that there was a market for pistols, and it did not suffer from modern fears of selling surplus handguns to the population.

John Nicholson, a gunsmith, offered a variety of firearms for sale in November of 1781, including “*Pistols* . . . upon the most reasonable terms.”<sup>61</sup> Edward Pole advertised his “Military Laboratory” where “Owners and Commanders of Armed Vessels may be supplied, for either the use of Small Arms or Cannon, at the shortest notice, with ever species of Military Stores.” Among the items for sale included “Musket’s [sic] and *pistol’s* [sic].” That Pole’s

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57. FROTHINGHAM, *supra* note 14, at 94–95.

58. 15 BERTHOLD FERNOW, DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 5 (AMS Press, Inc. 1969) (1887).

59. *Id.* at 42–43. A “case” of pistols ordinarily contained two handguns. A letter dated May 21, 1775 from a committee in Tryon County, complaining of a shortage of ammunition—but saying nothing about a shortage of firearms—has a similar implication. *See* AMERICAN ARCHIVES, *supra* note 16, at 665–66.

60. 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 244–46 (Roscoe R. Hill, ed., 1936) (emphasis added).

61. KAUFFMAN, *supra* note 49, at 71 (quoting PA. JOURNAL, Nov. 24, 1781) (emphasis added).

customers included civilians is suggested by the offering of “Musket cartridges in blank, for the exercise of the militia.”<sup>62</sup>

In 1785, Anthony Desverneys, Jr. of South Carolina advertised that he “continues to make and repair all sorts of guns, *Pistols* and generally everything that belongs to the Gunsmith’s Business.”<sup>63</sup> Francis Brooks in 1791 Philadelphia advertised himself as a “*Pistol* Maker.”<sup>64</sup> John Miles’s 1798 advertisement in the *Pennsylvania Packet* made it clear that there was a civilian market for pistols: “Gun and *Pistol* Manufactory . . . Where Merchants, Captains of vessels, and others may be supplied with all sorts of small arms, on the lowest terms and shortest notice.”<sup>65</sup>

Ads for lost pistols from the Revolutionary period also suggest that pistols were not particularly rare. An October 24, 1781 *Pennsylvania Gazette* ad offers a reward: “Was *LOST* on the Commons, A Silver mounted *Pistol*. Whoever has found the same, and will bring it to the Sheriff Office, shall receive ONE GUINEA REWARD.”<sup>66</sup> Other ads throughout the period for lost pistols suggest that people must have been carrying them often, both to have them fall out of a belt or pocket and to have them be sufficiently concealable so that there was no loud “thunk” as the pistol hit the ground: “*LOST*, on Saturday, the 5th instant, A Silver mounted *PISTOL*, with a brass barrel, on the road between Chester and this city . . . .”<sup>67</sup> or “*WAS* lost, on the evening of the 25th of January last, on the road leading from Philadelphia to the Lower Ferry, a very neat Pocket Pistol . . . .”<sup>68</sup>

Various accounts in the first few years of the early Republic suggest that the possession and carrying of pistols remained common. Isaac Weld’s account of his travels in North America between 1795

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62. Edward Pole, *Military Laboratory, at No. 34, Dock Street, Near the Drawbridge, Philadelphia* (Philadelphia, R. Aitken 1789), reprinted in AN AMERICAN TIME CAPSULE: THREE CENTURIES OF BROADSIDES AND OTHER PRINTED EPHEMERA (Library of Congress, Rare Book & Special Collections Div.), <http://hdl.loc.gov/loc.rbc/rbpe.1470090a> (last visited May 5, 2008) (emphasis added). See also PA. PACKET, Nov. 28, 1778 (displaying a similar ad for Pole).

63. KAUFFMAN, *supra* note 49, at 23 (quoting S.C. GAZETTE & PUBLIC ADVERTISER, Oct. 13, 1785) (emphasis added).

64. *Id.* at 14 (quoting FEDERAL GAZETTE, Sept. 21, 1791) (emphasis added).

65. *Id.* at 66 (quoting PA. PACKET (CLAYPOOLE’S AMERICAN DAILY ADVERTISER), Apr. 26, 1798) (emphasis added).

66. PA. GAZETTE, Oct. 24, 1781 (emphasis added).

67. PA. GAZETTE, June 9, 1784 (emphasis added).

68. PA. GAZETTE, Apr. 6, 1774 (emphasis added).

and 1797 described how in the back country, “[t]he people all travel on horseback, with *pistols* and swords.”<sup>69</sup>

When Aaron Burr was tried for his criminal conspiracy to detach the Southwest into its own country, one of the pieces of evidence used against him was a meeting between a Mr. Blannerhassett and a number of other conspirators—all of them armed. Burr’s defense attorney argued that gun ownership was the norm in the early Republic:

If there were evidence of a merely friendly meeting, it would be the same as if there were no assemblage. If they were to give evidence that Blannerhassett and some of those with him were in possession of arms, as people in this country usually are, it would not be sufficient of itself, to prove that the meeting was military.

Arms are not necessarily military weapons. Rifles, shot guns and fowling pieces are used commonly by the people of this country in hunting and for domestic purposes; they are generally in the habit of pursuing game. In the upper country every man has a gun; a majority of the people have guns everywhere, for peaceful purposes. Rifles and shot guns are no more evidence of military weapons than pistols or dirks used for personal defence, or common fowling pieces kept for the amusement of taking game. It is lawful for every man in this country to keep such weapons.<sup>70</sup>

Given this body of evidence, it is difficult to argue that pistols were loosely regulated because of their scarcity.

#### IV. WERE PISTOLS LESS MISUSED IN THE EIGHTEENTH CENTURY?

Were pistols less misused in the Colonial and Revolutionary periods? It is conceivable that if pistols were rarely misused, the Framers might have neglected to exclude pistols from the “arms” that “the people” had a right to keep and bear. However, references to criminal and violent uses of pistols occur occasionally in the Colonial and Revolutionary era, and these occurrences are *never* treated as unusual or surprising because of the type of weapon. Along with misuse by professional criminals, pistols also appear to be commonly used in crimes of passion and suicides of the period.

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69. ISAAC WELD, TRAVELS THROUGH THE STATES OF NORTH AMERICA, AND THE PROVINCES OF UPPER AND LOWER CANADA, DURING THE YEARS 1795, 1796, AND 1797, at 234 (London, John Stockdale 1807) (emphasis added).

70. DAVID ROBERTSON, REPORTS OF THE TRIALS OF COLONEL AARON BURR, (LATE VICE PRESIDENT OF THE UNITED STATES,) FOR TREASON, AND FOR A MISDEMEANOR 582 (Philadelphia, Hopkins & Earle 1808).

John Winthrop makes several references to pistols in New England in the nineteen years that his journal covers. A theological dispute at Pascataquack (now Dover, New Hampshire) in 1641 soon led the factions to arm themselves and march—at least one member is identified as armed with a pistol. There were murders with pistols at Stamford, Connecticut and at Penobscott in 1644 and an attempted murder with a pistol at Cape Sable in 1646.<sup>71</sup> Winthrop never expressed any surprise or disgust over the presence of pistols—and he was not a man inclined to withhold his moral revulsion at the actions of his fellow Englishmen.

Eighteenth century accounts also mention pistols, and their presence is never surprising. Eliza Lucas Pinckney describes the suicide of Anne LeBrasseur with a pistol as “melancholy and shocking;” however, newspaper accounts suggest that what was shocking about LeBrasseur’s suicide was not the weapon, but that she was “a Disciple of Mr. Whitefield’s” (the noted Anglican evangelist).<sup>72</sup> There are other examples of suicides in this period by pistol, and apparently, they were never surprising for the choice of method.<sup>73</sup> A similar account of a planned suicide involving pistols also appears as a result of a fatal hunting accident.<sup>74</sup> Further, accidental deaths involving pistols occasionally appear, but never with any note of surprise.<sup>75</sup>

The September 7, 1749 *Pennsylvania Gazette* reported that, “Sunday night last, about eight a Clock, Richard Green, coming to Town from Kensington, was stopt on the Road, and his Money demanded, by two Men with Pistols . . . .”<sup>76</sup> There are other examples available in the *Pennsylvania Gazette* that illustrate how criminal misuse of and accidental deaths from pistols was never expressed as surprising.<sup>77</sup> A gang of robbers, having terrorized New York City, moved on to Philadelphia in 1749. A newspaper account of their

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71. WINTHROP, *supra* note 17, at 27, 153, 180, 275.

72. ELIZA LUCAS PINCKNEY, *THE LETTERBOOK OF ELIZA LUCAS PINCKNEY* 42 & n.55 (Elise Pinckney, ed., Univ. of S.C. Press 1997).

73. See PA. GAZETTE, Dec. 27, 1759; PA. GAZETTE Aug. 22, 1765.

74. S.C. GAZETTE, May 29, 1736.

75. S.C. GAZETTE, Nov. 27, 1740.

76. PA. GAZETTE, Sept. 7, 1749.

77. PA. GAZETTE, Oct. 31, 1745 (accidental discharge of a pistol causes death); PA. GAZETTE, Apr. 20, 1749 (criminal shooting from inside a barricaded home); PA. GAZETTE, Oct. 27, 1763 (attempted robbery in Lancaster County, Pennsylvania); PA. GAZETTE, June 27, 1787 (attempted robbery in Bush Hill, Virginia with a pistol and blunderbuss).

crimes reported that, “two Men, unknown, were lately at Mr. Rush’s, a Gun smith, enquiring for six Pair of Pocket Pistols, to make up twelve Pair, having as they said, got the six Pair at some other Place.”<sup>78</sup>

An account from the *Pennsylvania Gazette* in 1765 reprints a report from Boston:

Last Wednesday Evening, just after seven o’Clock, as a Man was going over Boston neck, he was stopped by a Fellow, who presenting a Pistol to his Breast, bid him deliver, swearing he would send a *Brace* of Balls thro’him instantly if he refused; but the Man replying he had but 3 Pistareens about him, he ordered him to go about his Business, and then ran of—doubtless apprehending a Pursuit, as there were a Number of People hastening towards them. He was a little Fellow, had on a surtout Coat, wore his Hat slapped before, and had a Pair of *Pistols*.<sup>79</sup>

Other examples are available in which robbers were described as using pistols or as being taken into custody while armed with pistols.<sup>80</sup> Much like today, pistols also appeared in offenses that might be categorized as crimes of passion.<sup>81</sup>

As noted above, accidental deaths appear as well and are expressed as tragic—but not shocking—occurrences:

Monday Evening last a very melancholy Accident happen’d in this City, when a young Gentleman having been on board the Clinton Privateer, then going out, had a *Pair of Pistols* given him; which on his coming on Shore he carried into a Publick House, among some of his Acquaintance, where one of them was found to be loaded; upon which several Attempts were made to discharge it; but it missing Fire, he sat down in order to amend the Flint; in doing of which, the Pistol unhappily went off, and shot Mr. Thomas Cox, Butcher, through the Head, in such a Manner that some of his Brains came out, and he fell down dead without speaking a Word.<sup>82</sup>

Pistols appear repeatedly among the South Carolina Regulators and the criminals to whom they administered frontier justice in the 1760s.<sup>83</sup> Foolish persons engaged in duels appear in newspaper

78. PA. GAZETTE, Aug. 31, 1749.

79. PA. GAZETTE, Feb. 7, 1765 (emphasis added).

80. PA. GAZETTE, Dec. 10, 1751; PA. GAZETTE, Mar. 5, 1783; PA. GAZETTE, July 2, 1783.

81. S.C. GAZETTE, July 24, 1736.

82. PA. GAZETTE, Oct. 31, 1745 (emphasis added).

83. See RICHARD MAXWELL BROWN, *THE SOUTH CAROLINA REGULATORS* 25, 40, 54 (1963).

accounts, and the presence of pistols was not cause for surprise.<sup>84</sup> Nor was there any surprise when pistols appear in the hands of the law-abiding citizenry. For example, Rev. Whitfield is described as preaching in Massachusetts where “he was attended by many Friends with Muskets and Pistols on Account of the Indians.”<sup>85</sup>

Pistols also appear in the hands of non-militia members who engage in guerilla warfare against the British at the start of the Revolution. “Samuel Whittemore, aged eighty years,” upon seeing British soldiers marching towards Concord, prepared himself by oiling “his musket and pistols and sharpening his sword.” When the soldiers returned,

Whittemore had posted himself behind a stone wall, down Mystic Street about four hundred and fifty feet . . . . The distance seemed an easy range for him, and he opened fire, killing the soldier he aimed at. They must have discovered his hiding place from the smoke-puff, and hastened to close in on him. With one *pistol* he killed the second Briton, and with his other fatally wounded a third one. In the meantime, the ever vigilant flank guard were attracted to the contest, and a ball from one of their muskets struck his head and rendered him unconscious. They rushed to the spot, and clubbed him with their muskets and pierced him with their bayonets until they felt sure he was dead . . . . Whittemore lived eighteen more years, dying in 1793 at the age of ninety-eight.<sup>86</sup>

Enough pistols were present in private hands in Pennsylvania in 1774 for the legislature to include handguns in a law regulating New Year’s Day festivities. This statute made it illegal for:

[A]ny person or persons shall, on any thirty-first day of December, or first or second day of January, in every year, wantonly, and without reasonable occasion, discharge and fire off any *handgun*, *pistol*, or other firearms, or shall cast, throw or fire any squibs, rockets or other fireworks, within the inhabited parts of this province . . . .<sup>87</sup>

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84. S.C. GAZETTE, Sept. 6, 1735.

85. PA. GAZETTE, Aug. 15, 1745.

86. FRANK WARREN COBURN, THE BATTLE OF APRIL 19, 1775, at 141–42 (Kennikat Press, 2d ed. 1970) (1922). See also ABRAM ENGLISH BROWN, BENEATH OLD ROOF TREES 262–63 (Boston, Lee & Shepard 1896) (recounting the same story and also quoting Whittemore’s obituary in the Feb. 6, 1793 COLUMBIA SENTINEL, which reports very nearly the same facts as Coburn).

87. PA. GAZETTE, Dec. 28, 1774 (emphasis added). New Year’s revelry is still a problem in American cities. Minnesota did not get around to dealing with it until 1993. See MINN. STAT. § 609.66, subd. 1a (a)(3) (2007).

Could the small town nature of Colonial and Revolutionary America have played a part in framing a Second Amendment lacking a negative reference to handguns? America really only had three cities of any notable size in 1791: Philadelphia, New York, and Boston—none of which would even be a large town by current standards. Could the Framers simply not have envisioned the dangers that handguns might create in a city of several hundred thousand inhabitants? No. Many of the Framers had spent time in London and were certainly aware of that city's burgeoning crime problem and the recent growth in gun-facilitated violence. Given the leading colonists' abiding interest in all dimensions of London society, it seems likely that many of those who had not traveled there were nevertheless well aware of the problems of crime in England's urban area.

A sampling of the criminal cases of the Old Bailey covering the period 1674–1789 demonstrates that pistols appear commonly in these records especially in the period just before the adoption of the Bill of Rights.<sup>88</sup>

Table 1. Old Bailey Case Data

Decade	Pistol or Pistols cases	Sampled Criminal Misuse	Stolen	Accidental Death	Lawful Use	
1670s	16	16	12	1	0	
1680s	38	5	4	0	0	
1690s	80	8	3	1	2	
1700s	11	11	9	0	0	
1710s	58	6	5	1	0	
1720s	113	12	7	3	0	
1730s	185	10	6	1	0	
1740s	135	10	7	1	0	
1750s	139	10	8	1	0	
1760s	128	10	6	2	0	
1770s	286	10	7	3	0	
1780s	336	10	5	3	0	
Totals	1525	118	79	17	3	
%		7.74%	66.95%	14.41%	2.54%	3.39%

88. See Proceedings of the Old Bailey, 1674–1834, <http://www.oldbaileyonline.org/search/> (last visited Jan. 16, 2008). The term "pistol" appears occasionally to refer to a Spanish or French coin, and more rarely, used an adjective to describe something small or short.

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Projected	1020.97	219.7	38.77	51.69	
std.dev.	2.39	1.08	0.62	0.49	
Years covered	116				
Incidents/Year	8.8	1.89	0.33	0.45	

## V. TECHNOLOGY MARCHES ONWARD

One argument for treating the Second Amendment's protection as obsolete is that the technology of firearms has advanced so dramatically since 1791—a modern pistol provides so much destructive potential—that the Framers, were they present today, would recognize the absurdity of allowing ordinary law-abiding persons to possess or carry such a weapon. Alternatively, those with a mirthful spirit suggest that the Second Amendment should protect only the type of weapons available in 1791 when the states ratified the Second Amendment.

It is certainly true that firearms technology has advanced since 1791—but *not as much as some would like to think*. Repeating, magazine-fed firearms date back to at least the 1600s;<sup>89</sup> concealable “pepperbox” handguns capable of firing five to seven shots without reloading were in use by the end of the eighteenth century;<sup>90</sup> and there are some indications that multibarrel handguns were in development as early as the seventeenth century.<sup>91</sup> Several multibarrel repeating firearms survive from the late seventeenth century, and at least one six shot flint-lock pistol survives from the first half of the eighteenth century.<sup>92</sup> Additionally, some British soldiers were issued magazine-fed repeating guns as early as 1658.<sup>93</sup>

For example, in 1718 (seventy-one years *before* the drafting of the American Bill of Rights) the “Puckle Gun” was patented in England.<sup>94</sup> It was a repeating firearm from which multiple individual

89. See CLAUDE BLAIR, POLLARD'S HISTORY OF FIREARMS 207, 214 (1983); WILLIAM WELLINGTON GREENER, THE GUN AND ITS DEVELOPMENT 80–81 (Cassell & Co., 8th ed. 1907) (1881).

90. BLAIR, *supra* note 89, at 207, 214. While most surviving pepperbox handguns are percussion system, and therefore nineteenth century, there are occasional references to flintlock pepperbox handguns. *\$150 Paid for Flintlock*, N.Y. TIMES, Nov. 19, 1919, at 11.

91. CHARLES EDWARD CHAPEL, GUNS OF THE OLD WEST: AN ILLUSTRATED GUIDE 84 (2002); GREENER, *supra* note 89, at 509.

92. GREENER, *supra* note 89, at 82–83.

93. A. V. B. NORMAN & DON POTTINGER, ENGLISH WEAPONS & WARFARE: 449–1660, at 206–07 (1979).

94. A copy of the James Puckle Portable Gun patent is available at

shots could be discharged without physically *reloading* the gun. The tripod-mounted flintlock revolver had a barrel 2 feet, 9 inches long and a bore of 1.2 inches.<sup>95</sup> It was fitted with a removable “pre-loaded” cylinder that held eleven charges and was rotated by hand. Each shot required an independent decision to fire and a separate pull of the trigger. Several examples were manufactured and, in a demonstration at the Royal Woolrich Armory, the gun fired sixty-three shots in seven minutes in a rainfall.<sup>96</sup> This rate of nine shots per minute was *three times quicker* than the fastest musket of the time, which also could not fire reliably in the rain. Further increasing its firepower, the gun could be loaded to throw either one large or sixteen small Musquet Balls at every discharge.

In March 1722, the Daily Courant carried an advertisement for “Several sizes in Brass and Iron of Mr. Puckle’s Gun, called a Defence. . . . at the Workshop thereof, in White-Cross-Alley, Middle Moorfields.”<sup>97</sup> Although Puckle made strenuous efforts to market the gun, raising a company for this purpose in 1721, he was unable to acquire sufficient investors or a military contract. He did, however, prove that a repeating firearm was within the reach of inventors.

In 1776, Captain Patrick Ferguson was more successful than Puckle, gaining both a British patent and a military contract for his breech-loading rifle. Ferguson’s design built on the 1704 work of Isaac de la Chaumette and the 1720 designs of John Warsop.<sup>98</sup> The goal was in sight seventy years *before* the hardware was produced. The Ferguson rifle saw its first action in the Revolutionary War. Ferguson, now a Major, led a small corps of riflemen armed with his invention. The rifles were used with great success until the Battle of Brandywine in 1778, during which Ferguson was seriously wounded. Without the inventor in command, the test ended and the unit was

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<http://www.wedmore.org.uk/puckle/James.htm> (last visited May 20, 2008).

95. An essay on the Puckle Gun by a historian from De Montfort University, Leicester, UK, is available at <http://ccrkba.org/pub/rkba/news/Quick-firingGun.htm> (last visited on May 20, 2008) [hereinafter Puckle Gun Essay].

96. A surviving example of the “Puckle Gun” was observed by the author, Professor Olson, at the Tower of London Armory. See also JAMES H. WILLBANKS, MACHINE GUNS: AN ILLUSTRATED HISTORY OF THEIR IMPACT 23 (2004).

97. Puckle Gun Essay, *supra* note 95.

98. See generally Ferguson Rifle and Military Innovation in the 18th Century, <http://johnsmilitaryhistory.com/fergusonrifle.html> (last visited May 20, 2008).

soon merged into the regular infantry.<sup>99</sup> Thus, breech-loading, repeating rifles were more than just imaginable in 1791.

The next development in repeating firearms would take place in pistols.



An Allen & Thurber Pepperbox, Early Nineteenth Century<sup>100</sup>

The development of the percussion ignition system in 1816 encouraged further development of the pepperbox by making revolving handguns more practical—the concept of a repeating handgun was certainly known in 1791, if still unrefined. Even the development of the modern revolver by Samuel Colt did not suddenly render the pepperbox obsolete; Americans continued to use pepperboxes for self-defense for several decades after Colt's invention,<sup>101</sup> and there are indications from medico-legal texts published as late as 1895 that pepperboxes were not just curiosities.<sup>102</sup>

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99. Lance Klein, *This Barbarous Weapon*, <http://www.11thpa.org/ferguson.html> (originally posted on <http://www.nmlra.org/>) (last visited on May 20, 2008).

100. Photograph courtesy C.W. Slagle of Scottsdale, Arizona. There were dozens of similar early pepperboxes at the gun show where the author photographed this one.

101. See WILLIAM ELSEY CONNELLEY, *QUANTRILL AND THE BORDER WARS* 399 (Torch Press 1910); ANSON URIEL HANCOCK, *SILHOUETTES FROM LIFE ON THE PRAIRIE, IN THE BACKWOODS* 155 (Chicago, C.H. Kerr 1893); FRANK HICKENLOOPER, *AN ILLUSTRATED*

Even with respect to single shot pistols, the technological advance is less dramatic than it first appears. Pocket pistols of the Revolutionary-era were often surprisingly compact, such as this example owned by Paul Revere.



Paul Revere's Pocket Pistol<sup>103</sup>

Being so compact, those who were expecting trouble might carry two, four, or even six single shot pistols on their belt. This was such a sufficiently common practice that pistols were often sold (or stolen) in pairs<sup>104</sup>—sometimes as a “case of pistols” or a “brace of pistols.”<sup>105</sup>

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HISTORY OF MONROE COUNTY, IOWA 257 (1896); JOHN A. JOYCE, *A CHECKERED LIFE* 135 (Chicago, S.P. Rounds, Jr. 1883); JOHN S. MOSBY, *THE MEMOIRS OF COLONEL JOHN S. MOSBY* 8 (Charles Wells Russell, ed., Little, Brown, & Co. 1917).

102. MEDICO-LEGAL SOCIETY OF NEW YORK, *BULLETIN OF THE MEDICO-LEGAL CONGRESS, HELD AT THE FEDERAL BUILDING IN THE CITY OF NEW YORK, SEPTEMBER 4TH, 5TH AND 6TH, 1895*, at 168 (New York, Medico-Legal Journal 1898).

103. Photograph courtesy of the Massachusetts Historical Society.

104. See 78 *ARCHIVES OF MARYLAND*, *supra* note 27, at 63; WILLIAM P. PALMER, *CALENDAR OF VIRGINIA STATE PAPERS AND OTHER MANUSCRIPTS, 1652–1781, PRESERVED IN THE CAPITOL AT RICHMOND* 81 (Richmond, VI, R. F. Walker, ed. 1875). Advertisements for stolen pairs of pistols listed in runaway ads can be found in: THOMAS COSTA, *VIRGINIA RUNAWAYS: RUNAWAY SLAVE ADVERTISEMENTS FROM 18TH-CENTURY VIRGINIA NEWSPAPERS*, <http://etext.lib.virginia.edu/subjects/runaways/search.html> (last visited May 5, 2008). Advertisements for pairs of pistols for sale can be found in: *PA. GAZETTE*, Apr. 2, 1752; *PA. GAZETTE*, Oct. 25, 1753; *PA. GAZETTE*, Dec. 5, 1754; *PA. GAZETTE*, Aug. 10, 1774; *PA. GAZETTE*, May 10, 1775; *PA. GAZETTE*, Jan. 8, 1767; *PA. GAZETTE*, March 29, 1780; *PA. GAZETTE*, Dec. 5, 1781; *PA. GAZETTE*, May 19, 1784; *PA. GAZETTE*, June 27, 1787; *PA. GAZETTE*, Aug. 31, 1749; *PA. GAZETTE*, Sept. 19, 1751; *PA. GAZETTE*, Oct. 1, 1761; *PA. GAZETTE*, Oct. 21, 1762; *PA. GAZETTE*, Dec. 14, 1774; *PA. GAZETTE*, April 15, 1776; *PA.*

The phrase “brace of pistols” frequently appears in eighteenth century documents to describe this solution to the single shot problem.<sup>106</sup>

A criminal carrying six single-shot pistols in his pockets and on his belt in 1791 would admittedly not be as quick to fire those six shots as his 2008 counterpart using a modern revolver or semiautomatic pistol. However, most often, pistols induce compliance or deter attack without being discharged, and when fired, three shots are usually sufficient even with a modern handgun.<sup>107</sup> A modern pistol shooter can discharge three accurate shots in about three seconds. His 1791 equivalent might accurately fire three bullets in about ten seconds (with the extra time coming from the need to draw three times). As a practical matter, the often decisive first shot can be discharged in virtually equal time.<sup>108</sup> This is hardly an order of magnitude enhancement in the ability of handguns to discharge bullets and cause damage.

On the other side of the equation, advances in medical, communication, and protective technology have more than kept pace with the improvement in handgun technology. Any abdominal wound in 1791 was nearly a guarantee of death from peritonitis. Improvements in surgical technique and the ability to rapidly move a

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GAZETTE, Jan. 24, 1778; S.C. GAZETTE, Mar. 8, 1740.

105. See PA. GAZETTE, Oct. 1, 1761; PA. GAZETTE, Sept. 1, 1779.

106. See PA. GAZETTE, May 20, 1756; *Some Account of the Loss of the Hartwell East-Indiaman*, THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE, FOR THE YEAR 1787, at 253 (London, J. Dodsley 1789); *Account of the Disaster that befell his Majesty's Ship Guardian, Lieutenant Riou, Commander*, THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE, FOR THE YEAR 1790, at 260 (London, J. Dodsley 1793); MATTHEW GREGORY LEWIS, THE MONK: A ROMANCE 203 (J. Bell 1796); JASPER SPRANGE, THE TUNBRIDGE WELLS GUIDE 247 (London, n. pub. 1797); ROBERT BISSET, DOUGLAS; OR, THE HIGHLANDER 189 (London, T. Crowder 1800).

107. A multi-year study by the New York City Police Department reported that:

[In actual gunfights,] the average number of shots fired by individual officers in an armed confrontation is between two and three rounds, less than half the capacity of the service revolver. The two to three rounds per incident has remained constant over the years covered by the report. It also substantiates an earlier study by the L.A.P.D. (1967) which found that 2.6 rounds per encounter were discharged. The necessity for rapid reloading to prevent death or serious injury was not a factor in any of the cases examined. In close range encounters, under 15 feet, it was never reported as necessary to continue the action . . . .

*New York City Police Department Analysis of Police Combat Situations*, at Rapid Reloading, <http://www.theppsc.org/Grossman/SOP9/1981.htm> (last visited May 20, 2008).

108. These observations are based on the experience of the author, Professor Olson, an accomplished NRA pistol instructor, a state CCW instructor, and a thirty year competitor in combat pistol competitions.

victim to a hospital have also dramatically improved the chances of surviving gunshots.<sup>109</sup>

It is clear that the goal of multi-shot firearms was on the mind of gunsmiths, inventors, and shooters in 1791. Rudimentary repeating firearms existed, as did magazine-fed firearms. Faster, more secure and weather-resistant ignition technology was being pursued at the time of the drafting of the federal Bill of Rights. Firing mechanisms had advanced from the cumbersome matchlock to the relatively compact, more reliable and durable flintlock. Guns were in hand and getting better with every generation. Inventors knew where they wanted to be, and they were proving the truth of the familiar saying that “What man can imagine, he can invent.”

Compare this with the new mediums through which the First Amendment is exercised today. There was no rudimentary radio in 1791, although the concept of long range communication had existed for centuries using fire, mirror flashes and signal flags. Benjamin Franklin had just received his shock of electricity, but there was no wave theory and certainly no thought of amplitude or frequency modulation (AM or FM). The technological jump (actually a series of jumps) to radio and television was beyond imagination at that time.

Perhaps a more meaningful question than whether the improvement in weapons technology obsoletes the Second Amendment is whether *any* provision of the Bill of Rights could survive such a test. The technology of mass communications in 1791 limited a publisher to printing a few hundred “dangerous opinions” an hour; modern radio and television broadcasting and the Internet make it possible for NBC to repeatedly fire off a particular viewpoint into the sight and hearing of tens of millions of people in a few minutes. Would this dramatic technological advance justify a more restrictive view of the First Amendment’s freedom of the press?

Similarly, should we use the dramatic improvements in the technology of travel as an excuse to declare obsolete the Eighth Amendment’s guarantee of bail in non-capital cases? Does the increased risk of terrorism in an age of biological and radiological weapons justify excluding telecommunications from the Fourth Amendment’s protections against warrantless search and seizure? There are legitimate questions that might be asked about how

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109. See 2 SAMUEL DAVID GROSS, A SYSTEM OF SURGERY: PATHOLOGICAL, DIAGNOSTIC, THERAPEUTIC, AND OPERATIVE 615 (6th ed. Philadelphia, Henry C. Lea’s Son & Co. 1882).

technological change may render certain applications of 1791 concepts out of date—but if this is true, then the courts should treat the *entire* Bill of Rights in a consistent way.